

Case Note

Preliminary Reference on Environmental Liability and the Polluter Pays Principle: Case C-534/13, *Fipa*

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European Union (EU) environmental policy is the sole EU policy to proclaim a cluster of principles, including the polluter pays principle, the precautionary principle and the principles that preventive action should be taken and environmental damage rectified at source as a matter of priority. Although various understandings and definitions of these principles exist in international environmental law, the EU treaties provide no such definition. Lawyers are thus increasingly inquiring into the types of role these principles play, or may play in the legal practice. The Fipa case, examined in this case note, is one such example.

INTRODUCTION

There has been a great deal of argument about the legal nature of the polluter pays principle (PPP). Given a name that is almost a slogan and the seeming clarity of its underlying logic, the PPP easily wins approval. Its main function is to internalize the social costs borne by public authorities for pollution prevention and control. Accordingly, the principle serves as an economic rule according to which a portion of the profits accruing to polluters, as the result of their activities, must be returned to the public authorities responsible for inspecting, monitoring and controlling the pollution these activities produce. As such, it comes as no surprise that this principle is giving rise to a steady flow of case law.¹

Slowly, the PPP has shifted from the public sphere to civil liability.² Accordingly, environmental liability has been considered as a way to implement the PPP. This is echoed in Directive 2004/35 on environmental liability

with regard to the prevention and remedying of environmental damage (ELD).³ Pursuant to Article 1, the ELD is underpinned by the PPP.⁴ That said, it must be noted that the ELD does not establish a genuine liability regime,⁵ as an obligation to make the Member States responsible for environmental clean-up was considered by the European Council to go too far.⁶

Given the sheer number of contaminated sites posing significant health risks, soil decontamination is today at the heart of national environmental policies. In effect, 340,000 sites across Europe are understood to be contaminated and likely to require remediation. Only circa 15% have been remediated.⁷ Indeed, the cardinal importance of the PPP is that it requires public authorities to recover the costs incurred from the polluters.

FACTS OF THE CASE

Case C-534/13 (*Fipa*) arose from a dispute between owners of contaminated industrial sites and environmental authorities.⁸ More precisely, industrial activities undertaken, from the 1960s to the 1980s, in the surrounding area of the Italian city of Carrara by Montedison had left the land considerably contaminated. As the owners of the affected sites had changed, the current owners, who were not responsible for the

¹ N. de Sadeleer, 'The Polluter-Pays Principle in EU Law – Bold Case Law and Poor Harmonisation', in: I.L. Backer, O.K. Fauchald and C. Voigt (eds.), *Pro Natura. Festschrift til H.-C. Bugge* (Universitetsforlaget, 2013), 405.

² As to the scope of that environmental principle, see N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, 2002), at 21–60; and N. de Sadeleer, 'Polluter Pays, Precautionary Principles and Liability', in: G. Betlem and E. Brans (eds.), *Environmental Liability in the EU* (Cameron & May, 2006), 892.

³ Directive 2004/35/EC of the European Parliament and of the Council on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, [2004] OJ L143/56.

⁴ *Ibid.*, Article 1. In addition, the Directive stresses that 'the prevention and remedying of environmental damage should be implemented through the furtherance of the "polluter-pays" principle' and that accordingly, the 'operator should bear the cost of the necessary preventive or remedial measures'. *Ibid.*, 2nd and 18th recitals of the preamble.

⁵ N. de Sadeleer, 'La Directive 2004/35/CE Relative à la Responsabilité Environnementale: Avancée ou Recul pour le Droit de l'Environnement des Etats Membres?', in: B. Dubuisson and G. Viney (eds.), *Les Responsabilités Environnementales* (Bruylant, 2005), 732.

⁶ L. Krämer, 'Directive 2004/35/EC on Environmental Liability', in: G. Betlem and E. Brans, n. 2 above, 38.

⁷ Joint Research Centre (JRC) of the European Commission, *Progress in the Management of Contaminated Sites in Europe* (JRC, 2014).

⁸ CJEU, Case C-534/13, *Fipa Group and Others*, not yet reported.

pollution, were in a dispute with the Italian environmental authorities regarding the extent to which they could be held liable for remedying the damage caused by the historic pollution. National legislation did not allow the competent authority to compel owners, who were not responsible for pollution, to adopt remedial measures. Rather, it merely provided that an owner may, in these circumstances, be required to reimburse the costs relating to the actions undertaken by the competent authority – within the limit of the value of the land, as determined after the necessary measures have been carried out. The national authorities nevertheless ordered the owners to carry out safety and decontamination measures on their sites.

Relying on the fact that they were not responsible for the environmental damage, the owners brought proceedings before national administrative courts, which annulled the administrative orders on the grounds that, in accordance with the PPP, the agencies could not impose remedial measures on undertakings that bear no direct responsibility for the contamination. Subsequently, and as the judgment was appealed, the Italian Council of State referred several questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The CJEU was asked to rule on whether the principles laid down in Article 191.2 of the Treaty on the Functioning of the European Union (TFEU) and in the ELD require that a greater demand is imposed on current owners rather than on former operators. The Court focused its analysis on the applicability of both primary and secondary law. Before commenting on the judgment, the next section will offer a brief examination of the ELD liability arrangements.

A BRIEF OVERVIEW OF THE ELD

The ELD concerning the prevention and remedying of environmental damage was adopted in April 2004. It has been the subject of much discussion and criticism.⁹ Given that the ELD ventures into ‘highly sophisticated national legal and doctrinal traditions’ – in spite of a lengthy gestation period – it is seen to have left a flurry of unresolved conceptual puzzles,¹⁰ and given rise to several cases.¹¹

⁹ V. Fogleman, ‘Liability: Enforcing the Environmental Liability Directive’, 14:4 *Environmental Liability* (2006), 127; L. Krämer, ‘Directive 2004/35 on Environmental Liability and Environmental Principles’, 4 *Tijdschrift voor Milieuaansprakelijkheid (Environmental Liability Review)* (2005), 131; L. Bergkamp and B. Goldsmith (eds.), *The EU Environmental Liability Directive: A Commentary* (Oxford University Press, 2013).

¹⁰ G. Winter *et al.*, ‘Weighing up the EC Environmental Liability Directive’, 20:2 *Journal of Environmental Law* (2008), 163, at 163.

¹¹ See, e.g., CJEU, Case C-378/08, *ERG and Others*, [2010] ECR I-01919; and Case C-379/08, *ERG and Others*, [2010] ECR I-02007. See S. Casotta and C. Verdure, ‘Recent Developments Regarding the EU Environmental Liability for Enterprises: Lessons Learned from

In brief, the ELD provides a two-track liability scheme. On the one hand, the ELD establishes a strict liability regime (Article 3.1(a)) for environmental damage caused by any of the occupational activities listed in its Annex III.¹² On the other hand, and in instances concerning damage to protected species and natural habitats arising from non-listed activities in EU directives, a fault liability scheme applies (Article 3.1(b)).

The ELD has a twofold aim: the prevention *and* remediation of environmental damage. It essentially requires public authorities to ensure that the polluters restore the damaged environment. Against this background, the ELD distinguishes between: (i) the primary duty of the operator to act, and (ii) the secondary duty of bearing the costs.

In accordance with Articles 5.1(2) and 6.1, operators are called on to prevent, notify and manage environmental damage, irrespective of an administrative injunction. Pursuant to Article 6.2(b–d), they may also be ordered by the competent authorities to do so. If the operator fails to comply with the obligations to take remedial action, the public authority may, pursuant to Article 6.3, undertake the measures. In such cases, it can only recover the costs incurred after the completed work. The uncertainties associated with the feasibility of recovering the expenses are likely to dissuade the authorities from carrying out the remedial measures in the first place.

Regarding the allocation of costs, pursuant to Article 8.1, the operator causing environmental damage or creating an imminent threat of such damage bears the costs of both preventive and remedial measures.¹³ Furthermore, in line with Article 8.2, the competent authority ‘shall recover . . . from the operator who has caused the damage or the imminent threat of damage, the costs it has incurred in relation to the preventive or remedial actions taken under this Directive’.

It should be noted that this paragraph has been framed as an obligation and not as a right.¹⁴ Indeed, recital 18 clearly states that in cases ‘where a competent authority acts, itself or through a third party, in the place of an operator, that authority should ensure that the cost incurred by it is recovered from the operator’. Nevertheless, the obligation to bear the costs is not absolute, given that according to Article 8.4, Member States may

Italy’s Implementation of the “Raffinerie Méditerranée” Cases’, 21:4 *European Energy and Environmental Law Review* (2012), 156.

¹² Annex III lists 12 activities deemed to be dangerous for the environment: these include Integrated Pollution Prevention and Control (IPPC) activities, as well as other occupational activities regulated by EU directives, such as the Water Framework Directive, and directives addressing waste management, and air pollution.

¹³ Note recital 18 of Directive 2004/35/EC, n. 3 above, which associates this obligation with the PPP.

¹⁴ See G. Winter *et al.*, n. 10 above, at 171.

allow that operators who are not at fault or negligent shall not bear the cost of remedial measures.

In short, the ELD ensures that costs arising from clean-up measures associated with site contamination are not passed on to public authorities. Obliging plant operators to be financially accountable for these costs is a way of internalizing external environmental costs in accordance with the PPP.

TEMPORAL APPLICABILITY OF THE ELD

The ELD does not apply retroactively to historic pollution or damage caused before 30 April 2007. This means that the costs of cleaning up and restoring contaminated sites before this date will eventually be borne by public authorities.

The fact that the polluting activities of Montedison had ceased in 1988, and the areas were supposed to have been decontaminated by 1995, was a reason for not applying the ELD. However, only the referring court can ascertain, on the basis of the facts, the temporal application of the ELD. The CJEU held that if the Directive is not applicable, such a situation has to be governed by national law, 'with due observance of the rules of the Treaty and without prejudice to other secondary legislation'.¹⁵

THE TFEU ENVIRONMENTAL PRINCIPLES AND NATIONAL LEGISLATION

According to Article 191.2 TFEU:

Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It 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.¹⁶

These environmental principles are not devoid of legal effects, as they are mandatory.¹⁷ This means that EU

measures that fail to comply with these principles are likely to be subject to judicial review. In determining the status of these principles in the Member States' legal orders, the following observations should be made.¹⁸

First, the principles are addressed at the EU institutions, meaning that they cannot constrain national authorities and are, as such, devoid of direct effect. As a result, Member State measures may, in principle, not be reviewed on the basis of these principles. In the annotated judgment, the CJEU confirmed this by stating that the PPP

cannot be relied on as such by individuals in order to exclude the application of national legislation . . . in an area covered by environmental policy for which there is no EU legislation adopted on the basis of Article 192 TFEU that specifically covers the situation in question.¹⁹

Similarly, the competent environmental 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.

Second, EU environmental policy has given rise to a large number of directives that flesh out the five environmental principles. Where a treaty principle, such as these principles, is enshrined in the regulatory scheme of a directive or a regulation, it applies to the Member States, which have to take it into account primarily in the interpretation of the relevant provisions. Indeed, it is settled case law that Member States are obliged to take into consideration these principles when carrying out action in the environmental field that has been harmonized by secondary EU law.²⁰ Given that the PPP is implemented by the ELD, that principle has to be taken

¹⁵ Case C-378/08, n. 11 above, at paragraph 44; C-379/08, n. 11 above, at paragraph 37; and order in Case C-478/08, *Buzzi Unicem and Others*, [2010] ECR I-00031, at paragraph 34.

¹⁶ Treaty on the Functioning of the European Union, [2012] OJ 326/47, Article 191.2.

¹⁷ Most academics regard Article 192 TFEU principles as binding. See G. Winter, 'Constitutionalizing Environmental Protection in the EU', 2 *Yearbook of European Environmental Law* (2002), 76; G. Winter, 'The Legal Nature of Environmental Principles in International, EC and German Law', in: R. Macrory (ed.), *Principles of European Environmental Law* (Europa Law Publishing, 2004), 3, at

19–22; A. Epiney, *Umweltrecht in der Europäischen Union* (Heymanns, 1997), at 108; A. Epiney, 'Environmental Principles', in: R. Macrory (ed.), *Reflections on 30 Years of EU Environmental Law* (Europa Law Publishing, 2006), 17, at 21; C. Hilson, 'Rights and Principles in EU Law: A Distinction without Foundation', 15:2 *Maas-tricht Journal of European and Comparative Law* (2008), 193, at 209; but see L. Krämer, '30 Years of EC Environmental Law: Perspectives and Prospectives', 2 *Yearbook of European Environmental Law* (2002), 163; L. Krämer, *EC Environmental Law* (Sweet & Maxwell, 2007), at 15; E. Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart, 2007), at 212. See also M. Doherty, 'Hard Cases and Environmental Principles: An Aid to Interpretation?', 3 *Yearbook of European Environmental Law* (2003), 155, at 157–168; M. Doherty, 'The Judicial Use of the Principles of EC Environmental Policy', 2:4 *Environmental Law Review* (2002), 251.

¹⁸ N. de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press, 2014), at 42–44.

¹⁹ Case C-534/13, n. 8 above, at paragraphs 40–41.

²⁰ CJEU, Case C-127/02, *Waddenzee*, [2005] ECR I-6515, at paragraph 44; C-188/07, *Commune de Mesquer*, [2008] ECR I-04501, at paragraph 38; C-301/10, *Commission v. United Kingdom*, not yet reported, at paragraph 49; C-241/12 and C-242/12, *Shell Netherlands*, not yet reported, at paragraph 38; C-237/12, *Commission v. France*, not yet reported, at paragraph 30.

into account by the CJEU in answering the questions referred by the national court.²¹

THE QUESTION OF THE OPERATOR

At the outset, the CJEU takes the view ‘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’.²² Several provisions of the ELD (Articles 2, 6, 7, and 8.1) are testament to the fact that the operator is the linchpin of these liability arrangements.²³ Indeed, according to recital 2, the ‘fundamental principle’ of the Directive is that ‘an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced’. The fact that the operator occupies centre stage is confirmed by the exclusion from the personal scope of the ELD of persons who do not carry out an occupational activity.²⁴

Given that none of the undertakings owning the contaminated sites were engaging in any of the activities listed in Annex III to the ELD, the strict liability scheme was deemed to be inapplicable. It follows that only the fault-based liability scheme that applies to non-listed activities could apply. However, that scheme is restricted to damages caused to some protected species and habitats.²⁵

CONDITIONS FOR INCURRING ENVIRONMENTAL LIABILITY

The owners of the contaminated sites did not contribute to the occurrence of the environmental damage at issue. The question thus arose as to whether they incurred environmental liability for the purposes of the ELD.

²¹ Case C-534/13, n. 8 above, at paragraph 42.

²² *Ibid.*, at paragraph 48.

²³ Article 2.6 of Directive 2004/35/EC, n. 3 above, defines the ‘operator’ as ‘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 or the person registering or notifying such an activity’.

²⁴ Case C-534/13, n. 8 above, at paragraph 52.

²⁵ N. de Sadeleer, ‘EC Law to the Rescue of Wildlife under Threat: The Birds, Habitats and Environmental Liability Directives’, 7 *Yearbook of European Environmental Law* (2007), 36, at 36–37; V. Fogleman, ‘The Thresholds for Liability for Ecological Damage in the EU’, in: C.-H. Born *et al.* (eds.), *The Habitats Directive in its EU Environmental Law Context* (Routledge, 2015), 181.

The CJEU concludes in *Fipa* that the competent authority must establish a causal link between the activity of one or more identifiable operators and concrete and quantifiable damage, irrespective of the type of liability at issue. The relationship of causality between the operator’s activity and the environmental damage thus takes centre stage. In an *obiter dictum*, the CJEU justifies the importance of such an obligation on the grounds that under Article 8.3(a) ELD, read in conjunction with recital 20, the operator is not required to bear the costs of preventive or remedial action taken pursuant to the Directive if he can prove that the environmental damage was caused by a third party, and occurred despite the fact that appropriate safety measures were in place, or resulted from an order or instruction emanating from a public authority.²⁶

Regarding the scope of Article 8.3 ELD, the CJEU had held in *ERG and Others* that Member States are endowed with a broad discretion particularly when establishing the causes of pollution of a widespread, diffuse character. Therefore, the causation between the polluting activities and the damage can be presumed if plausible evidence is found, such as the fact that the operator’s installation is located close to the pollution.²⁷ Practically speaking, a correlation between the pollutants identified in the soil, or in the underground waters, and the substances used by the operator in connection with his activities is sufficient to demonstrate the causation.

That said, contrary to one of the hypotheses set out by the Italian Council of State, Article 8.3 cannot be interpreted as meaning that it could be automatically assumed that an operator using a polluted site caused the pollution. Rather, according to Advocate General Kokott’s views, this provision exonerates the operator in spite of the proof that the damage was caused by his occupational activity.²⁸

This shows that it is impossible to infer from the PPP that operators under the ELD must take on the burden of remedying pollution to which they have not contributed. This reasoning is in line with the *Standley* judgment according to which farmers ‘must not take on burdens from the elimination of pollution to which they have not contributed’.²⁹ It follows that ‘where no causal link can be established between the environmental damage and the activity of the operator, the situation

²⁶ Case C-534/13, n. 8 above, at paragraph 58; see also Case C-378/08, n. 11 above, at paragraph 67, and the order in Case C-478/08, n. 15 above, at paragraph 46.

²⁷ Case C-378/08, n. 11 above, at paragraph 55.

²⁸ Case C-534/13, n. 8 above, Opinion of Advocate General (AG) Kokott, at paragraph 34.

²⁹ CJEU, Case C-293/97, *Standley and Others*, [1999] ECR I-02603, at paragraph 51.

falls to be governed by national law', without prejudice to primary and secondary law obligations.³⁰

To conclude, the concept of the polluter overlaps with the key concept of the operator. This appears to be in line with Recommendation 75/436/Euratom regarding cost allocation and action by public authorities on environmental matters,³¹ which is still indispensable in understanding the significance of the PPP. The definition of the polluter is as follows:

natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of such measures as are necessary to eliminate that pollution or to reduce it so as to comply with the standards or equivalent measures which enable quality objectives to be met or, where there are no such objectives, so as to comply with the standards or equivalent measures laid down by the public authorities.³²

The polluter is thus defined as whoever 'directly or indirectly damages the environment or who creates conditions leading to such damage'. Under the ELD, a further condition applies: the polluter must be the operator causing the damage at issue.

MORE STRINGENT NATIONAL PROVISIONS IN RELATION TO THE PREVENTION AND REMEDYING COSTS BORNE BY THE OWNERS OF THE CONTAMINATED LAND

In contrast to the ELD as interpreted by the CJEU in *Fipa*, the trend at national level is towards pressing – for reasons of administrative expediency, it may be added – the owners rather than the former polluters to implement remedial measures and to bear the incurring costs. In the absence of any 'polluter', the only person able to take remedial measures is, apart from the public authorities, the landowner or occupier.³³ In that connection, the 1990 Environmental Protection Act of the United Kingdom imposes absolute liability on landowner or occupiers as a fallback position if the polluter is not identifiable.³⁴ The German Soil Protection Act is another case in point.³⁵ However, on 2 February

2000, the German Constitutional Court held that the unlimited nature of the owner's liability could violate the principle of proportionality which the lawmaker must contemplate in determining the limits to be placed on the right of property.³⁶ In Belgium, under the Walloon and Brussels Soil Protection Acts, owners can escape liability to the extent that they demonstrate that they bear no relationship with the pollution or that they were neither at fault nor negligent.³⁷

Article 16.1 ELD, which is entitled 'Relationship with National Law', specifies that the ELD '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'.³⁸ In line with the *Deponiezweckverband Eiterköpfe* judgment,³⁹ the CJEU held in *ERG and Others* that a Member State can validly rely on Article 16.1 if the same objective of protecting the environment as laid down in the Directive is pursued.⁴⁰ This condition must be approved given that the more stringent national measures must aim at achieving the environmental goals pursued by the EU lawmaker. The question arises whether the imposition by a Member State of an obligation to hold owners who did not cause the damage strictly liable could be restricted by the objectives of the ELD, which Member States may not undermine. Advocate General Kokott took the view that the Member States' discretion could be restricted on the account that it will run counter to the objectives of the ELD or the PPP:

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.⁴¹

The CJEU did not rule on this matter. It merely noted that the legislation at issue did not apply more stringent standards. Had the Advocate General's interpretation been endorsed, a number of national regulations, requiring the owners of contaminated sites to bear the

³⁰ Case C-534/13, n. 8 above, at paragraph 59.

³¹ Council Recommendation 75/436/Euratom, ECSC, EEC of 3 March 1975 Regarding Cost Allocation and Action by Public Authorities on Environmental Matters, [1975] L194.

³² *Ibid.*, at Annex, paragraph 2.

³³ A. Waite, 'The Quest for Environmental Law Equilibrium', in: G. Betlem and E. Brans, n. 2 above, 83.

³⁴ Environmental Protection Act 1990 (United Kingdom), Section 78F.4.

³⁵ E. Rehlinger, 'A German Source of Inspiration? *Locus Standi* and Remediation Duties under the Soil Protection Act, the Environmental Liability Act and the Draft Environmental Code', in: G. Betlem and E. Brans, n. 2 above, 103.

³⁶ 16 February 2000, 102 *Entscheidungen des Bundesverfassungsgerichts* 1 (2003).

³⁷ D. Paulet and J. Van Ypersele, 'Principes et Régimes d'Assainissement des Sols en Régions Wallonne et de Bruxelles-Capitale', 2 *Revue Aménagement Environnement* (2010), 100.

³⁸ Directive 2004/35/EC, n. 3 above, Article 16.1.

³⁹ CJEU, Case C-6/03, *Deponiezweckverband Eiterköpfe*, [2005] ECR I-2753, at paragraph 41. See N. de Sadeleer, n. 18 above, at 130, 152.

⁴⁰ Case C-378/08, n. 11 above, at paragraphs 60–61.

⁴¹ Opinion of AG Kokott, n. 28 above, at paragraph 34, at paragraphs 50–59.

costs of remedial measures, would have been called into question. If the costs of remedial measures are not borne by the owners or the occupiers, either the environment remains polluted or the State, and ultimately the taxpayer, has to pay for it. I am of the view that placing such a burden on the owners of the contaminated sites does not undermine the ELD's objectives.

CONCLUSIONS

The significance of the annotated judgment lies in the fact that the CJEU has adopted a robust view of causation between the activity of the operator and the concrete damage. Accordingly, liability for remediating contaminated lands falls primarily on the operators who caused or knowingly permitted the pollution. Conversely, mere owners of historically contaminated occupational sites, who are not responsible for the environmental damage, must not take on the burden of remedying pollution to which they have not contributed. Wherever the national legislation is silent on the issue, the owners or occupiers that are in no way connected with the pollution, or the risk of pollution, thus fall outside the scope of the obligation to cover the costs of the remedial measures.

The PPP enshrined in Article 191.2 ELD plays no role whatsoever in amplifying the personal scope of the Directive. It follows that EU liability arrangements apply exclusively to operators engaging in any of the activities listed in Annex III to the ELD (strict liability

scheme) or to operators other than those listed in Annex III, causing damage to a limited number of protected species and habitats (fault-based liability scheme), provided that their activities are connected to the environmental damage. Under both liability schemes, it is thus necessary for the agency to prove whether the operator caused the pollution, although in *ERG and Others* the Court held that plausible evidence was sufficient. The liability of an owner in those circumstances would be based solely on that person's status as owner.

The obligation to impose remedial measures on operators, provided that they contributed to the creation of pollution or the risk of pollution, is consistent with the PPP. Where these conditions are not fulfilled, the situation falls to be governed by national law. The national lawmaker is empowered by both Article 16 ELD and Article 193 TFEU to adopt more stringent requirements. Whether national schemes requiring owners of contaminated lands to bear the costs of remedial measures undermine the objectives of the ELD, or run counter to the PPP, remains to be seen.

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