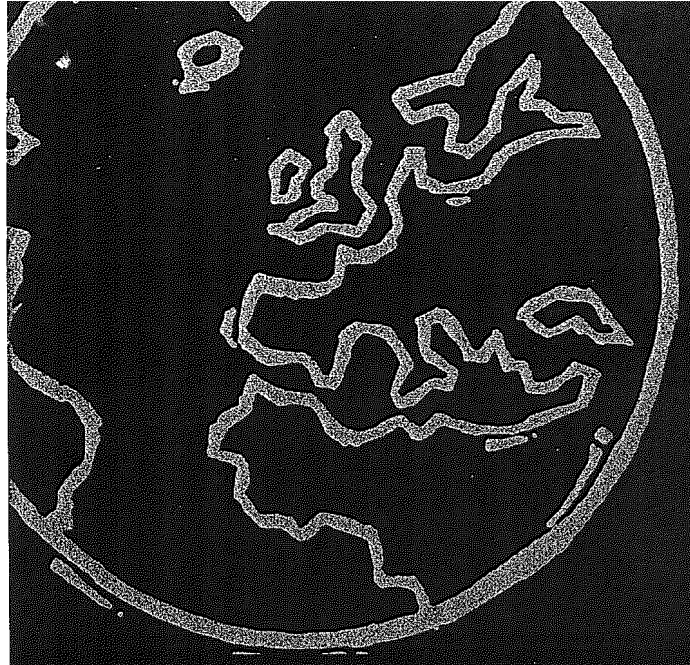

VOLUME 11 ISSUE 5 OCTOBER 2003
ISSN 0966 2030

ENVIRONMENTAL LIABILITY

LAWTEXT PUBLISHING

Regulation of the European Parliament and of the Council concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC	1830/2003	L268/24 18 October 2003
Decision of the EEA Joint Committee amending Annex XX (Environment) to the EEA Agreement	92/2003	L272/28 23 October 2003
Decision of the EEA Joint Committee amending Annex XX (Environment) to the EEA Agreement	93/2003	L272/29 23 October 2003
Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC	2003/87	L275/32 25 October 2003

ITALY

Enrico Caramori
Baker & McKenzie, Milan

Land contamination in Italy

Introduction

Italian general guidelines of environmental policy are set forth in the Italian Constitution of 1948, Article 9 of which entrusts the Government with the responsibility for 'protecting the Nation's landscape and its historical and cultural assets'.

Since that first provision, the development of Italian environmental policy has often shown the lack of a unitary and coordinated approach, and has been characterised by the presence of quite detailed national legislation on each specific aspect of environmental law, without any comprehensive law addressing environmental protection in general.

The same fragmentation exists with respect to legislation on contaminated lands. As a result, Italy lacks a coordinated policy in this field and environmental protection is more often pursued through the punishment of those who commit violation of specific environmental law provisions, rather than through the adoption and implementation of positive actions for the prevention and remediation of land contamination problems.

As a cornerstone of the entire Environmental legal system, Law No. 349 of 8 July 1986 established the Ministry of the Environment in Italy, with the specific responsibility to ensure the 'promotion, conservation and re-establishment of environmental conditions appropriate to the fundamental interest of the population and to the quality of life', as well as 'the conservation and valorisation of the national natural assets, and the defence of natural resources from pollution' (Article 1.2).

Environmental regulations in Italy, which support and articulate these concepts, are represented by a complex and sometimes overlapping mixture of constitutional provisions, special statutes, articles from the Civil and Criminal Codes, and special decrees issued by different levels of government.

This regulatory regime experienced the most notable change in 1984, when a decision of the Constitutional Court (Decision No. 170 of 8 June 1984) paved the way for the implementation of European Union Directives into national law.

Indeed, since the early 1990s, much of the environmental legislation in Italy has been in response to EU legislation, but Italy did not implemented the most relevant EU Directives on land contamination and waste pollution until 1997, when the Government enacted the Legislative Decree No. 22 of 5 February1997. This implemented the European Directives 91/156/EEC,[1] 91/689/EEC[2] and 94/62/EC.[3]

With the above mentioned Decree, the Government introduced for the first time specific rules on the remediation of contaminated sites. This Decree also constitutes the main backbone on which Italian legislation concerning land contamination has developed in recent years.

The legal framework for land contamination

As indicated above, until the enactment of Decree No. 22/1997, no national legislation existed which provided for strict liability for the remediation of contaminated sites. Only a few regions had introduced specific regulations governing this field of law and extended liability to persons other than the ones directly responsible for the contamination, such as the owner or the user of the land.

Article 17 of Decree No. 22/1997, as amended by Decree No. 471/1999 and by Law No. 93/2001, indicated the acceptable limits of polluting substances in soil and water, and established the relevant clean-up procedures.

Decree No. 471/1999 in detail

Decree No. 471/1999 considers land to be 'contaminated' when the concentration values of even one single parameter of polluting substances in soil, subsoil, groundwater or superficial waters exceeds the acceptable limits indicated in enclosure 1 of the same Decree.

Article 7 of Decree No. 471/1999 provides a special procedure to be followed in cases of contamination, or actual and current risk of contamination:

1. In the first phase, the responsible party must notify the relevant Region ('Regione'), Province ('Provincia') and Municipality ('Comune') of the contaminated land. This notification must be made within 48 hours after the event that caused the contamination and such notification has to disclose the following information:
   a) The name of the responsible party or parties and the name of proprietor of the land;
   b) The name of the place where the contamination had first been discovered and the estimated dimension of the contaminated area (or at risk of contamination);
   c) The causes of contamination/risk of contamination;
   d) The types of contaminating substances discovered in the soil and their quantity;
   e) The environmental components involved (i.e. soil, water, flora and/or fauna);
   f) Potential risks to the population, or in the event that such estimation is not possible, the town planning and territorial characteristics of the surrounding area.
2. Within 48 hours following the discovery of the contamination, the responsible party or parties must declare to the relevant authorities the emergency measures which have been adopted or are in the process of being adopted. The responsible party must disclose this information in writing and detail these emergency measures.
3. Within 30 days from the notification, the Municipality will verify whether the emergency measures taken are sufficient. The relevant authority may impose further measures in addition to those that the responsible party has taken or is presently taking.

According to Articles 19 and 20 of Decree No. 22/1997, each Region must issue its own contamination clean-up plan, while the Provinces are in charge of monitoring the clean up activities in their own territory.

1 Amending Directive 75/442/EEC on waste.
2 On hazardous waste.
3 On packaging and packaging waste.

Each Municipality must then give its approval to each project to clean up polluted sites. Following satisfactory completion of the cleanup, certificates of completion are issued by the relevant authority.

After this first phase, under Article 10 of Decree No. 471/1999, the responsible party must draft a three-part clean-up plan:

1. *Characterization plan.* This shows:
   - site characterization;
   - activities carried out or being carried out;
   - area contaminated;
   - necessary conditions to protect environment and public health;
   - other technical prescription.

This plan must be filed with the relevant authorities within 30 days from the contamination/ risk of contamination event.

2. *Preliminary plan.* This contains a detailed description of aims that have to be pursued by the definitive plan.

3. *Definitive plan.* This has to contain every detail of the planned clean up, including expenses. This plan must be filed with the relevant authorities within one year from the expiration of the 30-day term.

All these plans have to be filed with the relevant Municipality and Region. If the pollution occurred over an area bigger than one Municipality or Region then plans have to be authorized by the relevant Municipality or Region.

Articles 9 and 10 of Law 93/2001 ('General provisions on environmental regulations'), and Decree September 18, 2001 No. 468 ('National program of clean-up proceedings'), introduced regulations aimed at simplifying the process of cleaning up and the setting up of containment measures. In particular, according to Decree September 18, 2001 No. 468, public authorities are entitled to file a list of programmes, on a national basis, which shall be allowed to receive public funds in order to be successfully carried out.

Polluter's responsibilities

In cases where the contamination is discovered by the authorities, they will order the responsible party to adopt the necessary preventive and clean-up measures in line with paragraph 3, Article 17 of Decree No. 22/1997. According to paragraph 9, Article 17, if the responsible party cannot be traced or does not follow the clean-up procedure, the competent local authority must carry out the clean-up. In the latter case, the clean-up procedures carried out at the site will constitute a lien over the contaminated areas and thus the owner will ultimately be liable and asked to pay for the clean-up. Such lien has to be indicated in the public records and therefore will be easily detectable by any party.

As previously mentioned, the environmental liability remains with the responsible party and this is irrespective of whether the party is the proprietor of the land or just the tenant. Italian legislation has adopted the EU principle, i.e. the 'polluter pays' principle.

However, it should be noted that in the eyes of the authorities the person who is considered to be the responsible party is the person who operates the land. The operator of the land may nevertheless prove that someone else caused the contamination, e.g. by proving that the polluting substances found at the site are not or have not been used by his company. This however may be difficult to prove, particularly from a technical point of view, especially if the operator is using or has previously used the polluting substances found by the authorities.

According to the 'polluter pays' principle, it should further be noted that the liability to clean up does not include historical contamination caused by other operators. Nevertheless, it may still be difficult to prove that the contamination has not been caused by the current operator of the land. As mentioned above, if the polluter cannot be found and the competent authority proceeds to clean up the land, the relative costs would be recovered by the authorities by enforcing a special lien on the land. This means that, in the end, the landlord would be liable to pay the clean-up expenses.

If the polluter sells the land, the purchaser can avoid the risk of having to pay for the clean-up carried out by the public authority by stipulating that in the event contamination is discovered, the clean-up cost shall be borne by the seller.

In the event that third parties have been damaged by the contamination of the land, they can sue the responsible party. As far as liability vis-à-vis third parties is concerned, industrial activities are commonly recognized as dangerous activities (Section 2050 of the Civil Code) and therefore the companies, against whom damages have been requested, will have the burden to prove that they did not cause those damages.

Liabilities and Sanctions

According to Article 51-bis of Decree no. 22/1997, the contamination of land (or simply causing a current and real danger of contamination), and/or the failure to comply with the clean-up procedure under Article 17 of the same Decree, trigger civil and criminal sanctions.

I. Civil law implications

As a general principle arising from the relevant law sources, the polluter is liable to undertake at its own expense any containment measures in order to avoid larger and more serious pollution of the site, and any remediation required to purge the site from any residual pollution.

The polluter is commonly defined as the person who has, even accidentally, caused the overcoming of the maximum thresholds set by law with respect to the concentration of certain chemical substances in the air, water or soil. The polluter may even have simply determined the risk and danger of these thresholds being overcome.

Should the polluter not take the containment or remediation measures mentioned above, those measures are taken directly by the competent Municipality. The corresponding obligation is registered on the Real Estate Register as a lien on the real estate and the real estate itself is retained by the Municipality (also vis-à-vis third parties and assigns) as a collateral security for the compensation of the expenses defrayed for the compulsory remediation.

If the entity which has taken the containment measures or has carried on the remediation is not the polluter, this entity is entitled to a recourse action against the polluter (the Municipality against the landlord even if he is not the polluter) to seek reimbursement of the costs and compensation of damages.

From another standpoint, Section 18 of the Law of 8 July 1986, no. 349, establishing the Ministry of the Environment, provides that 'Any fraudulent, malicious or negligent act in breach of any laws or regulations, which causes damage to the environment, altering, modifying or destroying it in whole or in part, obliges the person who has committed the act to pay damages'. This provision only entitles the Government and local entities whose territory the damage has occurred, as well as some environmental associations, to start legal proceedings against the person who caused the damage to the environment. This type of action has been quite rare in the past few years, but is becoming more common.

Recently, a number of legal proceedings have been initiated, in particular by environmental associations.

II. Criminal law implications

The current tendency of Italian governmental environmental policy is to transform criminal offences into administrative violations. This does not mean that environmental violations will only be punished with administrative sanctions, but that criminal sanctions will be reserved for more serious violations.

In principle, a person or entity is responsible for the violation of environmental regulations and/or administrative orders and therefore is subject to criminal sanctions (fines up to €25,000 and conviction up to two years) if:

(i) this person or entity has, even accidentally, caused the overcoming of the maximum thresholds set down by law with respect to the concentration of certain chemical substances in the air, water or soil or even who has determined the risk and danger of these thresholds being overcome;
(ii) this person or entity has discovered the pollution and has not promptly notified the competent authorities about that (to the extent required);
(iii) this person or entity has received an order from the Municipality or other competent authority for adopting containment measures or for remediation, and has not complied with it.

Therefore, in order prudently to assess and evaluate any criminal responsibility in these matters it is necessary to determine initially the type of pollution (sanctions differ depending on the chemical substances involved), the period when the pollution occurred (due to the 'principle of non-retroactivity' of criminal laws) and the possible polluter.

Following a strict interpretation, also in line with the EU 'polluter pays' principle, liability for cleaning up does not include old contamination caused by other operators. Nevertheless, it still may be difficult sometimes to prove that the contamination has not been caused by the current operator of the land. As mentioned above, if the polluter cannot be found and the competent authority proceeds to clean up the land, the relative costs would be recovered by the authorities by enforcing a special lien on the land. This means that, in the end, the landlord will pay the clean-up expenses.

Strict liability

According to certain decisions of the Supreme Court, business activities which involve the production of hazardous waste must be treated as 'dangerous activities' and, as such, be ruled by Section 2050 of the Civil Code, whereby any environmental damage is deemed to constitute a case of strict liability. According to this provision, 'whoever causes injuries to another in the performances of an activity dangerous by its nature or by reason of the instrumentalities employed, is liable for damages, unless that he has taken all suitable measure to avoid the injury'.

III. Administrative law implications

The clean-up order issued to the landlord and/or to the operator can be challenged within sixty days from the date of service before the Administrative Court, or within 120 days from the date of service before the President of the Italian Republic, who decides on the basis of mandatory advice from the Council of State.

Prevention measures from land contamination

Legislative Decree No. 22/1997 sets forward the most recent legislation and requirements on hazardous waste reporting and record-keeping, in order to prevent and identify possible risk of soil pollution.

According to the Decree, industrial facilities producing hazardous and non-hazardous wastes must maintain a dedicated register, recording the quantity and quality of the wastes generated, reused and disposed.

The register must be updated regularly, within one week from generation and disposal of the waste (Article 12.1). The registers, together with the forms relative to waste transport, are kept for five years from the date of the last registration. Facilities producing less than five tons of non-hazardous waste yearly, and one ton of hazardous waste yearly, can commission a separate organization to maintain their registers.

During transport by dedicated companies, wastes must be accompanied by an identification register (manifest), containing information such as the name and the address of the producer of wastes, the source, the type and quantity of waste, the receiving facility, the route to be taken, and the name and address of the receiver.

The manifest must be prepared in four copies, compiled, dated and signed by the waste producer, and countersigned by the transporter. A copy of the manifest must remain with the producer while the other three are signed and dated by the receiving facility. One copy is kept by the facility, one is sent back to the waste producer, and the third is held by the waste transporter. The copies must be kept for five years.

A standard manifest model has been released by the Ministry of the Environment, through Ministerial Decree of 1 April 1998, No. 148.

Year-end reporting of generation, transport and/or disposal of hazardous waste is undertaken through the new Unified Declaration Form (*Modulo Universale di Dichiarazione*, MUD), issued by the Decree of the President of the Council of Ministers of 31 March 1999. Producers and collectors of waste are obliged to use the form to make their declaration.

Conclusion

To conclude, it is worth pointing out that the last five years have seen a complex process of implementation of EU Regulations by the Italian legislative framework, and have sometimes produced overlapping National Decrees of implementation and Special Decrees issued by different levels of government.

On 14 May 2003, with the intention to rationalize the legislative system, the Senate approved Parliamentary Bill No. 1753, which is still pending before the Camera dei Deputati (the other branch of the Parliament) and which delegates the Government to coordinate and organize a complete overhaul of the entire set of Italian environmental legislation by way of one or more Legislative Decrees.

Expectations on the development of this Parliamentary Bill are high, and the result of this ongoing retrenching of the basics of environmental law will eventually affect the entire Italian legal system for the next decade at least.

NETHERLANDS

Marjan Peeters
METRO Institute, Maastricht

Integrating and reducing the burden of environmental regulations

Integrating environmental legislation is an important Dutch policy goal, as can be read in a policy document from 3 April 2001 on the future of environmental legislation in the Netherlands.[1] The document stresses that there is not enough connection between different areas in existing environmental legislation. The lack of coherency makes the legislation less effective and efficient. It announces that the Dutch Environmental Management Act (EMA) should integrate all the different environmental areas, providing a procedural and substantive framework for the protection of the environment. The term 'environment' – which is not strictly defined in the Act – should be interpreted broadly. In addition, coherence with other relevant policy areas that also affect the environment should be strengthened.

1 Policy Document 'Met recht verantwoordelijk!', Tweede Kamer Staten Generaal, vergaderjaar 2000-2001, 27 664, nr. 2.