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# RECENT DEVELOPMENTS REGARDING THE EU ENVIRONMENTAL LIABILITY FOR ENTERPRISES: LESSONS LEARNED FROM ITALIAN'S IMPLEMENTATION WITH THE "RAFFINERIE MEDITERRANEE" CASES

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# Recent Developments Regarding the EU Environmental Liability for Enterprises: Lessons Learned from Italian's Implementation With the "Raffinerie Mediterranee" Cases

**by**

**Sandra CASSOTTA[*] & Christophe VERDURE[**]**

## INTRODUCTION

On the 21st of April 2007, the European Parliament and the Council of the EU finally succeeded in adopting an Environmental Liability Directive (hereafter referred as the "ELD"),[1] after a long gestation process which was characterized by a proposal for a directive on Civil Liability for Environmental Damage caused by waste which was never adopted,[2] and by both a Green and White Papers.[3]

The ELD set out a framework for making enterprises liable in case of environmental damage, namely to ensure that the Polluter-pays principle[4] is applied by prescribing that those who are responsible, the polluters, have to pay the costs of prevention and reparation for the damage. The potential responsible party or the potential polluter is the operator.[5]

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[1] Directive 2004/35/EC of the European Parliament and the Council of the 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage, *O.J.*, 30 April 2004, L 143, p. 56. For a general presentation of the Directive, see notably. S. CASSOTTA, "*The Environmental Liability Directive in a More Sustainable Future: A Quest to Rejuvenate its Approach after Lisbon* ? *in* C. VERDURE, *Environment Law and Consumer Protection*, numéro spécial du *European Journal of Consumer Law (Revue européenne de droit de la consommation)*, Brussels, Larcier, 2011, p. 177.

[2] The 1991 Second Proposal of the Commission for the Council Directive on Civil Liability for Damage caused by Waste.

[3] The Green Paper on Compensation for Environmental Damage COM(93) 47final, 14 May 1993, *O.J.*, 29 May 1993, C 149 ; and the White Paper on Liability for Environmental Damage, COM(2000) 66final.

[4] L. KRÄMER defines the Polluter-pays principle as being "firstly an economic principle belonging to the public sphere, and has to be understood as expressing the costs of environmental impairment, damage and clean-up that should not be borne via society's taxes, but by those persons who caused pollution" (L. KRÄMER, *EC Environmental Law*, 2007, Thomson Sweet & Maxell, pp. 27-28). On this principle, see also N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution,* coll. Universités francophones, Bruxelles, Bruylant, 1999, pp. 50-105; A. BLEEKER, "Does the Polluter Pay ? The Polluter-Pays Principle in the Case Law of the European Court of Justice", *Eur. En. Env. Law Rev.,* 2009, p. 289.

[5] Article 2, paragraph 2, of the ELD 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 by 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 authorization for such an activity or the person registering or notifying an activity".

The competent authority has the power to ensure that the operator sustains the costs of prevention and reparation of the environmental harm.

Hence, the environmental liability regime for enterprises established by the ELD highlights the crucial role of the operator which is considered to be the primary responsible party also because is potentially responsible since it has the technical knowledge of the activity and has the "best knowledge" to take preventive and restorative measures in case of environmental damage.

However, is it always true that enterprises polluting really pays? This article analyses what are the main legal obstacles to make enterprises liable in case of environmental damage, by evaluating recent cases of the European Court of Justice (hereafter referred as the "ECJ") which are all, surprisingly, related to ELD's Italian implementation. In order to do so, the contribution will begin with a general overview of both the ELD and its Italian's implementation.

Then, this contribution aims at offering a concrete and practical legal explanation of the barriers to an effective implementation by using a significant EU legal procedure and recent cases law demonstrating why the implementation of the ELD is cumbersome as it is not allowing effectively that those enterprises which pollute pays. The cases "infringement procedure against Italy" and the case C-378/08, and the joint cases C-379/08 and C- 380/08 all together called "Raffinerie Mediterranee" (hereafter referred as "Raffinerie" cases) will mainly be assessed in this view[6].

Finally, some conclusions evaluating particularly the *status* of environmental liability for Italian enterprises, and the Italian implementation in general, will be drawn.

## I. THE ENVIRONMENTAL LIABILITY AT EUROPEAN AND NATIONAL LEVELS

### A. General principles of the European Liability Directive 2004/35/EC

The ELD set up a regime more circumscribed even though *ceteri paribus* more severe compared with the Italian legislation which was the Law 349/86[7] pre-existing for twenty years before to the enforcement of the ELD. The ELD is concerned with the prevention of, and remedying of, environmental damage, and its overall ambitious objective is to establish a common European framework of environmental liability for environmental damage to air, water, land, protected species and natural resources. The threefold goals of the ELD, within this framework are as follows: i) to harmonize environmental liability by establishing common criteria to which national legislators will have to conform when setting up and environmental

[6] Cases related to the failure of member states to fulfil their obligations will not be assessed (see E.C.J., 18th of June 2009, C-417/08; E.C.J., 18th of June 2009, C-422/08).

[7] Law of the President of the Republic No. 349 of 8 July 1986, establishing the Italian Ministry of Environment and including some provisions on environmental damage, published in Supplement to the Official Journal of the Italian Republic No. 59 of 15 July 1986.

liability regime; ii) to ensure the application of the Polluter-pays principle;[8] iii) to eliminate situations of internal market distortions and secure trade.

The architecture of the ELD is designed on four main focal points: the notion of environmental damage; the enterprises' activities which must respect the environmental liability regime set by the ELD; a double system of liability and specific criteria of reparation as a consequence of environmental damage.

Firstly, the ELD provides for a notion of environmental damage only for specific cases (damage to biodiversity, land and water) without including damage to air, which is in contrast to what was considered by the pre-existing Italian legislation.

Secondly, the activities carried on by the enterprises which are bound to the environmental liability regime of the ELD are those specifically contained in an *ad hoc* technical Annex to the ELD.[9] The selection of such kind of activities, which was absent in the pre-existing Italian legislation, are thus, important notably for insurance purposes.[10]

Thirdly, the ELD provides for a dual system of liability, based on fault-based liability and on strict liability[11]. Liability is strict, only for the activities which have been selected in correspondence to specific environmental goods taken into account by the ELD.

When liability is strict, the victim must prove the existence of the causality link between the potential wrongdoer and the damaging event, and there is no need for the victim to demonstrate *culpa*. On the contrary, liability is fault-based, for the activities which are not those selected by the ELD and when the damage has been caused to the biodiversity. In the latter case, when liability is fault-based, the victim in order to receive compensation must prove *culpa* of the potential wrongdoer. This was different compared to the pre-existing Italian legislation which was solely based on a system of fault-based liability.[12]

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[8] And to ensure also the application of the other two principles: the Principle of prevention and the Principle of precaution. On these two principles, see notably N. DE SADELEER, *Les principes du pollueur-payeur, de prévention et de précaution*, *op. cit.*

[9] The "activities" listed in Annex III of the ELD which determine environmental damage are: "waste management operations, including collection, transport, recovery and disposal of waste and hazardous waste, including the supervision of such operations and after care of disposal of sites, subject to permit or registration in pursuance of Council Directive 74/422/EEC of 15 July 1975 on Waste and Council Directive 91/689/EEC of 12 December 1991 on Hazardous Waste". Even if these directives were repealed and replaced by the Directive 2008/98/EC of 22 November 2008, the principles remain globally the same, with regard to the activities listed in the abovementioned annex. On the interaction of the waste framework directive and the ELD, see notably C. VERDURE, « Gestion des déchets, protection de l'environnement et responsabilité », *R.G.A.R.*, 2009/4, n°14.449, p. 6.

[10] On the interest of taking an insurance, see C. VERDURE & L. EECKHOUDT « Quelques observations relatives à la gestion des risques » *in* C. VERDURE (coord.), *Les assurances de responsabilité de l'entreprise*, coll. Les ateliers des FUCAM, Louvain-la-Neuve, Anthemis, 2010, p. 11.

[11] In the ELD, whereas n. 9.

[12] The Italian pre-existing legislation was based on a single system of liability which was fault based, even though the jurisprudence interpreted this legal system in the light of the provisions of the Italian Civil Code (articles 2050 and 2051) by considering the possibility to assign strict liability criteria in certain circumstances.

Fourthly, the ELD provides for specific measures for reparation after environmental damage has occurred. These measures of reparations are the object of a separate Annex in the ELD, which is Annex II. This Annex II, entitled "Measures aimed at repairing environmental damage", establishes, in general, all of the criteria which the operators, and the competent authorities, have to follow in order to repair the environmental damage.

Thus, what has been used as method for quantification of environmental damage is the equivalency method: resource-to resource, or service-to-service, which means that remedial actions should be able to render natural resources and/or services of the same kind (equivalent) both in terms of quality and quantity.

## B. Specificities of the Implementation of the ELD in Italy by Part VI of Italian Law 152/2006

The main focal points - the notion of environmental damage, the enterprises' activities which must respect the environmental liability regime set by the ELD; a double system of liability, and specific criteria of reparation as a consequence of environmental damage – have been transposed in the phase of adaptation of the EU law into the Italian national law by Part VI of the Italian law of implementation 152/2006 (hereafter the "Italian law of implementation"). However, the way through which these focal points have been formulated in the ELD, opened the path to several misunderstandings.[13] The grim formulation of the focal points in the ELD made that the Italian law of implementation was neither stringent nor clearly formulated, giving arise to many problems of "misleading interpretation" of its formulation especially by the Italian courts during the application of the ELD in the Italian legal system.[14]

These problems of confusion in the formulation of the Italian law of implementation determined an uneven implementation of the ELD in Italy, and further complicated the existence of public authorities, enterprises and insurers. More concretely, the weak level of quality of elaboration of the Italian law of implementation derives in the elaboration of the definition of environmental damage; the absence of selected activities subordinated to the ELD regime; the existence of a solely criteria of liability, and the absence of measure of reparations implementing the ELD provisions.

So, with regard to the notion of environmental damage, the Italian law of implementation abrogates the Ronchi Decree[15] which provided for a specific table of thresholds to be used as a parameter for determining the degree of pollution and the minimum and maximum acceptable degrees of pollution relevant to assign environmental liability on the operator, which is necessary for the evaluation of the risk each time that there is environmental damage. As to the

[13] S. CASSOTTA, *Environmental Damage and Liability Problems in a Multilevel Context: the Case of the Environmental Liability Directive*, Kluwer Law International, The Hague, 2012, in press.
[14] M.C. ALBERTON, "*Saint George and the Dragon: Transposing the Environmental Liability Regime in Italy*", 2007, Environmental Liability, Volume 15, Issue 6, pp. 235-241.
[15] An important law existing in Italy, before the ELD, was the 1999 Ronchi Decree concerned with sites contamination.

selection of activities which are subordinated to the ELD regime, there are practically no selected activities as the Italian law of implementation is characterized by the absence of the activities determining environmental damage and which as a consequence establish liability for environmental damage.[16]

Finally, regarding the measures of compensation for environmental damage, the Italian law of implementation comprehends the criteria for reparation as a consequence of environmental damage from articles 305-307. The Italian law of implementation did not correctly transpose the criteria for reparation as regards the respect the "hierarchy" provided in the technical Annex II of the ELD on the measures of reparation which are part of a separate Annex in the ELD entitled "Measures aimed at repairing environmental damage". The respect of the "hierarchical" scheme of restorative measures, proposed by the EU legislator in the ELD, outlined the differences between Primary, Secondary and Compensatory Remediation".[17] However, it is worth noticing, that the scheme of restorative measure proposed by the EU legislator does not outline clearly when environmental damage is compensable given that the EU legislator has distinguished incorrectly what the "Secondary Remediation" is, which aims at compensating, what the "Compensatory Remediation" is, and which actually does not compensate.[18] The non-respect of such a described hierarchical scheme of restorative measure from Italy opened up the way for the Commission, to initiate, in 2008, an infringement procedure against the Italian government, precisely, due to this omission, from Italy, to integrate and respect the ELD hierarchical scheme of the measures of reparation, as it will be analyzed more in depth in the following sections. In the substance, the overall system of uncertainties in the design of the ELD opened the path, on the one hand to the infringement procedure against Italy (II, *infra*), and, on the other hand, to the presentation by the Tribunale Amministrativo Regionale (TAR) of Sicily of a request of preliminary ruling procedure on the interpretation by the ECJ on the compatibility of the Italian legislation with the EU law (III, *infra*).

## II. THE CASE INFRINGEMENT PROCEDURE AGAINST ITALY

### A. Context

On the 31st of January 2008, the Commission started the Infringement Procedure n. 2007/4679 on the basis of articles 258-260 of the TFEU against the Italian Government which differs in terms of nature and function compared to a "preliminary procedure" (which will be object of analysis in the next section), the infringement procedure, called also "action against member state", concerns the proceeding of a direct action (or infringement procedure/action) in response to a breach of duties provided by the EU Treaty.

[16] In the substance, what is missing in the Italian law of implementation is the technical Annex III of the ELD, which selects those activities, in paragraph 2-7, which determine a significant potential or real risk to health and environment.
[17] See Annex II to the ELD, titled "Measures aimed at Repairing Environmental Damage".
[18] S. CASSOTTA, S., *Environmental Damage and Liability Problems in a Multilevel Context: The Case of the Environmental Liability Directive, op. cit.*

Whilst in a "preliminary ruling procedure" the ECJ did not apply the EU law, it rather interpreted it because the application is left to national courts (in the present case, the Italian national court).[19]
The Commission started the infringement procedure because the Italian law of implementation, Part IV (on the "measures of compensation as a consequence of environmental damage"), Title V ("Restoration of contaminated sites"), and Part VI (on the "measures on waste management and restoration of contaminated sites"), did not correctly implemented the ELD.

In a more concrete way, there were three main motives of non conformity or incompatibility of the Italian law of implementation with the provisions of the ELD: (i) breach of articles 3 and 6 of the ELD *on the criteria to assign environmental liability*; (ii) breach of article 4 of the ELD *on the exception not contemplated by the ELD*; (iii) breach of articles 1 and 7 of the Annex II to the ELD *on the lack of respect of the hierarchy provided by the ELD*. Below, follows a deep legal analysis of the above mentioned motives which pushed the Commission to bring an action against the conduct of the Italian Government.

**B. Issues at Stake**

*1. How to assign environmental liability?*

Articles 3 and 6 of the ELD are related to *the criteria to assign environmental liability.* These two provisions both set up a system of strict liability as a consequence of environmental damage caused by those professional activities listed in the Annex III of the ELD (Art. 3) and, that in case of manifestation of an environmental damage, provide for certain obligations that the operators must borne, (as well as the competent authorities which includes the obligation to adopt restorative measures).[20]

Hence, according to the Commission and diametrically in contrast to articles 3 and 6 of the ELD establishing a strict liability regime, as described above, the Italian law of implementation is still using the fault or the *culpa* as a prerequisite to assign environmental liability as a consequence of environmental damage. In fact, the fault is the subjective element only used by the Directive to assign liability only as a consequence of environmental damage caused by professional activities not listed in Annex III of the ELD.

In the substance, this way of understanding the provisions of the ELD and to misunderstand the correct criteria for assigning liability has, as consequential effect, to narrow down considerably the scope of application of the ELD.

[19] The difference between a "preliminary ruling procedure" (article 267 TFEU, ex article 234 EC), and an "infringement procedure" (258 TFEU, ex article 226 EC), is that in the first case, the ECJ, under Art. 234 EC will give only a ruling on the interpretation of the EU law leaving to national courts to apply or not a given rule and the implication that this rule has on national level. Whilst in "the infringement procedure" or "direct action against Member States", the ECJ will pronounce directly on a compatibility of a Member State's conduct with the EU law. See for that point P. CRAIG & G. DE BURCA, *EU Law – Text, Cases and Materials*, Chapter 12, "*Enforcement Actions against Member States*", 4th Edition, Oxford, Oxford University Press, 2007, pp. 428-458.
[20] See article 6 of the ELD.

*2. Exception not contemplated*

A breach of article 4 of the ELD *on the exception not contemplated by the ELD,* since article 303 of the Italian law of implementation, while listing the exemptions of Part IV of the Italian law of implementation, is also establishing that it is not applicable to those polluting situations and contaminated sites which are in the process of being cleaned-up or object of drainage's processes or where clean-up or drainage have been conducted in compliance with the legislation in force.

The sole exception to the aforementioned "non applicability" of Part VI of the Italian law of implementation would be in case that environmental damage is the result of the situation mentioned above which is to say the result of the clean-up or drainage of such contaminated sites where the polluting situation occurred. However, this latter exception does not exist in article 4 of the ELD.

*3. Importance of the hierarchy*

A breach of articles 1 and 7 of the Annex II to the ELD *on the lack of respect of the hierarchy provided by the ELD* also was stressed within the Italian law of implementation.

Article 7 of the ELD establishes that in case of environmental damage, the operators shall identify, in accordance with Annex II, potential remedial measures and submit them to the competent authority for its approval[21]. This means that the competent authorities decide which are the measures that shall be adopted in line with the Annex II of the ELD. In this way of designing the provision, the EU legislator establish a general scheme of hierarchy of measures of reparation in case of damage to natural resources, and separate the remedial measures according to the various categories of remediation in three different ranking (Primarily, Secondarily and Compensatory Remediation) and the objective to be achieved according to the different types of remedies.[22]

The first position in the scaling grade is Primarily Remediation. Only if the Primarily remediation is not possible, the scheme provide for the possibility to identify measures of Secondarily or Compensatory Remediation. The scheme provide the possibility to identify the Secondarily and Compensatory Remediation through the use of methods for quantification of the damage defined as "equivalency method": resource-to resource, or service-to-service and methods alternative of quantification.

[21] See article 7, paragraph 1, of the ELD.

[22] The hierarchical scheme of the measure of reparation designed by the ELD is based on 1) Primarily remediation; 2) Secondarily Remediation; 3) Compensatory Remediation. The objective of the Primarily remediation is to return the resources to the baseline conditions. The objective of the Secondarily Remediation is to obtain a level of natural resources similar to the one which could have been obtained if the polluted area had been drained. The objective of the Compensatory Remediation is to compensate *interim* losses of natural resources.

Although the ELD contemplates in some cases the use of monetary techniques of evaluation, the latter are employed with the purpose to determine the extent of the Secondary of Compensatory Remediation, and not with the purpose of substituting these latter measures (Secondary and Compensatory) with pecuniary measures of compensation.[23]

In contrast to all that proceed, several provisions of the Italian law of implementation allowed that measures of Remediation could be substituted by pecuniary measure of compensation which is visible by considering articles 311 to 313 of the Italian law Italian law of implementation. More specifically, article 311, paragraph 2, allowed measure of Remediation to be substituted by pecuniary measures or equivalent measures even in cases where Primary Remediation is not possible.

Hence, the Commission finds in the Italian law a gap with regard to the obligation of identifying appropriate measures of Secondary or Compensatory Remediation[24] in case that Remediation of the *status quo ante* (which is Primary Remediation or the situation before that the damaging event occurred) is not possible.

## C. Italy's Reaction: Sufficient or Not?

Italy has reacted to the action taken against its government based on the three main motives of non conformity exposed above from point (1) to (3) initiated by the Commission against its government, by providing immediately to rectify some parts of the Italian law of implementation in order to render not only the implementation law but also the implementation, more effective.

For these purposes, the Italian government has very recently introduced by Decree n.135 of 25 September 2009 converted with changes by the law n. 166 of 20 November 2009, article 5-Bis. This article 5-Bis introduces some innovative aspects. In particular, this provision introduces the following changes into the Italian law of implementation: i) new criteria for the reparation of environmental damage which are more in line with those contained in the ELD; ii) re-introduction of individual-liability (and not joint and several liability) on the obligation of the passive subject that has to restore the environmental damage; and iii) the plan to set-up future enactments for criteria to quantify environmental damage.

With regard to the new criteria for reparation of environmental damage (point i), article 311, paragraph 2, has been recently modified and clarified which means that Secondary and Compensatory Remediation has now to be carried out in line with the hierarchical scheme of reparation of the ELD and only if remediation or the adoption of Secondary Remediation or Compensatory remediation turns out to be: "*in all or partly omitted, impossible or excessively expensive (Art. 2058 of the Italian Civil Code) or carried out in an incomplete way or*

[23] This means that in case where it is not possible to return the damaged natural resources to the baseline conditions, then the measures undertaken will be based on the Secondary Remediation. The Compensatory Remediation has to be understood as a compensation for "*interim losses"* of natural resources which is just temporary compensation.
[24] See article 7 of the ELD.

*differently as to what prescribed, the polluter is obliged, subsidiarily, to compensate and bring about remedial actions that should be able to render natural resources of the same kind equivalent both in term of quality and quantity which will have to be identified with further Decree by the Ministry of the Environment".*

As to the re-introduction of individual liability (and not joint and several liability; point ii), some words have been added to the provision dealing with this issue which is article 303, paragraph 1, letter f. The words added to the latter article of the Italian law of implementation are the following: "*criteria for determining the duty to repair in accordance with Art. 311, page 2, 3".*

Lastly, with regards, the plan to set-up future enactments for criteria to quantify environmental damage (point iii), the Italian legislator added to article 311, paragraph 3, the following sentence: "*through Decree of the Ministry of the Environment, Land and Sea to be enacted by sixty days from the date of enforcement of the present provision, in accordance with Art. 17, paragraph 3 of the law, n. 400 of 23 August 1988, are herby established, in conformity with what is provided for in point 1.2.3 of Annex II of Directive 2004/35/EC, the criteria for determination of remedy by equivalency and excessive expenses according to the estimated monetary values of natural resources and services in previous judgements at national and EU level of legislation. In cases of multi-parties, liable for environmental damage each party is responsible and shall be liable. The debts can be transmitted, according to legislation in force".*

After all that proceeded, there are still pending questions which remained opened and represent important point of critique. Moreover, they still constitute elements of non conformity of the Italian law of implementation with the ELD. Regarding the issues at stake, highlighted above, the criteria to assign environmental liability and the criteria of quantification of environmental damage are still absent.

## III. THE "RAFFINERIE" CASES

### A. Context

As exposed above, several problems during the implementation process of the ELD in Italy surfaced, and the nature of these problems is still related to the formulation of the focal points at EU level, as the Italian law of implementation was neither stringent nor clearly formulated, giving arise to many problems of "misleading interpretation" of its formulation by the national courts during the application of the ELD in the Italian legal system.[25]

In that respect, it is important to stress that, in parallel to the infringement procedure previously analysed, there was also another procedure previously introduced which differs from an infringement procedure in terms of nature and function, as it was a "preliminary ruling

[25] M.C. ALBERTON, "*Saint George and the Dragon: Transposing the Environmental Liability Directive in Italy*", 2007, *Environmental Liability*, Volume 15, Issue 6, pp. 235-241.

procedure".[26] This preliminary ruling procedure is the procedure opened with the first original case C-378/08 followed by the others "Raffinerie" joint cases (C-379/09 and C-380/09) all started upon request of the Tribunale Amministrativo Regionale (TAR Sicilia).[27] All the three cases have in common the same original environmental damaging situation of the case 378/08 and are all involved with the same plaintiffs (the same enterprises) and interlaced with the same three main questions of interpretation to which the ECJ reply in different ways because the first case C-378/08 concern more a question of interpretation of the general principles of the concept of environmental liability and which are, the criteria for assign environmental liability, in general. Whilst the other two joint cases, (C-379/09 and C-380/09) even though characterized by the same factual situations of the first original case (C-378), they do differ from the latter because they do not concerns exactly the criteria to assign liability but rather which measures of reparation are necessary to be taken in order to repair the damages which have been aggravated and accumulated since the first manifestation of the environmental damaging situation motivating the starting of the case 378/08. All the cases concern the EU law and the compatibility of the Italian legislation with the EU law and are focusing on two issues in the formulation of the ELD which are strictly intertwined with each other and which reflects both in the degree of rigorousness of enterprises liability and effectiveness in the implementation.

These two main problems, which are the motive leading to the necessity for interpretation of the ECJ, consist on (i) the difficulty in identifying the operator; (ii) the difficulty in attributing liability in cases where the operator is more than one (*i.e.* the problem of multiple operators which could be assimilated to the problem of diffuse pollution or cumulative emissions).[28]

**B. ELD's Provisions Regarding the Operator**

When an environmental damage arises, it would be a disaster if the responsible party, which is the operator, could not be identified, and this is highly likely in the environmental field.[29] Therefore, the identifying of the operator is framed by the ELD which indicates that it is the operator who is the best placed to control an activity should bear the liability.

[26] The difference between the infringement procedure and a preliminary ruling procedure has already been explained in the previous section, footnote n. 18.
[27] TAR is an Italian administrative court.
[28] The problem emerging in case the damage is not a consequence of a single damaging situation is what is known as "cumulative emissions", or "diffuse pollution". This is in other words the problem of the identification of the author of the damage where the legislator has to face the problem of determining what the percentage of responsibility is for each polluter to the polluting activity. A significant example of the latter problem is in cases of the identification of the authors of the acid rain, where the result of the pollution caused by rain reverberates at a long distance to the location where the loss of the substance provoked damage, with the consequent difficulty in determining the author of the damage. Also the problem of the "time factor" or called also the problem of "remoteness of the damage" it is a problem concerned with the "manifestation of the damage". For example, in case the damage appears, or emerges, at the surface several years after the verification of the damaging actions, with the related difficulties of demonstrating the relationship between the damaging actions and the damaging events. In environmental law, both the problems of "cumulative emissions" and "remoteness" of the damage are part of the same main problem which is the identification of the causality link or "causation" which means the difficulty to establish a link between the author of the damage and the event.

The second difficulty, which is strictly in connection with the identifying of the operator, is the existence of multiple operators. These issue was considered by article 2, §6, ELD, related to the definition of the operator, which points out that the operator is the responsible party, which implies the responsible party could be, precisely, more than one.
There could be multiple potential responsible parties (not just one operator) which could create the risk that liability is diluted and compactness is lost.

The choice of the EU legislator in this article is to permit "canalisation" of liability toward "a responsible party." By implication, the victim of the damage must prove causation. If causation is proved, then the operator must bear the costs passively.

The latter problem also unveils another sub-problem which is the case of multiple parties or companies succeeding one another in the same location where the economic activity was carried on and the environmental damage was caused by previous companies or a combination of current and previous companies.

In this hypothesis, and in connection to the formulation of the term "operator," given that the activity is run by a new operator (a new enterprise), the past enterprise cannot be held liable solely because of not falling under the definition of the term "operator" given that the "operator" is the new company.[30]

In that sense, this entails that even if liability is shared, it would not be possible to make a distinction between past and present pollution or assess each firm's responsibility (and the percentages of the monetary costs of restoration as a consequence of liability shared among the multiple operators) particularly due to the difficulty in case of potential multiple operators, to establish causation on the basis of technical parameters, with the consequence that the Polluter-pays principle, even if liability is assigned, would remain in vain.

Moreover, even when the operator is identified, and liability canalised on his person, it would be difficult in concrete terms for the operator to share liability with several and joint responsible parties who could have contributed to the damage, which would in turn render problematic the homogeneous application of the Polluter-pays principle, and harmonisation. An emblematic example showing how and when the entrenchment of the two problems analysed occurs is contained in the Reference for the Preliminary Ruling Procedure from the TAR in the case C-378/08, and joined cases C-379/08 and C-380/08 "Raffinerie",[31] which will be object of an in depth legal analysis in the penultimate section.

**C. Cases**

[30] This example illustrating the second problem is also a clear example on how and when the problem on the difficulty in identifying the operator, is intertwined with the problem on the difficulty in attributing liability in case the liable parties would be more than one.

[31] See Judgements in Case C-378/08 and Joined Cases C-379/08 and C-380/08 Raffinerie Mediterranee (ERG) SpA, Polimeri Europea SpA and Syndial SpA v Ministero dello Sviluppo economic and Others and ENI Spa v Minitero Ambiente e Tutela del Territorio e del Mare and Others, where the ECJ had to clarify the formulation of the ELD through the mechanism of reference for preliminary ruling from the Tribunale Amministrativo Regionale per la Sicilia (Italy).

*1. The "Raffinerie" Case C-378/08*

The ELD provides, with regards, to certain activities listed in Annex II, that an operator whose activity has caused environmental damage or imminent threat of such damage, is held responsible. The operator must therefore take the necessary measures to bear the costs. As already identified in the previous section, the two main problems arisen in the Cases "Raffinerie" are the difficulty of identifying the operator and the problems of multiple tortfeasors which is the case of multiple parties or multiple enterprises succeeding one another in the same location where the economic activity was carried on.

The cases arises also the question whether the competent authorities do not have to provide proof of responsibility for environmental damage before requiring an installation to clean-up a polluted area, but they must carry out an investigation first. The competent authorities must also make sure that they can provide "plausible evidence" such as installation being closed to the pollution and a correlation between pollutants causing the damage and plants' activities. In the ELD, the correlation between pollution causing the damage and plant's activities reflect the necessity to ascertain the existence of the causality link between the author of the damage and the event as a prerequisite to assign environmental liability.

Three main factual legal situations characterize the cases under examination. Below, follows from "factual legal situation I to III" an analytical and chronological picture of the most salient legal facts characterizing the puzzle of the cases under observation.

(i) Factual situation I:
The Augusta roadstead is characterized by phenomenon of environmental pollution dating back to the 1960's. In particular the marine pollution found of this area has been contaminated by dangerous polluting substances. During this lapse of time, when it has been presumed to found a phenomenon of environmental pollution, in the Augusta roadstead, several undertakings operating in the hydrocarbon and petrochemical sectors have been operating simultaneously and succeeded one other.

According to the referring job, this situation of parallel and sequential polluting events can have as a consequence, the impossibility to ascertain individual liability for each single enterprise as a consequence of the manifestation of the above mentioned polluting event. By various successive decisions, the Italian administrative authorities required the undertakings bordering the Augusta roadstead to carry out measures to remedy the pollution found which had been declared a "site of national interest for the purposes of decontamination" since these enterprises which shall undertake measures of drainage and clean-up are conducting activities utilizing polluting dangerous substances for the environment.

Regarding such a situation, the TAR asks whether the Polluter-pays principle as laid down in the first sub-paragraph of Art. 191, paragraph 2 TFEU (previous Art. 174, paragraph 2, EC and the "old" Art. 130 R, paragraph 2 of the TEC) and the provisions of the ELD, which seeks to give that principle concrete expression in the field of environmental liability, preclude national

legislation which allows the competent authorities to impose measures for remedying environmental damage on commercial operators on account on the fact their installations are located close to a contaminated area, without carrying out any preliminary investigation into the occurrence of the contamination or establishing a causality link between the environmental damage and those operators or indeed intent or negligence on the part of the operators.

(ii) Factual situation II:
According to the TAR ascertainments, the Italian administrations obliged the enterprises conducting activities in the area of Rada Augusta, to proceed to restoration of existing environmental damages without distinguishing between past and present pollution and without ascertaining to which extent, each enterprise was responsible for environmental damage. The above mentioned decisions have been challenged by the interested enterprises "Raffinerie Mediterranee" (ERG) SPA, Polimeri Europa SPA, Syndial SPA and ENI SPA which brought actions against those administrative decisions before the Italian Courts. Before to refer a number of questions to the ECJ for preliminary ruling concerning the application of the Polluter-pays principle, the TAR had previously already declared illegal, with several judgments, several decisions challenged, motivated through the existence of violation of the Polluter-pays principle. However, the "Consiglio di Giustizia Amministrativa" della Regione Sicilia, sitting as an appeal court, declared legitimate the involvement of enterprises operating in the zone of Rada Augusta, interrupting the judgment by the TAR. In the administrative judgment at the origin of the case C-378/08, several enterprises, conducting activity in the zone of Rada Augusta, challenged the decision adopted on 20 December 2007 provided with an obligation to restore the pollution found.

Again, regarding such situation, the TAR asks whether the "Polluter-pays Principle", as laid down in the first sub-paragraph of Art. 191, paragraph 2 of the TFEU (previous Art. 174, paragraph 2, EC) and the provisions of the ELD preclude a national legislation which allows public administration to assign liability to restore environmental damage to the owners of individual rights conducting an activity in the contaminated sites without the necessity to ascertain the existence of causality link between the author of the damage and the event but only with the existence of a relation "positioning" where he/she/it found itself (because he/she/it is operating the activity which can contaminated the site).

(iii) Factual situation III:
After the above mentioned meeting of the 20 December 2007, it was decided that the enterprises should be required to take further measures, including the building of a dam, the contract for the planning and execution of which was awarded to "Sviluppo Italia Aree Produttive" SPA ("Sviluppo"). Such a project was planning drainage of the contaminated sediments and their reuse, after treatment, to build an "artificial island in the sea". Such island was supposed to work as a "harbor hub" for ship and shipment containers of different dimensions. "Sviluppo Italia" is an enterprise set up by the State and operating in the market.
The Italian administration delegated the task of executing the project, and in case of inertia of the enterprises, the conduction of restorative measures without a public tendering procedure.

According to the evaluation of the national judge, such kinds of work are of very high economic value.

In the substance, in all the factual situations the focal point always consists in wondering f the EU provision lay down in Art 191 of the TFEU (previous Art. 174 of the EC) and provisions ELD, preclude national legislation which according to the Polluter-pays principle, allows the public administration to assign liability as a consequence of environmental damage with restorative measures including the enterprises of the contaminated area and without the necessity for those enterprises to ascertain the prerequisite of the causality link or the existence of the subjective element of *culpa*.

*2. The "Raffinerie"Cases C-379/08 and C-380/08*

With regards to the ruling of 9th march 2010, in the joined cases C-379/08 and C-380/08 in its judgment, the ECJ finds that the competent authority is permitted to alter substantially measures for remedying environmental damage which were chosen at the conclusion of a procedure carried out on a consultative basis with the operators concerned and which have already been implemented or begun to be put into effect. However, in order to adopt such a decision that the competent authority must i) give the operators the opportunity to be heard, except where the urgency of the environmental situation requires immediate action on the part of the competent authority; ii) invite, *inter alia*, the persons on whose land those measures are to be carried out to submit their observations and take them into account and 3) take into account the criteria of the point 1.3.1 of Annex II to the ELD and state, in its decision, the grounds on which its choice is based and, where appropriate, the grounds which justify the fact that there was no need for a detailed examination or that is was not possible to carry out such an examination due, for example, to the urgency of the environmental situation.

The ELD does not preclude national legislation which permits the competent authorities to make the exercise by operators of the right to use their land subject to the condition that they carry out the environmental remedial works required, even though that land is not affected by those workers because it has already been contaminated or has never been polluted. However, such a measure must be justified by the objective of preventing deterioration of the environmental situation or pursuant to the Precautionary principle, by the objective of preventing the occurrence or resurgence of further environmental damage on the land belonging to the operators which is adjacent to the whole shoreline at which those remedial measures are directed.

## IV. CONCLUSION

According to the conclusions of the Advocate General of the ECJ of 22 October 2009, it is possible to assign environmental liability independently from fault or *culpa* whilst it is not possible to assign liability without the existence of causation. [32] However, in case it would be impossible to identify the author of the damage it is possible to assign liability and the costs of restorative measures to subjects others that the author of the damage even though this trend is opposing the provisions of the ELD. This latter trend is also identical to other simultaneous judgments of the ECJ related to the same issues at stake in the cases under examination in this article, the ruling of which was enacted on the 9th March of 2010.[33]

The distinction between past and present pollution is shown even though the Advocate General is in the opinion that the ELD cannot have retroactive effects and shall apply only in case of environmental damage caused by enterprises before April 2007 (date corresponding to the deadline of implementation of the ELD) which means that for reparation of environmental damage occurred before the latter date, national legislation should apply. The very last changes introduced by the Italian law are certainly to be estimated as promising especially because they can inspire the EU legislator in a future design of criteria of quantification of environmental damage.

However, it is not certain what the future stands both of the Commission as to the Italian conducts of infringement procedure and the parallel trends on the interpretation of the ECJ will be. It is difficult to cope with these parallel situations of uncertainty: on the one hand, problems of Member States' conduct in the correct application of the ELD, on the other hand, problems of interpretation of the ELD. Italian enterprises are facing an uncertain path due to the absence of a clear definition of the choice of the type of liability; absence a law with regards to criteria for quantification of environmental damage; uncertainties in the case-law which will seldom lead to the set-up and consolidation of mechanisms based on insurance policies.

[32] See the conclusions in the opinion of the ECJ's Advocate General, Kokott, presented on the 22 October 2009 in the Cases C-378/08 and C-379/08.
[33] See Judgment of the ECJ in the Joined Cases C-478/08 and C-479/08 related to the identical question of interpretation object of the "Raffinerie" Cases focusing on the compatibility of national law with the ELD's provisions.