THE NATIONAL CONTAMINATED LAND REGIMES IN THE EU AND THE BASELINE REPORT PROVIDED FOR BY THE IED DIRECTIVE: European or National Rules for the Remediation of Soil and Groundwater

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Abstract: European or National Rules for the Remediation of Soil and Groundwater

The obligation to draw up a Baseline Report (BR) has been introduced in European Union (EU) law by the *Industrial Emissions Directive 2010/75/EU (IED)*. The aim of the baseline report is to allow a quantifiable comparison between the state of soil and groundwater at the site of an industrial installation before starting operations and its condition upon definitive cessation of activities. This short note invokes debate on how the implementation of the Baseline Report (BR) under the *IED Directive* may affect the Contaminated Land Regimes (CLRs) of EU Member States.

Note

Art. 22 of the *Industrial Emissions Directive 2010/75/EU* (IED) introduces a new, important tool in European Environmental Law: the Baseline Report (BR).[1] The IED entered into force on January 6th 2011 and should have been transposed into national legislation by Member States by January 7th 2013. Some Member States have already complied with this obligation, while others are yet to do so.

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[1] "Where the activity involves the use, production or release of relevant hazardous substances and having regard to the possibility of soil and groundwater contamination at the site of the installation, the operator shall prepare and submit to the competent authority a baseline report before starting operation of an installation or before a permit for an installation is updated for the first time after 7 January 2013".

The IED only contains a generic description of the BR content. It requires that the report include information on the present and past (when available) uses of the site, as well as on soil and groundwater contamination by those hazardous substances to be used, produced or released by the installation concerned.[2]

The aim of the BR is to allow a quantifiable comparison between the state of the site as described in the report ("the original state") and its condition upon definitive cessation of activities. An increase in the pollution level between the two points in time would trigger the obligation for operators to return the site to its original state. This is made clear by art. 22 of the IED in the following terms: "*Upon definitive cessation of the activities*" the operator shall assess and compare the contamination levels, as well as take the necessary measures to address that pollution so as to return the site to its initial state.

Given this context, the point I would like to invoke a debate on is the following: *To what extent can and does the implementation of the Baseline Report (BR) under the IED Directive affect national Contaminated Land Regimes (CLRs)?*

A country's Contaminated Land Regime (**CLR**) can be defined as the national regulation applicable to the land polluted by substances likely to cause significant harm to the health of living organisms or to affect the subsoil and/or the water table.

At present, no detailed EU legislation on CLRs is in place, thereby leaving relevant legislative and policy decisions to the discretion of the Member States. Moreover, little guidance in this regard is offered by case law from the EU Court of Justice, and solely with respect to allocation of liability for contamination in conformity with the Polluter-Pays Principle as incorporated into the *Directive 2004/35/EC on Environmental Liability (ELD)*.[3]

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[2] Article 22, par. 2 of the IED.

[3] This can be observed in the most relevant interpretative rulings of the European Court of Justice (ECJ) on the ELD (judgments of 9 March 2010 - Cases C-378/08, C-379/08 and C-380/08), which concluded that a Member State may establish a rebuttable presumption if "plausible evidence" exists to link an operator's activities to diffuse pollution. As a consequence, an operator will be liable for remediation unless the aforesaid presumption is rebutted by proving that its activities did not cause the pollution. More recently, the Plenary Session of the Italian Council of State (Decision n. 21 of 25 September 2013) submitted a reference for a preliminary ruling to the ECJ. The ECJ was asked to determine whether, in circumstances where it is impossible to identify the polluter or to have that person adopt the restoration measures, EU law precludes national legislation which does not require

The resulting scenario consists of a rather mixed framework, where Member States' CLRs often respond very differently to common regulatory issues, such as: does the operator of an installation bear the duty to look for the existence of possible contamination in soil or groundwater? [4] What level of pollution causes a site to be legally regarded as 'contaminated'? [5] How are the remediation targets identified?[6] Is the remediation to be

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the owner of the land (who did not cause the contamination) to take on the burden of remedying pollution. On 4 March 2015 the ECJ adopted the following decision (Case C-534/13): "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". This decision is expected to influence Italy's ongoing judicial controversy over the allocation of environmental liability between the person who caused the contamination and the owner of the land.

[4] In France, upon changing the operating conditions of their installations, site operators must submit to the authorities an operating review document assessing any potential land contamination impacts arising therefrom (Article L.512-18, Environment Code). By contrast, UK law holds that any remediation mechanism concerning potentially contaminated land is triggered solely by local authorities, who are under a statutory duty to survey their land to assess which land is contaminated, only to serve a remediation notice on the appropriate persons when they do not voluntarily implement remediation (Environmental Protection Act, hereinafter 'EPA' 1990, 78B-78H). For a comprehensive review of the CLR in France, see Chantal, C., Makowiak, J., 'Code de l'Environnement 2014, Commenté' (17th edition), March 2014, Dalloz; for a comprehensive review of the CLR in the UK, see Fogleman, V., 'The Contaminated Land Regime: Time for a Regime that is Fit for Purpose' (Part 1 and 2), (2014) 6 The International Journal of Law in the Built Environment, 43-68, 129-151.

[5] In France, there are no legal definition or regulatory value limits indicating what contamination is. By contrast, Title V, Section 4 of the Italian Environmental Code (Legislative Decree n. 152/06) not only defines contaminated land and land at risk of contamination, but also contains information regarding specific contamination thresholds, the exceeding of which triggers the obligation to carry out clean-up interventions. For a comprehensive review of the CLR in Italy, see Cassa, G., Leonforte, A., 'Contaminated Land in Italy', Practical law Environment Multi-Jurisdictional Guide 2014/2015, 2014 Practical Law Company, Thomson Reuters.

[6] In France, there are only technical guidelines issued by the Ministry of Environment to provide guidance for site operators, including as regards the proposed remediation measures to limit the identified risks ("La loi responsabilité environnementale et ses méthodes d'équivalence - guide

carried out as soon as the pollution is discovered or just upon definitive cessation of the activity?[7] If the responsible party is not in a position to finance the remediation, does the landowner bear any legal duty to remediate the site?[8]

Analysing if and how the BR implementation affects national CLRs first requires an in-depth study of the European Commission Guidance concerning baseline reports under Article 22(2) of the IED (2014/C 136/03), which was released to promote a consistent implementation of the IED by Member States. The available national guidelines issued by Member States could also prove an interesting examination in this regard.[9]

Although this short piece by no means aims to provide a solution to the problem, it appears to this writer that some aspects of the CLRs will be heavily influenced by the implementation of the BR.

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méthodologique"), issued in July 2012. By contrast, Title V, Section 4 of the Italian Environmental Code holds that remediation targets must be identified through a site-specific risk analysis.

[7] In Italy, the operator may be required to conduct investigation and adopt clean-up measures either during operation or after closure of the installation (Environmental Code, Title V, Section 4). By contrast, in the UK operators are required to act solely upon receiving a remediation note from the enforcing authorities, which is subject to suspension upon appeal in a way whereby the remediation may be delayed for several years (EPA 1990, 78H).

[8] In France, if the responsible person has disappeared or is insolvent, the Agency for Environment and Energy Management (Agence de l'Environnement et de la Maîtrise de l'Energie) may be entrusted with the site remediation (Article L.556-3, Environment Code) but under no circumstances can the landowner be charged for the clean-up obligations unless it is proven that he/she has behaved as the site operator. By contrast, UK law holds that only if the person who caused or knowingly permitted the contamination cannot be found after a reasonable inquiry can the landowner or occupier be held liable (EPA 78F); however – as Emma Lees notes – in practice authorities rarely impose clean-up costs on landowners (and rather end up paying the clean-up themselves) under the assumption that charging them with any costs of remediation necessarily causes hardship (see Lees, E., 'Interpreting the Contaminated Land Regime: Should The 'Polluter' Pay'?, Environmental Law Review 14 (2012), 98-110).

[9] France was the first State to issue a "Guide méthodologique pour l'élaboration du rapport de base prévu par la directive IED" in May 2013, a year ahead of the release of the EC Guidance. Other notable guidelines include: "Baseline report in accordance with the Environmental Protection Act – guidelines for operators and permit and supervisory authorities" issued by Finland in November 2014; a "Guidance for the preparation of the baseline report on the state of soil and groundwater" issued by Germany in August 2013; Ministerial Decree n. 242/2014 issued by the Italian government in November 2014; Resolution of 25 October 2013 issued by the Autonomous Region of Murcia (Spain).

First of all, virtually all Member States' legislation will now incorporate a duty to investigate the state of soil and groundwater contamination (at least) at two points in time throughout an installation's life cycle, followed by a duty of remedying pollution, though only upon definitive cessation of the activity. Secondly, where a CLR imposes immediate remediation upon discovery of contamination at any point in time,[10] the premise of the BR obligation to conduct a "quantifiable comparison" between the original state and that upon cessation of the activity could become severely frustrated. Finally, by posing relevant clean-up duties solely on the operator, the BR obligation might significantly alter the balance of duties allocated by a given CLR between the party who is responsible of the pollution and the non-responsible site owner.[11]

Arguably, an in-depth evaluation of the breadth and direction of these changes makes for a fascinating theme for research.

[10] Italian legislation offers a rather fitting example in this regard: upon discovery of a potential contamination, the person responsible is obliged, within 24 hours, to carry out the necessary preventive measures and execute a preliminary investigation to verify whether the contamination threshold has been exceeded. When the threshold is exceeded, a characterisation plan is executed, followed by clean-up interventions to remediate the contamination, if necessary (Environmental Code, Title V, Section 4).

[11] Italian legislation provides a further example in this regard: Environmental Code, Title V, Section 4 poses relevant obligations upon the "person responsible for the land contamination", who may or may not be the owner of the contaminated site.