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ALERT MEMORANDUM

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Remediation of Contaminated Sites: Obligations of Innocent Landowners under Italian Law in Light of a Recent EU Court of Justice Judgment

On March 4, 2015, the Court of Justice of the European Union issued a preliminary ruling[1] on a question referred to it by the Grand Chamber of the Italian Council of State (*Adunanza Plenaria del Consiglio di Stato*), by order dated September 25, 2013, No. 21[2], regarding the interpretation of EU environmental principles in relation to national legislation concerning the duties of "innocent landowners" (*i.e.*, owners of contaminated sites who are not responsible for the pollution). Pursuant to the Italian law under scrutiny, administrative authorities are not empowered to require innocent landowners to implement preventive and remedial measures, but only to request a refund for the costs incurred in implementing such preventive and remedial measures, within the limit of the market value of the cleaned sites.

The issue of landowners' liability has given rise to conflicting Italian administrative case law. The Court of Justice's ruling confirmed that EU law does not preclude national legislation from exempting the innocent landowner from the obligation to implement emergency, safety and remedial measures and limits its liability to the recovery of costs which the authority incurred for remedial actions, within the limit of market value of the sites once the remediation has been carried out.

1. The Case at Issue

The case which led the Grand Chamber of the Council of State to refer the preliminary question concerned an appeal against orders issued by the Ministry of Environment (*Ministero dell'Ambiente*) imposing on three companies the implementation of emergency safety measures, in order to protect underlying groundwater aquifers. The contamination was caused by the previous owners of those sites; therefore the three companies could be qualified as mere owners who were not responsible for the pollution. The Administrative Court of the Region of Tuscany (*T.A.R. Toscana*) quashed those orders, finding it unlawful to impose such measures on persons not responsible for the contamination.[3] The Ministry appealed these judgments to the Council of State. In light of the split among Italian administrative courts as to whether the orders imposing on innocent landowners the implementation of emergency safety and remedial measures are legitimate (see also paragraph 2.2 below), the case was taken up by the Grand Chamber. The Grand Chamber decided to ask the Court of Justice whether the relevant EU principles (in particular the "polluter pays" principle, the "preventive action" principle, and the principle that

[1] Court of Justice of the European Union judgment March 4, 2015, C-534/13, *Fipa et al.*

[2] The Council of State referred the same preliminary question by order dated November 13, 2013, No. 25.

[3] T.A.R. Toscana, sezione II, judgments No. 1659, 1664 and 1666 dated October 19, 2012.

environmental damages should, as a matter of priority, be rectified at the source) preclude the application of Italian legislation, which, according to the Grand Chamber, does not allow the imposition of remedial measures on the owner who is not responsible for the pollution.

2. Legislative and Case Law Framework

2.1 The Innocent Landowner under EU Law

Directive 2004/35/CE concerns environmental liability with regard to the prevention and remedying of environmental damage (the "Directive"). The Directive applies to damage caused by an emission, event or incident which took place after April 30, 2007, whether the damage derives from an activity which took place after that date or from an activity which took place, but was not completed, before that date. Article 8, paragraphs 1 and 3 of the Directive provides that the operator will not be required to bear the cost of preventive or remedial actions when he can prove not to have caused that damage. However, Article 3 contemplates two kinds of liability: "strict" liability for those operators carrying out any of the occupational activities listed in Annex III of the Directive, and liability based on fault or negligence for all other operators. Moreover, Article 11, paragraph 2 of the Directive imposes on the competent authority the duty of establishing which operator is responsible for the damage or threat of damage.

Article 16 of the Directive allows the European Member States to maintain or adopt more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional responsible parties.

2.2 The Innocent Landowner under Italian Law

Legislative Decree No. 152 of April 3, 2006 (the "Environmental Code") regulates, *inter alia*, the obligations incumbent on persons who are not responsible for the contamination. Article 245 of the Environmental Code requires the innocent landowner who discovers contamination or becomes aware of a risk of contamination to inform the authorities and to implement "preventive measures".[4] This rule does not require the implementation of emergency safety measures or remedial measures, which are expressly imposed on the person responsible for the pollution. In the event that the latter fails to adopt the measures required by the Environmental Code or it is not possible to identify the polluter, it is the administrative authority's duty to carry out all necessary remedial activities (Article 250 of the Environmental Code). The measures taken by the administrative authority constitute: "*encumbrances ["oneri reali"] on contaminated sites […]. The costs incurred for the measures […] shall be coupled with a special security interest in the same land […]. The security interest and the recovery of costs may not be claimed vis-à-vis to the owner of the site where that person is in no way connected with the pollution or the risk of*

[4] Article 240 of the Environmental Code defines the preventive measures as "*any measures taken in response of an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimizing that damage*". Those are the measures to be carried out immediately upon the discovery of the contamination, within the following 24 hours.

pollution, except by reasoned decision of the competent authority attesting, inter alia, 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"(Article 253 of the Environmental Code).

This legislative framework has given rise to two conflicting trends in case law. According to the minority view[5], it is legitimate to impose on the innocent landowner the implementation of emergency safety and remedial measures. In support of this interpretation, the case law has identified the following reasons:[6] (i) the correct implementation of the EU principles of precaution, preventive action and "polluter pays", to avoid that society bears the consequences of the pollution (after the sale of the concerned sites between private parties); (ii) pursuant to the Civil Code, the ownership of a site entails a duty of care and protection, regardless of whether the owner was directly involved in causing the contamination; and (iii) the peculiar position of the landowner, whose liability would not depend on any actual negligence on his part.[7]

However, the prevailing opinion[8] is that the administrative authority should not be allowed to impose on the innocent landowner the implementation of emergency safety and remedial measures. In support of this interpretation, the case law has indicated the following reasons: (i) an interpretation of the EU "polluter pays" principle that would exclude any reference to presumptive or strict liability; (ii) a literal interpretation of applicable laws, which clearly distinguish the obligations of the person responsible for the pollution from those of the person who is not so responsible; and (iii) the EU precautionary principle does not imply, *per se*, that the innocent landowner should be burdened with the implementation of the precautionary measures (no provision seems to assume that the "polluter pays" principle links environmental liability to mere ownership of the contaminated site); (iv) there would be no basis to attach environmental liability to the current landowner on the ground of protection and custody obligations if the pollution took place when the sites were owned by other persons; and (v) although environmental law provides for strict liability standards for certain conduct (see Law No. 185 of April 6, 1977, *Ratification of the convention on pollution from hydrocarbons*), it cannot be interpreted extensively. In the order at issue, the Grand Chamber of the Council of State endorsed the prevailing view, against the imposition of emergency safety and remedial

[5] See in particular Consiglio di Stato, sezione II, opinion No. 2038/2012, delivered following the hearing of November 23, 2011; Consiglio di Stato, sezione VI, July 15, 2010, No. 4561; T.A.R. Piemonte, sezione II, February 11, 2011, No. 136.

[6] Summarized in the Council of State order of September 25, 2013, No. 21.

[7] Case law has stated that this kind of liability would depend on the relationship with the real property, on the existence of an encumbrance (*onere reale*) provided by the law on the site, or on the circumstance of being better placed to implement any useful measure in order to prevent the occurrence of an environmental damage.

[8] Consiglio di Stato, sezione VI, January 9, 2013, No. 56; Consiglio di Stato, sezione VI, April 18, 2011, No. 2376.

measures on the innocent landowner. Indeed, the Council of State considers it "*the only interpretation compliant with the literal interpretation of the law*".[9]

3. The Question Referred and the Decision of the European Court of Justice

The Council of State referred to the Court of Justice the following interpretation request: "*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 'polluters pay' 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 sites once the rehabilitation measures have been carried out?*".

A systematic interpretation of the relevant provisions of the Directive led the Court of Justice to affirm that, under the principles of European Union law, environmental liability is never decoupled from the causal link between the damage and the conduct carried out by the operator. This applies both to the operators carrying out the activities listed in Annex III of the Directive (who are held liable on the basis of a strict liability standard)[10] and to all the other operators (who are held liable on the basis of fault or negligence liability standards).[11] Indeed, under EU law, no environmental liability (whether strict or based on fault or negligence) can be attached without the assessment of a causal link.

Therefore, the Court stated that the EU environmental principles must be interpreted as not precluding a 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*

[9] As a further demonstration of the relevance of the conflicts among the interpretations outlined above and the sensitivity of this issue, this order, although issued by the highest administrative judicial body, did not prevent administrative courts from issuing further conflicting decisions. Indeed, the administrative judges have continued to endorse both opinions described above. In particular, a recent judgment of chamber No. V of the Council of State dated February 4, 2015, No. 533, affirms the legitimacy of an order that imposed the implementation of emergency safety measures on a landowner, regardless of the assessment on the liability for the pollution. Among the rulings following this opinion, see also: T.A.R. Puglia, Lecce, sezione I, February 6, 2014, No. 339; T.A.R. Campania, Napoli, sezione V, February 3, 2015, No. 679; and T.A.R. Lazio, sezione I, February 12, 2015, No. 2509. The rulings which followed the prevailing opinion are: T.A.R. Friuli Venezia Giulia, Trieste, sezione I, May 5, 2014, No. 183; T.A.R. Abruzzo, l'Aquila, sezione I, July 3, 2014, No. 577; and T.A.R. Lombardia, Milano, sezione IV, July 8, 2014 No. 1768.

[10] See paragraph No. 55 of the ruling.

[11] See paragraph No. 56 of the ruling.

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".[12]

However, the consistency with the EU law of Article 245 of the Environmental Code, as interpreted by the Grand Chamber of the Council of State does not exclude *per se* that the Court of Justice might consider other interpretations of domestic law as compatible with the EU law. Indeed, on the one hand, the Court stated that Italian legislation, as interpreted by the Council of State to the effect that it is not legitimate to impose the duty to carry out remedial actions on innocent landowners, is compatible with the EU law. On the other hand, the Court pointed out that the EU law allows Member States to adopt more stringent measures, including through the identification of additional responsible parties, provided that they are compatible with the Treaties[13]. Therefore, it is not possible to exclude that a different interpretation of national legislation (hypothetically, the minority opinion in current Italian case law) could also be deemed compatible with the principles of the EU environmental law.

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[12] See paragraph No. 64 of the ruling.

[13] See paragraph No. 61 of the ruling.

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