THE IMPACT OF EU LEGISLATION, PRINCIPLES AND CASE LAW ON THE NATIONAL CONTAMINATED LAND REGIMES

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1. Contaminated Land Regime (CLR): notion

- **Contaminated Land Regime (CLR)** refers to the 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.

- It entails a set of rules aimed at deciding whether the mentioned pollution or significant harm are in place or can reasonably be expected.

- It also defines 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.

- CLRs' aim is to promote remediation (whenever useful and cost-effective), not to promote just investigation of contaminated areas

2. Contaminated Land Regimes (CLRs) in the EU

- CLR is one of the few areas of environmental law where **detailed legislation is not in place at the EU level.**

- Important decisions are thus left to the **discretion of Member States**, such as decisions on:

  - the allocation of the burden and the costs of the remediation;

  - the standard of evidence to be applied in order to identify the responsible party ("more probable than not" or "beyond a reasonable doubt"? Links between the administrative proceedings and the subsequent possible criminal liability);

  - the definition of the remediation targets;

  - how to handle contaminated areas where nobody voluntarily takes up the responsibility for the remediation.

3. EU law and the CLRs: IED Directive, EU Principles and ECJ Case Law

- However, **EU environmental law and ECJ case law regulate and address matters that are relevant** for the drafting, interpretation and implementation of national CLRs.

- At least three parts of EU law must be mentioned to that aim:

  - The **IED** (Directive 2010/75/EU), when it introduces the **Baseline Report**

  - **Some EU environmental and general principles**

  - EU **case law on the ELD** (Directive 2004/35/EC).

4. The Baseline Report under the IED (2010/75/EU Directive) and the CLRs (1)

The **Baseline Report** (introduced by the IED):

- contains information on the **state of soil and groundwater** contaminated by relevant hazardous substances;
- is a tool that permits, as far as pos-sible, a **quantified comparison** between the state of the site described in that report and the state upon definitive cessation of activities;
- aims to ensure that the operation of an installation **does not deteriorate** the quality of soil and groundwater;
- puts a **duty for the operator of an activity to investigate and disclose the contamination**, if any.

The important **EU May 2014 Guidance Document** (8 stages; "*relevant hazardous substances*"; "*detailed*": interest of the operator? It depends from the features of the national CLR), followed by several **national guide lines** (compliant with the EU Guidance? Effectively implemented?)

4. The Baseline Report under the IED (2010/75/EU Directive) and the CLRs (2)

- According to the IED, **any increase** in the pollution levels **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.

- National legislation and guidelines implementing the Baseline Report obligation do not take explicitly into account its inevitable **links with the national CLRs.**

5. EU environmental principles and the CLRs (1)

- The **polluter pays principle**: only the polluter should pay for the remediation. If the polluter is not found or is not in the condition to pay, either the remediation is funded by taxpayers or it does not take place. **Some CLRs rely heavily on this principle.**

- The **stewardship principle**: the landowner - even when not responsible for the contamination – should pay for at least part of the remediation. **Some other CLRs rely also on this principle, with varied intensity.**

- The **precautionary principle and the principle of environmental harm** anticipate the timing and enlarge the size of the measures to be adopted in order to remediate contaminated areas.

- **Of course, the question of their costs is relevant.** Which measures must be taken to remediate a contaminated area, regardless the costs?

5. EU environmental principles and the CLRs (2)

- This problem has been scrutinized by the Courts worldwide. For instance:

  - **The ECJ** (European Court of Justice) maintained that the actual content (and consequently the costs) of any precautionary measures must be determined taking into account another EU legal principle: **the proportionality principle** (recently, see the OPINION OF ADVOCATE GENERAL KOKOTT delivered on **8 September 2016** in Case C-444/15: **EU proportionality principle** "*imposes on the EU legislature the requirement, when formulating environmental legislation, to improve environmental protection at least in areas where this can be accomplished with a* ***reasonable degree of effort and is not precluded by any legitimate interests***").

  - **The US Supreme Court** established that the **EPA** (Environmental Protection Agency) must take **costs into account** when delivering orders relevant to industry;

  - **The Italian Constitutional Court** indicated the need to find a **balance** between environmental protection and the right to have a job (Ilva case).

6. ECJ case law and the CLRs (1)

- The relevant EU case law pertains mainly to the **ELD (2004/35/EC Directive)**

- ***ECJ decisions of 9 March 2010 - cases C-378/08, C-379/08 and C-380/08***: interpretation of the ELD that pushes the Member States towards a rigid application of the **polluter pays principle** in the allocation of responsibility.

- ***ECJ decision of 4 March 2015 - case C-534/13***: where it is impossible to identify the polluter or to have that person implement the remediation, the EU law precludes national legislation from not requiring the landowner to take on **at least part** of the burden of remediation.

"Directive 2004/35/EC … on environmental liability 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".

(ECJ decision of 4 March 2015 - case C-534/13)

6. ECJ case law and the CLRs (2)

- ***ECJ decision of 4 March 2015 - case C-534/13***: The ELD must be now interpreted as providing **national CLRs** with a **choice between the following two options only**:

  - requiring the 'innocent' landowner to adopt **full** preventive and remedial measures,

or, at the very least,

  - 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 following the remediation.

Conclusions (1)

- The national CLRs will probably be receptive to the developments in the EU legislation and case law outlined above. This will probably shape a **common, though 'unofficial', EU CLR.**

- This **standardization process** will probably focus on the following **five main issues:**

  a) how the CLR defines the system to be used in order to **classify a land as contaminated;**

  b) how the CLR **identifies the liable party**: (Which standard of evidence? Causation by omission of emergency measures? Causation by statistical (Bayesian) risk increase?);

  c) which are the established criteria for dealing with contaminated areas where **nobody voluntarily takes up the responsibility for the remediation?** (Do the Public Authorities clean up? / With which funds? / Via subsequent stages?);

  d) what are the tools that the CLR puts in place to **identify the remediation targets**, for both soil and groundwater (Limit thresholds? Which rationale for identifying the thresholds? Risk Analysis?);

  e) joint and several liability or proportionate liability when there are different responsible parties? Examples. The new frontier of proportionate liability (Dutch 2006 High Court; Italian 2015 *Consiglio di Stato*). Difficulties in the practical implementation of proportionate liability.

Conclusions (2)

- **From the initial reliance on the polluter-pays principle alone, to increased prominence of the stewardship principle**: legislation and case law at the EU level have the potential to nudge the national CLRs towards mitigating the polluter-pays through the stewardship principle.

- Some CLRs contain rules which **differentiate the public from the private law domain**, particularly in the allocation of the remediation costs. In the former, the stewardship principle seems to prevail, whereas the latter is dominated by the polluter-pays principle.

Conclusions (3)

- Both the ELD and the recent ECJ case law extend the application of remediation rules to **three - rather than two - different parties: polluter, innocent landowner and operator.**

- **Operator:** "*any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity ….*" (Art. 2(6) ELD, which is very similar to the definition of 'operator' provided by art. 3 of the IED)

- The operator does not necessarily coincide with either the **polluter** or the '**innocent' landowner.**

THANK YOU

FOR YOUR ATTENTION

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