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A Case Study: Acquiring a Brownfield for Redevelopment and Rating Buildings

Notes for the Case Study
A perspective from Italy

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EU Law - The "polluter pays" principle

The EU Union policy on the environment is aimed at a "high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the **precautionary**
principle and on the principles that **preventive action** should be taken, that environmental damage should as a priority be rectified at source and that the **polluter should pay**."[1]

The purpose of Directive 2004/35/CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, is to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage (Art. 1), and 'environmental damage' mean, inter alia "land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms" (art 2 (c);
"An operator shall not be required to bear the cost of preventive or remedial actions taken pursuant to this Directive when he can prove that the environmental damage or imminent threat of such damage:
(a) was caused by a third party and occurred despite the fact that appropriate safety measures were in place" (art 8 para 3)
The Directive recognises that
Recital (13): "Not all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there need to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the identified polluter(s)."
"Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts or failure to act of certain individual actors"
Recital (24) "It is necessary to ensure that effective means of implementation and enforcement are available, while ensuring that the legitimate interests of the relevant operators and other interested parties are adequately safeguarded. Competent authorities should be in charge of specific tasks entailing appropriate administrative discretion, namely the duty to assess the significance of the damage and to determine which remedial measures should be taken."

The EU Court limits the scope of environmental liability for new owners of polluted land

The Court of Justice of the European Union (the "CJEU") has shed light on the application of the "polluter pays" principle in the context of the EU's Environmental Liability Directive. The judgment, handed down on 4 March 2015 in Case C-534/13 Fipa Group & Others[2], confirms that

[1] Treaty on the functioning of the European Union, Title XX Environment, Article 191 (ex Article 174 TEC)

[2] Case C-534/13 Ministero dell'Ambiente e della Tutela del Territorio e del Mare and Others v Fipa Group Srl and Others - Judgment of the Court (Third Chamber) of 4 March 2015 (request for a preliminary ruling from the Consiglio di Stato — Italy) — Ministero dell'Ambiente e della Tutela del Territorio e del Mare and Others v Fipa Group Srl, Tws Automation Srl, Ivan Srl. Operative part of the judgment:
Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage 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

EU law does not require Member States to impose liability on the new owners of polluted land who are not responsible for that environmental damage.
The case at hand concerns **land in Tuscany** that had been contaminated by chemical substances as a result of activities carried out by the former owners, which had manufactured insecticides and herbicides on-site. The Italian authorities tried to compel the new owners, Tws Automation, Ivan and Fipa Group, to adopt "emergency safety measures" to protect the groundwater, even though the new owners were not responsible for the environmental damage
In the dispute that followed, the Italian *Consiglio di Stato* held that Italian law did not allow the authorities to require owners that are not responsible for pollution to adopt preventative and remedial measures. However, it referred the case to the CJEU, asking whether this position was consistent with the requirements of EU environmental law, in particular the Environmental Liability Directive 2004/35, and the "polluter pays" principle. According to the Environmental Liability Directive, the "polluter pays" principle means that "an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures". The CJEU held that the Italian law was not in conflict with the "polluter pays" principle or with the EU Environmental Liability Directive. It referred to the concept of the "operator" which, under the Directive, may be deemed responsible for the damage. It also underlined the importance of the causal link between the activity of the operator and the damage, and confirmed that the Member States authorities' obligation to establish a causal link applies both in the context of the system of strict environmental liability of operators and in the context of the fault based liability system — under which liability arises from fault or negligence on the part of the operator. In light of this, EU law did not require, in cases where it is impossible to identify the polluter or to have that operator adopt remedial measures, competent authorities to require the new owner of the land, if it is not responsible for the pollution, to adopt preventive and remedial measures. The CJEU noted however that Member States may adopt stricter requirements. In the present case, Italy had chosen not to do so, merely providing that a new owner may be required to reimburse costs associated with measures undertaken by competent national authorities, within the limit of the market value of the site, determined after those measures have been carried out. This confirms the importance of considering the position under both EU and national law.

Remediation of a contaminated site: no obligations of owners not responsible for the pollution

The Italian Council of State (*Consiglio di Stato*, Section VI) with its judgement n. 4647 of of November 7, 2016 has stated that the public administration has no right to impose the remediation of a contaminated site by the owners of the land which are not responsible for the pollution whilst accordingly it has the right to seek from the owners of the land the reimbursement of the remediation expenses within the limit of the value of the land

The Italian Ministry for the environment (*Ministero dell'ambiente e della tutela del territorio e del mare*) together with the Ministry of Health and the Ministry of Economic development has filed an appeal against the judgement of the Regional Administrative Tribunal (*TAR - Tribunale amministrativo regionale*) of the Region Marche of August 5, 2009 n. 857: this judgement had upheld the recourse made by **Hugo Boss & Accessories Italia S.p.a.** and had annulled the measure n. 19128 of September 29, 2006 and all other public acts which were the precondition of and consequential thereof **(***atti presupposti e conseguenziali*) which as a result of a number of conferences between the various public entities of the territory (so-called *conferenze di servizi*) had imposed to Hugo Boss certain prescriptions which were functional to the safety placement of

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.

the areas surrounding the industrial buildings in the Comune di Morrovalle - in the lower basin of the river Chienti - which areas were interested by a phenomenon of pollution of the groundwater.
In its judgement the TAR had reasonably excluded, based on the results of the verifications carried out, the right to impose upon Hugo Boss, as the present owner of the site, substantial and important remediation activities in respect of the polluted site due to 2 evident critical points: first , the remediation activities which according to the Court cannot be imposed upon a subject whose responsibility for the production of the pollution is not proven ; second , the nature of the activities imposed upon the owner (hydraulic barrier on the slopes) which are not properly qualified as emergency deployment activities but rather due to actual site reclamation.

The Council of State in line with its consolidated jurisprudence (*Order n. 21 of 25/9/2013*), has confirmed that "with regards to the limits of the liability for environmental damage of the present owner of areas interested by pollution which is not caused by the owner itself , the principle to be upheld - also in light of the principles drawn from European law as well is from the Italian environmental code - excludes the right to impose upon the owner who has not caused the in pollution of the site prevention or repair measures except for any measures which the subject might undertakes spontaneously pursuant to art. 245 environmental code **".**
Furthermore the Council of State recalling the jurisprudence of the European court (*CJEU, judgement March 4, 2015 case C-534/13; March 9, 2010, case C- 378/08*), has confirmed that the European Directive 2004/35/EC should be interpreted in the sense that "where it is impossible to identify the subject responsible for the contamination of the site or to obtain from the latter repair measures , the competent authority is not allowed to impose the performance of prevention and repair measures to the owner of the site who is not responsible for the contamination".

This jurisprudence is confirmed by other two judgements of the Council of State (n. 4119/2016 and n. 3756/2016): "once a situation of potential contamination of a site has been ascertained, the interventions of *"characterisation", "placing in security"* in emergency or definitive*, of remediation and of environmental recovery* can be imposed by the public administration only upon the subjects who are responsible for the pollution, hence on the subjects who have in whole or in part generated the contamination through its behaviour whether active or omissive, linked to the pollution by means of a specific cause and effect connection".

Specifically pursuant to art. 245, para 2 Legislative Decree 152/2006 (Environmental code /*Codice dell'Ambiente*) the owner of the area which is not responsible for the pollution has a duty only to adopt prevention measures whilst the interventions of repair, safe-keeping, reclamation and restoration measures can be imposed exclusively on the subject responsible for the contamination

Furthermore it has been stated that the owner's obligation is limited to reimbursing the expenses relating to the interventions carried out by the competent authority within the limits of the market value of the site to be calculated after the performance of such interventions

The owner of a contaminated site is not permitted to build on the site unless and until the appropriate remediation activities are carried out.

Remediation activities (*bonifica di sito contaminato*)

The rules concerning the red-tape process of the remedial actions for contaminated sites are laid down in Legislative Decree 152/2006 (Part Four, Title V) "Rules on environmental matters" , which has reorganised the subject matter and has established two levels of concentration thresholds

(*concentrazione soglia*) for pollutants to be considered in the environmental matrices and which correspond to different modes of intervention:

- contamination concentrations thresholds (CCT) (in Italian: CSC, *concentrazioni soglia di contaminazione*): soil/subsoil and under groundwater as shown in certain tables (Tables 1 and 2 of Annex 5) which represent attention values (*valori di attenzione*) which if exceeded make it necessary to carry out a so-called "site characterisation" (*caratterizzazione del sito*) ;

- risk concentrations thresholds (RCT) (in Italian : CSR, *concentrazioni soglia di rischio*): identify the acceptable residual contamination levels on which putting in security and/or remediation measures are set and are determined on a case-by-case basis by applying the site-specific environmental health risk assessment procedure according to the principles set out in Annex 1.

Legislative Decree 152/2006 has introduced a new definition of *contaminated site* (*sito contaminato)*.

In particular a site is considered:

- *potentially contaminated* when one or more concentration values of pollutants found in environmental matrices are higher than the CSC values, before carrying out the operations of "characterisation" and specific site health and environmental risk analysis to determine the state of contamination on the basis of the CSR

- *contaminated* when the values of CSRs are exceeded by applying the risk analysis procedure set out in Annex 1, Part Four, of Legislative Decree 152/06, based on the results of the characterization plan;

- *not contaminated* when the contamination observed in environmental matrices is lower than the CSC values or, if higher, is still lower than the CSR values determined following the site specific health and environmental risk analysis.

The management of contaminated sites identifies three different types of procedures:

- normal procedures (*procedure ordinarie* - art. 242);

- simplified procedures (*procedure semplificate*) that are split down into: procedures for small size contaminated areas (Article 249), simplified procedures for remediation operations (Article 242 bis), simplified procedures for fuel sales points (Article 242, paragraph 13, art. 252 paragraph 4 and DM 31/2015).

Other Procedures: Specific Procedures for sites of national interest sites (Article 252), Procedures for Military Areas (Article 241 bis) , Procedures for Agricultural Areas (Article 241).
The administrative procedures for the management of contaminated sites can be summarised as follows:

Normal procedure	Simplified procedures	Other procedures

Art. 242 Procedure operative ed amministrative	Art. 242 bis Procedura semplificata per le operazioni di bonifica	Art. 249 Aree contaminate di ridotte dimensioni	DM 31/2015Regolamento recante criteri semplificati per la caratterizzazione, messa in sicurezza e bonifica dei punti vendita carburanti	Art. 252 Siti di interesse nazionale (SIN)	Art. 241 Regolamento aree agricole	Art. 241 bis Aree militari

When an event occurs which can potentially contaminate a site or if there is a suspect possible contamination, the responsible subject will activate the necessary emergency measures to mitigate the event and carry out a preliminary research on the parameters of the pollution.

In the normal procedure (art. 242 , D. Lgs. 152/06) the main stages of the remediation process can be summarised as follows:

1. *"Characterization" plan* - which provides , if the contamination concentration (CSC) level of the site is exceeded, for the definition of the survey plan, its implementation and a descriptive technical report.

2. *Risk Analysis* - On the basis of the results of the site characterization plan, a site specific risk analysis is applied to determine the risk Concentrations thresholds (CSR).

3. *Operational Clearing/Remediation Planning* - If the source representative concentrations (CRS - *Concentrazioni Rappresentative della Sorgente*) exceed the CSRs.

The ISPRA (*Istituto Superiore per la Protezione e la Ricerca Ambientale*), an entity which provides technical support to the Ministry for the Environment, is responsible for drawing up and updating the guidelines for the so-called "characterisation" activities and the remediation of contaminated sites.

The possible kinds of intervention depending on the state of contamination and of use of the site are as follows:

- Urgent placing of the site in security (*messa in sicurezza d'urgenza*) aimed at removing the primary and secondary contamination sources and to limit their expansion and preventing direct contact with the population

- Operating placing in security (*messa in sicurezza operativa*) mitigating and containment measures applied to contaminated sites with production activities in operation

- Remediation and environmental recovery and permanent placing in security (*bonifica e ripristino ambientale/messa in sicurezza permanente*)

A new simplified procedure for remediation operations was introduced recently (Law 164/2014, converting the so-called *Sblocca Italia* Decree Law) introducing art. 242 bis in D. Lgs. 152/2006) for economic operators interested in carrying out at their expense soil remediation interventions reducing the contamination to a level equal or lower than CSC.

The conditions for applying such a simplified procedure are the following:

- the contaminated matrix is the soil ;

- the objective of the remediation is achieving the CSC;
- the term for completion of the remediation interventions is within 18 months + 6 months extension from approval of the plan.

Finally Ministerial Decree 31/2015, has introduced a simplified procedure specifically for fuel sale points.

The trend of recent pieces of legislation is towards simplification and reducing the time frame of public administration processes, such as the Decree Law 91/2014 (so-called competitiveness decree) with the aim of cutting the timeframe and securing simplification and efficiency to the remediation process and transferring more responsibilities on private operators

1. Remediation interventions inverting the order of the normal procedures

The interested subject (so as to proceed in a "quicker" way to the environmental recovery of his area) may present directly to the competent entities an "intervention plan" aimed at achieving the values as laid down by the law with reference to the specific destination of use of the site , without having to go through this stage of the preliminary "characterisation" of the site under the supervision of the authority:

2. Simplified procedure

specific deadlines are laid down by which the authorities must complete the process : the Region (or the delegated local municipalities - *Comuni*) have a duty to call a so called conference of services (*conferenza di servizi*) to assess the remediation plan within 30 days , and the plan must be approved within the following 90 days. The remediation works on the hall must be completed by the operator within 12 months (with the possibility of an extension of further six months), after which if the remediation is not completed the operate the loses the benefit of the simplified procedure and the normal procedure will apply.

The so-called Sblocca Italia decree law allows construction works to commence prior to remediation of contaminated sites, but only in respect of publicly owned sites owned by the Comuni and the Provinces (clarifying the scope of application of art. 34, para 7, legislative decree 133/2014 which governed the possibility of carrying out construction works on sites subject to remediation interventions.
Law 164/2014 clarifies that this rule applies only to polluted sites owned by territorial entities , with reference to which it is possible to carry out infrastructures and linear works also in a situation where remediation interventions or placement in security interventions are pending , on condition that the performance of such works does not prejudice the completion or carrying out of environmental interventions and does not cause risk for the workers and for the future users of the construction

Purchaser of a contaminated site: how to obtain damages

The purchaser of a contaminated site exposes the purchaser, once he has become the owner of the area , to the risk of not being able to use the area because the contamination might prevent its intended use and also because the owner is exposed to the risk of a substantial expropriation by the public administration. It should be considered that if the subject responsible for the contamination is not identified, the remediation is carried out by the public administration, in which case the owner of the land (although not responsible for the pollution) does run the risk of losing the land as a result

of its sale through a court auction instituted by the public administration to recover the remediation costs.
In the event that the purchaser matures the awareness of the risk , the situation can be handled by means of suitable contractual warranties.

However if contractual warranties have not been inserted in the deed of purchase of the plots of land, the following are the possible remedies available

Lack of quality of the property sold

The vendor of a contaminated site may be held responsible for defects (lack of quality) of the property sold cfr. Italian Supreme Court judgement of February 9, 2015, n. 239 and cannot benefit of the provision of article 1491 civil code which exonerates the vendor from the warranty if the defects are easily recognisable , given that in the case of the sale of a contaminated site, the defect can be considered as not easily detectable.
Moreover, the purchaser may also claim vis-a-vis the vendor the lack of essential qualities for the intended use of the property

Damages

A further protection available to the purchaser is the possibility of arguing that a sale *aliud pro alio* has occurred, whereby the property sold is considered completely different from the property which the parties had agreed to transfer. This is the argument upheld by the Tribunal of Verona (judgement of November 21, 2012 , n. 2491) which concerned the sale of a plot of land on which waste had been found that made the site unfit for building [*sito inedificabile*] and the costs of the remediation so high as to render the building anti-economic

Nullity of the sale for lack of mention of the contamination in the certificate of urban destination [*certificato di destinazione urbanistica*]

A further protection for the purchaser is the possibility of arguing that the sale of polluted land is null on the basis that the pollution and state of contamination of the land is not mentioned in the "certificate of urban destination" (which must accompany the sale of land measuring in excess of 5000 m²) . However the Supreme Court with its judgement of February 2, 2012 n. 2982 has stated that this argument, which is drawn from nullity of the sale for failure in itself to annex the certificate in question to the deed of purchase, may not be extended to an omission as regards the contents of the certificate itself.

Non-contractual damages

The owner not responsible for the pollution who has <u>not</u> carried out the remediation (and is therefore <u>not</u> entitled to recover from the subject responsible the remediation expenses sustained) and who has lost the ownership of the land as a result of an expropriation process by the public administration , is entitled to claim compensation for extra-contractual damages from the subject responsible for the pollution, other than the seller of the land.