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ENVIRONMENTAL LIABILITY UNDER SCRUTINY: THE MARGINS OF APPLYING THE EU 'POLLUTER PAYS' PRINCIPLE AGAINST THE OWNERS OF THE POLLUTED LAND WHO DID NOT CONTRIBUTE TO THE POLLUTION

Samvel Varvastian

Case C-534/13 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare and Others v Fipa Group Srl and Others* [2015] (ECJ, 4 March 2015) (Fipa Group and Others).

Keywords: Directive 2004/35/EC, EU law, 'polluter pays' principle, environmental liability, pollution, preventive and remedial measures

INTRODUCTION

The origins of the case *Fipa Group and Others* date back to the period between the 1960s – 1980s, when two companies belonging to the industrial group Montedison SpA (now Edison SpA), Farmoplant SpA and Cersam Srl, operated an industrial site for the manufacture of insecticides and herbicides in a municipality of the Province of Massa Carrara in Tuscany, Italy.¹ As a result of the industrial activities, massive contamination of the surrounding land by various chemical substances, including dichloroethane and ammonia, occurred.² In 1995, the land was partly decontaminated; however, the decontamination proved to be inadequate therefore in 1998 the area was proclaimed a 'site of national interest' under Italian law for the purposes of its rehabilitation.³

In 2006, 2008 and 2011, three different private companies, TwS Automation (engaged in sales of electronic devices), Ivan (a real estate agency) and Nasco Srl (engaged in the construction and boat repair business) respectively, became the owners of various plots of land on the site.⁴ Since the contamination took place before the above-mentioned entities acquired their respective land areas from Edison SpA, none of them was actually responsible for the pollution caused by the latter.⁵

However, by administrative acts issued on 18 May 2007 and 16 September and 7 November 2011 respectively, the Italian authorities ordered the three companies, as the 'guardians of the land', to adopt specific 'emergency safety' measures, including the erection of a hydraulic capture barrier in

¹ *Fipa Group and Others*, para. 25.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*, at paras 27 and 28.

⁵ Opinion of Advocate General Kokott, delivered on 20 November 2014 in Case C-534/13 *Fipa Group and Others*, para. 14.

order to protect the groundwater table and to submit an amendment to a project, dating back to 1995, for the rehabilitation of the land.⁶ The original owner, Edison SpA, which was clearly indicated as the one responsible for the contamination, was also charged with carrying out the same measures.⁷ The legal background for these decisions was Italy's Legislative Decree No 152 of 3 April 2006 (the Environmental Code), Article 245(2) of which stipulated, *inter alia*, that

'Without prejudice to the obligations incumbent upon the person responsible for the potential contamination, ... the owner or the administrator of the land who finds that the contamination threshold concentrations ... have been exceeded, or are specifically and genuinely at risk of being exceeded, is required to inform accordingly the region, province or municipality with territorial competence and to implement preventive measures'.⁸

LITIGATION BEFORE NATIONAL COURTS

The three companies brought proceedings to challenge the administrative acts before the Regional Administrative Court of Tuscany, relying on the fact that they were not responsible for the pollution in the first place. The regional court supported their cause by referring to both national legislation and the 'polluter pays' principle established in EU law, which it held did not grant the authorities a right to impose the measures at issue on entities that were not directly responsible for the contamination observed on the site. The Regional Administrative Court therefore annulled the administrative acts in question, in three separate judgments.⁹

The Italian authorities then lodged an appeal against these judgments before the Council of State, claiming that a proper interpretation of Italy's Environmental Code, which takes into account not only the 'polluter pays' principle, but the precautionary principle as well, did permit them to compel the owner of a polluted site to adopt emergency safety measures.¹⁰

On hearing the case, the chamber of the Council of State referred a question to the plenary assembly of that court, asking whether the 'polluter pays' principle grants national authorities the right to impose an obligation to implement emergency safety measures on owners of polluted land who were not responsible for that pollution or whether, in such circumstances, the owner is bound only by the obligations expressly provided for in Article 253 of the Environmental Code.¹¹

Under Article 250 of the Code:¹²

'if the persons responsible for the contamination do not immediately adopt [measures necessary to prevent pollution or restore polluted land] or if they cannot be identified, and if neither the owner nor any interested party adopts those measures ... [they] shall be implemented on its own initiative by the municipality that is territorially competent and, if that municipality does not adopt those measures, by the region, in accordance with the order of priority set by the regional plan for the rehabilitation of polluted land ...'

However Articles 253(3) and 253(4) of the Code then stipulate that:

⁶ See *Fipa Group and Others*, para. 28.

⁷ See Opinion of Advocate General Kokott, para. 15.

⁸ See *Fipa Group and Others*, para. 22.

⁹ *Ibid.*, at para. 29.

¹⁰ *Ibid.*, at paras 30 and 31.

¹¹ *Ibid.*, at para. 32.

¹² *Ibid.*, at para. 23.

‘... the recovery of costs may not be claimed vis-à-vis the owner of the site where that person is in no way connected with the pollution or the risk of pollution, except by reasoned decision of the competent authority attesting, inter alia, to the impossibility of identifying the person responsible or of bringing an action for damages against that person, or to the unsuccessful outcome of such an action.’

‘In any event, owners not responsible for the pollution may be required to reimburse ... the costs relating to the measures adopted by the competent authority only within the limits of the market value of the land, determined after the implementation of those measures. If an owner who is not responsible for the pollution has rehabilitated the polluted site on a voluntary basis, that person shall be entitled to bring an action for damages against the person responsible for the pollution in respect of costs incurred and any additional damage suffered.’¹³

With regard to the question put forward by the chamber, the plenary assembly noted that Italian administrative courts had applied two different approaches in interpreting the above-mentioned provisions of the Environmental Code in relation to the obligations of the owner of a contaminated site.¹⁴ The first, which is based *inter alia* on the principles of EU environmental law, namely the precautionary principle, the principle that preventive action should be taken and the ‘polluter pays’ principle, implies that the owner is under an obligation to adopt emergency safety measures and rehabilitation measures even where that owner is not the polluter.¹⁵ The second approach, however, stipulates that such owners do not incur any liability and that the authorities are not entitled to compel them to adopt such measures.¹⁶

For its part, the plenary assembly of the Council of State took the latter view as prevailing in Italian administrative case-law.¹⁷ It argued that this approach followed not only from a literal interpretation of the Environmental Code and the principles of civil liability, which require a causal link between the act and damage, but from the case-law of the European Court of Justice (ECJ) as well,¹⁸ relying upon *ERG and Others*,¹⁹ and *ERG and Others and ENI*.²⁰ Consequently, the plenary assembly came to a conclusion that the absence of a causal link between the act and damage in cases where the owner is not the polluter meant that no fault-based or strict liability could be established in respect of such damage. Thus, the liability of such a person would be based solely on their status as owner.²¹ In these circumstances, the assembly decided to refer the matter to the ECJ and asked whether the EU principles of environmental law, envisaged in Article 191(2) of the Treaty on the Functioning of the European Union (TFEU)²² and Directive 2004/35/EC on environmental liability (Environmental Liability Directive)²³, particularly the ‘polluter pays’ principle

¹³ Ibid., at para. 24.

¹⁴ Ibid., at para. 34.

¹⁵ Ibid., at para. 35.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid., at para. 36.

¹⁹ Case C-378/08 *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others* [2010] ECR I-1919.

²⁰ Joined cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others and ENI SpA v Ministero Ambiente e Tutela del Territorio e del Mare and Others* [2010] ECR I-2007.

²¹ See *Fipa Group and Others*, para. 36.

²² Consolidated Version of the Treaty on the Functioning of the European Union (OJ C326/47 26.10.2012).

²³ 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 (OJ L143/56 30.4.2004).

‘must be interpreted as 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.’²⁴

DECISION OF THE ECJ

Applicability of ‘Polluter Pays’ Principle Under Article 191(2) TFEU

First of all, the ECJ emphasized that Article 191(2) TFEU, establishing that EU policy on the environment ‘shall aim at a high level of protection’ and ‘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’, is essentially a political instrument, since it defines the general environmental objectives of the EU to be implemented by the EU bodies.²⁵ Accordingly, the Court stated that since this provision is directed at action at EU level, it cannot be relied upon by individuals to challenge the application of national legislation in an area for which there is no EU legislation adopted on the basis of Article 192 TFEU.²⁶ Similarly, it found that competent national authorities cannot rely on Article 191(2) TFEU, in the absence of any national legal basis, for the purposes of imposing preventive and remedial measures.²⁷ Therefore, the ECJ concluded that the only way to apply the ‘polluter pays’ principle in this particular case was through the Environmental Liability Directive.²⁸

Applicability of the Environmental Liability Directive

The main doubt raised by the ECJ as to the applicability of the Environmental Liability Directive in *Fipa Group and Others* was related to the fact that the contamination in question occurred decades before the Directive was adopted,²⁹ and according to Edison SpA, the polluting activities ceased in 1988 with partial decontamination of the area in 1995.³⁰ The Court noted that

‘It follows from the first and second indents of Article 17 of [Environmental Liability Directive], read in conjunction with recital 30 thereto, that the directive applies only to damage caused by an emission, event or incident which took place on or after 30 April 2007, where the damage derives from activities

²⁴ See *Fipa Group and Others*, paras 37 and 38.

²⁵ *Ibid.*, at para. 39. This position is well-established in the ECJ case-law: Case C-379/92 *Criminal proceedings against Matteo Peralta* [1994] ECR I-3453, para. 57; Case C-378/08 *ERG and Others*, para. 45; Joined cases C-379/08 and C-380/08 *ERG and Others and ENI*, para. 38; Order in joined cases C-478/08 and C-479/08 *Buzzi Unicem SpA and Others v Ministero dello Sviluppo economico and Others* and *Dow Italia Divisione Commerciale Srl v Ministero Ambiente e Tutela del Territorio e del Mare and Others* [2010] ECR I-0031, para. 35.

²⁶ See *Fipa Group and Others*, at para. 40.

²⁷ *Ibid.*, at para. 41.

²⁸ *Ibid.*, at para. 42.

²⁹ *Ibid.*, at paras 44 and 45.

³⁰ See Opinion of Advocate General Kokott, para. 28.

which took place on or after that date or from activities which took place before that date, but were not brought to completion before that date.³¹

Furthermore, the Court stressed that it follows from the scope of the Environmental Liability Directive that one of the essential conditions for the application of the liability arrangements laid down therein is the identification of an operator who may be deemed responsible.³² This stemmed from the fact that the Directive applied to environmental damage and damage to protected species and natural habitats caused by occupational activities carried out by an operator.³³

However, persons other than those defined in Article 2(6), i.e. those who do not carry out an occupational activity within the meaning of Article 2(7) of the Environmental Liability Directive, fall outside the scope of the Directive.³⁴ Since the Court accepted that none of the three respondents in the present case were engaged in any of the activities listed in Annex III to the Environmental Liability Directive, it observed that the only way for them to be held liable under the Directive was through fault or negligence, pursuant to Article 3(1)(b).³⁵ However, for this mechanism to apply, a causal link must be established ‘between the activity of one or more identifiable operators and concrete and quantifiable damage, irrespective of the type of pollution at issue’.³⁶ This rule follows from Articles 4(5) and 11(2) of the Environmental Liability Directive read in conjunction with recital 13, which require both the identification of the polluter and the establishment of a causal link between their activity and the damage in question. In other words, a causal link should be established both in case of strict liability and fault-based liability, as provided in Articles 3(1)(a) and (b),³⁷ otherwise, the situation would be regulated solely by national legislation.³⁸

The ECJ concluded that the situation in *Fipa Group and Others* clearly indicated that no causal link existed between the three companies and the contamination in question. The situation was therefore governed by national legislation. That national legislation did not permit the competent authority to require an owner of land who was not responsible for pollution to adopt preventive and remedial measures. That person was merely required to reimburse the costs of the measures undertaken by the competent authority. This did not infringe the Environmental Liability Directive, nor the EU ‘polluter pays’ principle.³⁹

COMMENTARY

The case is interesting in a number of ways. First, it is in line with previous ECJ rulings that the application of the ‘polluter pays’ principle envisaged in the Treaty on the Functioning of the European Union is possible only via the implementation of EU legislation, in this case, the

³¹ See *Fipa Group and Others*, para. 45.

³² *Ibid.*, at para. 48.

³³ Articles 2(6) and (7) and 3(1) read together with Articles 5, 6, 8 and 11(2) and recitals 2 and 18.

³⁴ See *Fipa Group and Others*, para. 52.

³⁵ *Ibid.* at para. 53.

³⁶ *Ibid.* at para. 54. See also: Case C-378/08 *ERG and Others*, paras 52 and 53; order in *Buzzi Unicem and Others*, para. 45.

³⁷ See *Fipa Group and Others*, paras 55 and 56.

³⁸ *Ibid.* at para. 59. See also: Case C-378/08 *ERG and Others*, para. 59; order in *Buzzi Unicem and Others*, paras 43 and 48.

³⁹ See *Fipa Group and Others*, paras 60 and 63.

Environmental Liability Directive.⁴⁰ This renders the application of the principle contingent on the application of directives in EU environmental law.

Second, it raised the question of third-party environmental liability in the absence of a causal link to specific environmental pollution. In this particular case, the third party was merely the owner of the polluted site and had not been responsible for its damage. Since Article 8(3)(a) and recital 20 of the Environmental Liability Directive emphasize that an operator shall not be liable in case of *force majeure*, which implies, *inter alia*, damage caused by a third party,⁴¹ it is logical that mere owners are to be exempted from the liability, should the damage be caused by another entity. Otherwise, owners would be liable for any environmental damage to their property arising from the acts of third parties, including the deliberate acts of sabotage.⁴² This would be beyond the scope of the Environmental Liability Directive.⁴³

EU environmental law, at least up to now, has not shown willingness to regulate these particular situations, leaving to national law the question of whether owners of polluted land are liable for environmental damage, caused by others. Indeed, Article 16(1) of the Environmental Liability Directive stipulates that:

‘This Directive shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and remediation requirements of this Directive and the identification of additional responsible parties.’

This power, however, may not be absolute. According to Advocate General Kokott:

‘[it] is restricted by the objectives of the Environmental Liability Directive, which Member States may not undermine. Thus, they would be prohibited from identifying additional responsible parties to replace the polluter who was liable under the directive.’⁴⁴

‘The directive contains, at most, an unspoken requirement that Member States oblige such persons to allow the necessary measures on their sites and, where necessary, to cooperate in their implementation.’⁴⁵

Therefore,

‘The scope of the ‘polluter-pays’ principle coincides essentially with the restrictions which the objectives of the Environmental Liability Directive impose on the application of Article 16. Member States may not undermine the ‘polluter-pays’ principle by identifying additional responsible parties as well as or instead of the polluters. Thus, additional responsible parties may have only secondary liability.’⁴⁶

Such secondary liability could, for example, include an obligation on site owners to support preventive and remedial measures. This would possibly make these measures much more effective

⁴⁰ Article 1 of the Environmental Liability Directive:

‘The purpose of this Directive is to establish a framework of environmental liability based on the ‘polluter-pays’ principle, to prevent and remedy environmental damage.’

⁴¹ See *Fipa Group and Others*, para. 58.

⁴² See Opinion of Advocate General Kokott, para. 33.

⁴³ *Ibid.*, at para. 39.

⁴⁴ *Ibid.*, at para. 48.

⁴⁵ *Ibid.*, at para. 52.

⁴⁶ *Ibid.*, at para. 54.

due to the owners' better knowledge of the site and be in line with the principle of preventive action and the principle that environmental damage should as a priority be rectified at source. However, it would by no means imply that the owners should be under obligation to carry out such measures by themselves.⁴⁷ Furthermore, the comprehensive secondary liability of site owners for environmental damage would be in line with the EU objective of achieving a high level of environmental protection (Article 191(2) TFEU), yet also be balanced with fundamental economic rights of the owners.⁴⁸

Nevertheless, it seems that such an interpretation of environmental liability, given that it is indeed fully substantiated by EU law, does not bode well for the active promotion of environmental protection. After all, shifting the responsibility of undertaking preventive and remedial measures from the owners to a competent authority, where the owners are unwilling to undertake them themselves, is likely to result in a certain delay between the damage occurring and such measures being taken. For example, in present case it took years for national environmental authorities to address the owners with this matter. Consequently, the land was allowed to remain contaminated for much longer than it otherwise could have been. In contrast, the promotion of obligatory immediate measures to be taken not only by the operator, but also by owners of polluted sites, would ensure that preventive and remedial action takes place as soon as possible, and result in less severe environmental deterioration. At this point yet, it should be observed that the notion of balance between environmental protection and economic rights, highlighted by the Advocate General, looms over contemporary environmental policy. This explains not only the reluctance of some Member States to adopt more stringent environmental liability rules, but also cases in which there is a failure to comply even with minimal EU environmental standards.⁴⁹

However, it is still disheartening for the environmentalists that in interpreting the right to identify additional responsible parties the Court, unlike the Advocate General, did not go beyond a simple statement that such measures should be compatible with EU primary legislation.⁵⁰ As the Advocate General herself acknowledged, since other EU provisions, such as waste legislation, 'may establish wider liability on the part of site owners for the rehabilitation of polluted areas than the Environmental Liability Directive.'⁵¹ It should therefore not be ruled out that similar obligations could be implemented in the future.⁵² This would most certainly be welcomed from the point of view of enhanced environmental protection.

CONCLUSION

As long as the current provisions of the Environmental Liability Directive remain in place, there is no obligation upon owners who were not responsible for environmental pollution to adopt preventive and remedial measures. National authorities cannot invoke the EU 'polluter pays' principle in such situations. However, they retain a right to regulate these matters under domestic legislation. Pursuant to Article 16 of the Environmental Liability Directive, this allows them to

⁴⁷ Ibid., at para. 56.

⁴⁸ Ibid., at paras 60 and 61.

⁴⁹ See, e.g., Case C-68/11 *Commission v Italy* [2012] (ECJ, 19 December 2012), para. 40; Case C-404/13 *The Queen, on the application of ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs* [2014] (ECJ, 19 November 2014), para. 20.

⁵⁰ See *Fipa Group and Others*, para. 61.

⁵¹ See Opinion of Advocate General Kokott, para. 72.

⁵² Ibid., at para. 22.

adopt more stringent measures with regard to prevention and to remedying environmental damage. At the moment, however, the right to identify additional responsible parties, never mind replacing those actually responsible, in the national legislation must be regarded with high caution, since such policy should be consistent with the objectives of EU primary legislation.