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Case C-534/13 Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl (not yet published)

The Environmental Liability Directive and Owners/Occupiers

The European Court of Justice has recently reached its decision in Case C-534/13 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl*, a case which required assessment of the relationship between national legislation concerning contaminated land, the Environmental Liability Directive (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), and the polluter pays principle. The Court was required to assess whether the relevant Italian legislation, which did not require an owner/occupier to remediate land where no causal link could be established in relation to the pollution, was compatible with EU law.
The court stated that:

> Directive 2004/35 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 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. [63]

This decision provides an interesting point of development from the decision in C-378/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo Economico* [2010] ECR I-01919. In that case, the ECJ was required to assess whether national law presumptions in relation to causal liability breached the polluter pays principle. The Court in that case concluded that:

> Directive 2004/35 does not preclude national legislation which allows the competent authority acting within the framework of the directive to operate on the presumption, also in cases involving diffuse pollution, that there is a causal link between operators and the pollution found on account of the fact that the operators' installations are located close to the polluted area. However, in accordance with the "polluter pays" principle, in order for such a causal link thus to be presumed, that authority must have plausible evidence capable of justifying its presumption, such as the fact that the operator's installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities. [70]

This conclusion, that more stringent national legislation would misrepresent the polluter pays principle if causation could be presumed, was somewhat at odds with the approach of AG Kokott. In *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl*, the Court appears to be more sympathetic to her view that:

> It is not possible to derive from the 'polluter pays' principle an absolute prohibition on imposing the costs of remedying environmental damage on parties other than the polluters. Such a prohibition would be tantamount to accepting environmental damage

> where the polluter cannot be made liable. Even where remedial action is taken at public expense, the costs have to be borne by someone who is not responsible for the damage. However, accepting environmental damage would be incompatible with the aim of encouraging a high level of environmental protection and improving the quality of the environment. The function of "polluter pays" principle is to help to achieve that objective, which is laid down not only in art.174(2) EC , but also in art.174(1) EC , and above all in art.2 EC . The "polluter pays" principle may not be construed in such a way that it is inconsistent with environmental protection, for example by preventing the remedying of environmental damage where the liability of the person responsible cannot be established. [AG112]

This more recent decision of the ECJ appears, therefore, to represent a 'non-exclusionary' interpretation of the polluter pays principle. I have argued elsewhere that there are two approaches to interpreting this principle (see E Lees, 'Remediation of Contaminated Land: the Polluter Pays Principle and Stewardship' in *Towards a Jurisprudence of Implementation* (eds Martin, Bigdela, Daya-Winterbottom, DuPlessis, & Kennedy, Edward Elgar, forthcoming); and E Lees, 'The polluter pays principle and the Environmental Liability Directive' in review). Firstly, it can be said that the polluter pays principle, in demanding that the cost of pollution be internalised, requires that the polluter pay and that no one else pay. This turns the principle into an exclusionary principle of liability. Alternatively, it could be argued that the principle is merely a justification for liability falling onto a polluter – either amongst others equally, or as a matter of priority. Prior to the decision in *Fipa Group*, the ECJ had been indicating that the former interpretation was to be preferred. This was somewhat surprising, and at odds with many of the Member States' own interpretations of what this principle required.

Fipa Group thus represents a welcome further development. It recognises that the polluter pays principle, when translated from an economic principle, to a legal principle, undergoes a transformation in terms of what regulation is justified by reliance on that principle. As AG Kokott noted, to rely too heavily on the polluter pays principle as an exclusionary principle of liability would in fact result in a potential diminution in the power of the Directive to result in the clean-up of contaminated land.

Noteworthy too is the confirmation from the ECJ that an individual cannot rely on the polluter pays principle as a stand-alone basis in relation to national law where no EU law covers the grounds. Thus:

> Consequently, since Article 191(2) TFEU, which establishes the 'polluter pays' principle, is directed at action at EU level, that provision cannot be relied on as such by individuals in order to exclude the application of national legislation - such as that at issue in the main proceedings - in an area covered by environmental policy for which there is no EU legislation adopted. [40]

As part of my on-going research I have considered the relationship between national legislation relating to the clean-up of contaminated land within the EU, and the Environmental Liability Directive. This research revealed that in the process of attempting to harmonise environmental liability for damage to land, the ELD did not provide for a harmonised understanding of the polluter pays principle. Multiple interpretations of that principle exist within the institutions of the Union and within the Member States. It is to be hoped, although is perhaps unlikely, that this decision could lead to a more unified interpretation of that principle, one which sees it purely as a reason to impose liability, not one which excludes liability where no causal link can be established.