Contaminated land in Italy

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Contaminated land is a significant and contentious issue in every jurisdiction. The presence of contamination in land poses a serious threat to human health and environmental media (for example soil, subsoil and water). Similarly, land contamination can have a harmful impact on property and can give rise to controversial legal issues relating to the allocation of liability for contamination.

Legislative Decree No. 152 of 3 April 2006 (Consolidated Environmental Protection Code), as subsequently modified, contains the Italian contaminated land regime. It provides the main environmental protection legislation.

Title V, section IV of the Consolidated Environmental Protection Code sets out the legal structure to deal with contaminated land issues. In particular, it:

- Defines contaminated land and land at risk of contamination.
- Sets out the duty to carry out prevention measures to tackle the risk of contamination.
- Regulates the administrative procedures for the approval of plans for monitoring and remediating contamination.
- Determines liability and duties of persons held responsible for contamination.
- Allocates and apportions the cost of carrying out the clean-up works among the responsible persons (if the regulators directly execute the clean-up works themselves).

Title V, section IV of the Consolidated Environmental Protection Code applies to:

- Events that can cause risk of land contamination.
- Historical contamination that can determine the risk of contamination worsening.
- Widespread contamination of non-detected source.

**REGULATORY FRAMEWORK**

**Statutory definitions**

Contaminated land is defined as a site in which the concentration of contaminating substances exceeds the acceptable risk threshold (Title V, section IV, Consolidated Environmental Protection Code (Concentrazioni Soglia di Rischio) (CSR)). The CSR is determined on a case-by-case basis under the health and environmental risk analysis procedure and on the basis of the results of the characterisation plan. The characterisation plan includes the whole set of investigations aimed at gathering as much information as possible about the contamination status of the site, to select the necessary prevention measures and clean-up works.

Land at risk of contamination is a site in which the concentration of one or more polluting substances on soil, subsoil and underground waters is higher than the contaminating concentration threshold (Concentrazioni Soglia di Contaminazione) (CSC), before the characterisation plan and specific health and environmental risk analysis procedures are carried out.

The CSR and CSC criteria are central to both:

- Ascertaining contamination, or risk of contamination, in land.
- Determining the consequential procedures and types of measures that must be implemented to remediate contamination.

If the CSC threshold is exceeded, the characterisation plan within the specific health and environmental risk analysis procedure is executed to determine whether or not the CSR threshold is exceeded. If the CSR threshold is exceeded, the land is subject to safety measures and clean-up interventions to remediate the contamination.

Annex 5, Title V, of section IV contains the CSC threshold for soil and underground soil referred to the specific designation of use as well as for underground water. Recently, the CSC threshold has been updated.

**Main public authorities and their duties**

The main public authorities involved in the clean-up procedure are the:

- **Ministry of Environment and Protection of Land and Sea**, and the Ministry of Economic Development. These have authority in relation to contamination in sites designated as Sites of National Interest (SINs) and in sites of prime public interest contaminated by events that occurred before 30 April 2006 (see below, Special sites).

- **Regions**. These have the authority to approve the different plans submitted by the responsible person during the clean-up procedure (that is, the characterisation plan, monitoring plan, report concerning the results of the specific health and environmental risk analysis procedure, and the clean-up project) and to approve the plans for the clean-up of widespread contaminated lands.

- **Provinces**. These carry out investigations required both:
  - during the clean-up procedure (with the assistance of the Regional Agency for the Protection of Environment (Agenzia Regionale per la Protezione Ambientale)) (ARPA); and
  - for the identification of the person who caused the contamination.

The provinces also have the authority to issue a mandatory order to the responsible person and the owner of the land to carry out measures necessary in each specific case.
- **Municipalities.** These take part in the authorisation procedure of clean-up works. If the person responsible for the contamination cannot be identified or does not take action, the municipalities can adopt all necessary measures to tackle the contamination risk.

**Special sites**

There are special provisions for the following types of site (*Title IV, section IV, Consolidated Environmental Protection Code*):

- SIWs designated as such by means of a decree issued by the Ministry of Environment and Protection of Land and Sea and the relevant region. The designation takes into consideration the:
  - characteristics of the site;
  - quantity and seriousness of the pollutants;
  - significance of the environmental impact on the nearby lands; and
  - risk for health, safety, and public heritage.

- SIWs cover about 3% of the national territory.

- For the purposes of clean-up works, sites where mining and production of asbestos take place are designated as SIWs by law (*Title V, section IV, Consolidated Environmental Protection Code*).

- Due to the importance of the designation as a SIW and the public interests involved, the Ministry of Environment and Protection of Land and Sea is in charge of the clean-up procedure.

- Sites of prime public interest that are both:
  - contaminated by events that occurred before 30 April 2006; and
  - selected for the implementation of programmes to reconvert and restructure the site into a productive area for economic development.

- These sites are designated by the Ministry for Economic Development together with the Ministry of Environment and Protection of Land and Sea, having heard the Committee of permanent representatives of the State, Regions and Autonomous Provinces.

- The clean-up procedure is aimed at restoring contaminated lands and waters. The priority is the industrial reconversion of the designated site. Therefore, the general provisions of Title V, section IV of the Consolidated Environmental Protection Code do not need to be applied strictly.

- Sites in which the production activity is ongoing. For these sites, works and interventions approved within the clean-up procedure can be carried out alongside the production activity, provided that both the:
  - protection of public health and environment is duly guaranteed; and
  - industrial activity is not the direct cause of the contamination.

- Sites used for agriculture and cattle rearing are subject to a special secondary legislation to be issued by the Ministry of Environment and Protection of Land and Sea together with the Ministry of Economic Development, Ministry of Public Health, and the Ministry of Agriculture and Forestry. This legislation has not yet been issued.

- Sites with a small surface area (including gasoline stations) or contamination limited to surface areas not exceeding 1,000 m² are subject to simplified clean-up procedures contained in Annex 4, *Title V, section IV of the Consolidated Environmental Protection Code*.

- Sites used by the Armed Forces in connection with national defence activity which are subject to CSC as set forth in Annex 5, *Title V, section IV of the Consolidated Environmental Protection Code*.

**IDENTIFYING CONTAMINATION IN LAND**

Contamination in land is determined through analyses and investigations carried out under administrative procedures involving local authorities and the person responsible for the contamination.

On the occurrence of an event that could cause land contamination, complex procedures are triggered (*Title V, section IV, Consolidated Environmental Protection Code*). In summary:

- The person responsible for the contamination must, within 24 hours after the occurrence of the event:
  - carry out the necessary prevention measures; and
  - notify the event to the relevant municipality, region, province, local authority of the Ministry of Interiors.

- The responsible person must also execute a preliminary investigation on the site to verify whether the CSC threshold has been exceeded or not.

- If the values analysed are inferior to the CSC threshold, the responsible person must notify the province and municipality through a self-certified declaration within 48 hours from the first notification (see above). In this case, the notification concludes the procedure.

- If the values analysed exceed the CSC threshold, the responsible person must immediately contact the relevant province and municipality informing them of the necessary prevention and safety measures adopted. In this case, within the following 30 days, the responsible person must submit to the relevant region, province, and municipality the characterisation plan (*Annex 2, section IV, Consolidated Environmental Protection Code*). The characterisation plan, which consists of preliminary investigations and analyses aimed at determining the actual level and extent of contamination, is examined for its approval within the next 30 days by a committee composed of all the interested public authorities (*Conferenza di servizi*).

- On the basis of the results of the characterisation plan, the site undergoes a specific health and environmental risk analysis procedure in accordance with the general criteria set out in Annex 1, section IV of the Consolidated Environmental Protection Code. The purpose of the procedure is to determine whether or not the CSR threshold has been exceeded. The document resulting from the execution of the specific risk analysis procedure is submitted to the *Conferenza di servizi* (see above), which must decide whether to approve it within 60 days after its filing.

- If the results of the specific health and environmental risk analysis show that the level of contamination is lower than the CSR threshold, the *Conferenza di servizi* (see above) concludes the procedure with the approval of the risk analysis document. The responsible person can be required to monitor the land, usually for about six months, to verify that the relevant values do not exceed the CSR threshold.

At the end of the monitoring period, the results of the
monitoring must be described in a technical report to be filed with the region and province.

Recently the Italian Parliament introduced the possibility for any interested operator to carry out, at its own expense, clean-up interventions on a specific site for the reduction of the polluted substances at levels equal to or less than the CSC threshold and the use of the site for productive activities. The operator is obliged to notify the province and municipality of the interventions and the characterisation plan to demonstrate that the site is no longer contaminated. Once the CSC threshold is reached, the site can be used in compliance with the designation of use set out in the relevant zoning plan. The advantage of this provision is that the operator can immediately carry out clean-up interventions and use the site for productive activities before the approval of the characterisation plan to demonstrate the absence of contamination.

**ALLOCATION OF LIABILITY**

Identifying the person responsible for the land contamination (responsible person) is central to the operation of the regime under Title V, section IV of the Consolidated Environmental Protection Code. This is because the responsible person is under a duty to carry out all preliminary investigations, safety measures and clean-up interventions, and can face serious penalties if it does not act promptly.

The issue of identifying the responsible person raised a judicial controversy in relation to the allocation of liability between the person who caused the contamination and the person who acquired the ownership of the land but did not cause the contamination. In particular, judicial decisions delivered in 2012 and 2013 by the Administrative Courts of First Instance and Italian Courts of Second Instance held opposite opinions on whether the implementation of the "polluter pays principle" required to subject an owner of land, who did not cause contamination, to the same legal obligations provided for the person who caused the contamination.

This issue was referred by the Italian Council of State to the Court of Justice of the European Union (ECJ) in 2013 for a preliminary ruling on the correct interpretation of EU law (Decision No. 21 of 25 September 2013 of the Italian Council of State).

With a judgment given on 4 March 2015 (Case C-534/13), the ECJ answered the referred question by recalling that environmental liability can arise only if a causal link is established between the contamination and the activity of the alleged polluter and stating that EU law does not impose on the owner of the land who did not cause the contamination the obligation to carry out clean-up works.

The principles expressed in the judgment of the ECJ, which is binding upon national courts, have been recently applied by the Italian Council of State (Decision No. 3544 of 16 July 2015) which, excluding any environmental liability for the owner of the land not responsible for the contamination, has stated that in case the responsible person is not identified, does not act or is insolvent, the relevant public authority must both:

- Carry out ex officio the necessary clean-up works.
- Recover the costs from the actual owner of the land within the limit of the market value of the land determined after the execution of the clean-up works.

**CLEAN-UP**

**Clean-up project plan**

Exceeding the CSR threshold triggers the obligation to carry out clean-up interventions on the relevant site. In this case, within six months from the approval of the risk analysis document, the responsible person must submit to the region a project plan to reduce the risk deriving from the contamination and bring it back to an acceptable level. The project plan must contain:

- Clean-up works.
- Safety measures.

If necessary, further measures of environmental restoration.

For particularly difficult cases (due to the nature of the contamination, size of the site, works to be executed and facilities required), the clean-up interventions can be divided into different stages to be completed one after the other.

Annex 3, section IV of the Consolidated Environmental Protection Code contains the:

- Criteria for the selection and execution of:
  - clean-up works;
  - safety measures; and
  - environmental restoration.
- Best technologies of intervention not entailing excessive costs (BATNEEC).

The region must approve the clean-up project, having obtained the positive opinions of the municipality and the province, within 60 days from its receipt. Approval by the region includes all the necessary permits and authorisations required by the applicable laws to carry out the works, including the environmental impact assessment. In addition, the region can provide conditions to be complied with and a time limit for the execution of the works.

Once the clean-up works are completed, the province (or the region if the province does not act) issues a certificate attesting the completion of the clean-up interventions on the site.

**Financial guarantees**

The approval of the clean-up project fixes the amount of the financial guarantees covering the correct fulfilment of clean-up works. Such financial guarantees, to be issued in favour of the region, cannot exceed 50% of the estimated costs of intervention. The certificate attesting the completion of the clean-up interventions on the site issued by the province or the region gives title to have the financial guarantees released.

**Register of contaminated sites**

Each region keeps a register of sites of interest, which contains the details of clean-up procedure and which must contain the following information:

- List of sites subject to intervention of reclamation and environmental restoration together with any work carried out.
- Details of the responsible person bound to execute clean-up works.
- Public entities assisting the region to execute clean-up works if the responsible person does not act.
In addition, to make information about contamination in land accessible to the public, such details must be reported in the town-planning certificate of the site.

**Penalties**

Serious and different criminal sanctions apply in case of breaches of clean-up obligations. In particular, in addition to the penalties already established by Article 257 of the Consolidated Environmental Protection Code for failure to comply with clean-up projects already approved by the competent authority or with the duty of prompt notification of a contamination risk, Law No. 68 of 22 May 2015 introduced into the Italian Criminal Code a new specific crime for the person that, being obliged by law, does not comply with a clean-up order issued by the authority or the relevant court (Article 452-terdecies of the Italian Criminal Code). In this case, the conduct is punished more severely than the one covered by Article 257 of the Consolidated Environmental Protection Code as the former is now subject to the imprisonment from one to four years and a fine from EUR20,000 to EUR80,000.

The first comments published on the new provision have noted that the reference to the breach of clean-up obligations imposed by a court order may determine the risk to hold liable the person who, even though he did not cause the contamination, acquired the land and expressly agreed to carry out clean-up measures, obligation later enforced by means of a court order. In fact, this result would infringe on the "polluter pays principle" as recently recalled by the Court of Justice of the European Union.

**Ilva case**

On 25 July 2012, the Criminal Court of Taranto ordered the seizure of six plants and related surrounding areas of the Ilva plant in Taranto, the biggest steel manufacturing plant in Europe. The area is designated as an SIN (see above, Special sites) for its industrial significance. The seizure was based on the alleged contamination due to air emissions and disposal of residual wastewater by plants operating in breach of the health, safety and environmental protection provisions.

On 20 August 2012, the seizure was upheld by the Court of Appeal. The Court of Appeal underlined the need to carry out clean-up interventions and safety measures to reduce the workers' and residents' exposure to serious pollution, allegedly the cause of hundreds of deaths and diseases. The Court of Appeal stated that the activity of the Ilva plant caused some of the most "serious environmental contamination" of the soil in the territories of the municipalities of Statte and Taranto, as the activity both:

- Had been conducted "for years in breach of the environment and the health protection laws".
- Put in serious danger public health and workers' and residents' lives.

Because of the significant costs of the necessary clean-up interventions, the shareholders of Ilva threatened to close down all steel industrial activities of Ilva in Italy, with the consequential loss of about 2,300 jobs.

The Italian government tackled the situation by both:

- Entering into a clean-up agreement to carry out urgent clean-up interventions.
- Allocating public budget aimed at the requalification of the industrial area and the implementation of safety measures to reduce the risk to public health.

In this respect, Regional Law No. 21 of 24 July 2012 established a special technical committee required to monitor the area and submit an annual report analysing the damage to health. According to the clean-up agreement (see above), the Ministry of the Environment and Protection of Land and Sea appointed a special technical committee to review the Integrated Pollution Prevention and Control permit for the operation of the plants (which was eventually issued on 26 October 2012). Clean-up interventions in the contaminated areas near the Ilva plants started in July 2013.

**ENVIRONMENTAL LIABILITY AND ASSET/SHARE TRANSFERS**

**Liability**

In an asset sale, the buyer becomes the owner of the site. If the site is contaminated, the buyer has subsidiary liability for the remediation of the property. In a share sale, the buyer does not become the direct owner of the land and, therefore, does not have direct subsidiary liability. However, the target company is liable for all the pollution it caused in the past, including pollution that may have occurred on land that no longer belongs to the target company. The liabilities of the target company are not transferred to the buyer as the new parent company, except if either:

- A parent company that is a sole shareholder breaches certain requirements of disclosure.
- Undue influence is exercised by the parent company over the subsidiary for the benefit of the corporate group (Italian Civil Code).

The seller is liable for clean-up of any pollution if he is the polluter. In addition, the seller may be considered liable if he is unable to prove that he was not the polluter.

The seller is not liable for events in relation to the target company that occurred before the sale, except for:

- Any contractual representation and warranties in the sale and purchase agreement.
- Any liability for having exercised undue influence over the target company. In practice, this is difficult to prove.

**Disclosure**

The seller is not expressly required to disclose environmental information to the buyer, except if the seller has expressly undertaken to disclose it. However, anyone who becomes aware of the contamination must report it to the public authority (Environmental Code).

There is no express requirement for the seller to disclose environmental information to the buyer.

**Due diligence**

Environmental due diligence is very common in all commercial transactions concerning the transfer of industrial activities or significant pieces of land. Environmental due diligence usually covers any:

- Authorisations.
- Challenges.
- Claims of the regulatory authorities.
- Court proceedings for breaches of criminal law.
- Notices of pollution in the land or water and requirements of clean-up.
- Surveys on the presence of asbestos.

Environmental assessments usually involve:
• The identification of the applicable environmental provisions.
• The review of the relevant necessary environmental authorisations and of the duties deriving from the applicable environmental laws.
• Compliance of the obtained authorisations with the applicable laws.

Additionally, the environmental assessment (based primarily on the analysis of corporate documents, projects and documents of the authorisation procedure) verifies:
• The company’s compliance with the prescriptions contained in the authorisations.
• Whether there are any existing or potential environmental liabilities.

Warranties
The environmental warranties typically granted by a seller in an asset sale are that:
• The target business holds all the environmental permits necessary to operate and those permits will not be subject to review or renewal for a certain period of time.
• The environmental permits and the current environmental regulation will not require the company to make adjustments or modifications to the plants for a certain period of time.
• The target business has complied in all material respects with all applicable environmental laws and permits.
• The business is not the subject of any proceedings, claims, environmental investigations or complaints started by the regulatory authorities or by private entities.
• As far as the seller is aware, there is no contamination or pollution present on any of the target company’s properties to be transferred.
• The seller has disclosed all environmental information relating to the business of the properties to be transferred.

In a share sale, the environmental warranties are substantially the same as in an asset sale, except that the warranties also cover the pre-acquisition period and the activities performed by the company during that period.

Time limits and financial caps on environmental warranties and indemnities are commonly used. They are normally determined at the same time as the sale price. The warranties usually last from one to five years.
Professional qualifications. Lawyer, admitted to Bar in 1998

Areas of practice. Administrative law and public works; energy and natural resources; environment; litigation; town planning and zoning requirements; pharmaceutical.

Recent transactions
- Assisting in legal proceedings concerning orders of the public authority to carry out clean-up works for contamination of soil in industrial sites in Sardinia Region.
- Assisting various municipalities and agricultural companies in the individuation of the correct identification of the legal authorisation process for the construction and operation of energy projects generating biogas from landfills and from agricultural activity.
- Advising on the implementation of energy efficiency projects in public schools.
- Successfully represented a leading renewable energy producer in a claim against a demolition order of a hydropower plant.

Languages. Italian, English

Professional associations/memberships. Member of the Milan Bar; member of the International Bar Association.

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Professional qualifications. Lawyer, admitted to Bar in 2006

Areas of practice. Administrative law and public works; energy and natural resources; environmental law.

Recent transactions
- Advising on water disposal and odour emissions issues in relation to a biogas plant.
- Assisting a public consortium in respect of the obtaining of public incentives for the electricity generated from landfill gas.

Languages. Italian, English, Spanish

Professional associations/memberships. Member of the Palermo Bar.