II.10-4: The European Court of Justice hands down a series of decisions on March 9, 2010 that reduce the burden of proving causality in environmental liability suits in order to further the goal of protecting the environment

Tuesday 18 May 2010, by Béatrice Parance, Senior Editor and Member of the Editorial Committee

ECJ, Grand Chamber, 9 March 2010, C-378/08, Raffinerie Mediterranée SpA vs. Ministero dello Sviluppo economico

MAIN INFORMATION

A series of decisions handed down by the European Court of Justice on March 9, 2010 reduces the burden of proof for environmental damages, in order to facilitate the application of the 'polluter pays' principle, and provides national regulatory authorities broad powers in enforcing environmental liability.

CONTEXT AND SUMMARY

European Parliament directive 2004/35/CE relating to environmental liability for preventing and remedying environmental damage required Member States to implement a regime for preventing and remedying damages caused to the environment, based on the 'polluter pays' principle. The economic operator whose business activities have caused damage to the environment, or which are likely to cause imminent damage, is required to take preventive or remedial measures as necessary. The Directive identifies two sorts of liability: the first is a strict liability, independent of negligence, applicable to operators whose field of activity is considered to be polluting (list of activities enumerated in Annex III); the second is a liability for activities not listed in Annex III, when fault or negligence has been proven. This liability is enforced by a 'competent authority' (according to the terms of the directive), which is the administrative authority in charge of prosecuting damage to the environment. The deadline for implementation of the directive was April 30, 2007. In France, this Directive gave way to the (Act relating to environmental liability) of August 1st, 2008, transposing the European directive into French law, and designating the Prefect as the competent administrative authority.

On March 9, 2010, the European Court of Justice (ECJ) handed down three decisions relating to the conditions of application of this Directive, in affairs C-378/08 and annexed affairs C-379/08 and C-380/08, following a request for preliminary ruling by the Italian Administrative Tribunal for the Sicily Region. The matter at hand was the appreciation of the articulation between the Directive's provisions and Italian national legislation on the reparation and rehabilitation of polluted sites. In each affair, there was a

conflict between the Sicilian authorities that had the jurisdiction to decide on decontamination measures, and hydrocarbon and petrochemical corporations operating in the region of Priolo Gargallo, especially the roadstead of Augusta, which was declared a Site of National Interest for the purposes of decontamination. This site has been subject to heavy pollution since the 1960s, when the site was created as a hub for the petroleum industry. In application of Italian legislation, corporations operating in this petrochemical hub were required to present emergency security plans to protect the ground water supply, in their capacity as owners of industrial zones located on the site of national interest. But, the Sicilian authorities ordered the corporations to undertake extremely large-scale and very costly construction projects; and decided that if they did not perform, the work would be undertaken by the region and charged to the corporations. The companies therefore introduced legal action against the authorities on two grounds. The first was that the pollution-removing construction projects exposed them to unreasonable costs. The second was that these measures were contrary to the 'polluter pays' principle and Directive 2004/35/CE, in that they made all companies operating in the Augusta roadstead liable for the pollution, without distinguishing between former and current pollution, or justifying the portion of liability for each individual enterprise in the damage to the environment.

The Sicilian Administrative Tribunal therefore asked the ECJ if the 'polluter pays' principle precludes national legislation from allowing the competent authority to require operators to repair environmental damages, simply because of the proximity of their facilities to the polluted zone, without investigating the events having caused the pollution or establishing the fault of the operators and a causal link between the operators' actions and the pollution.

The ECJ replied that the Directive on environmental liability does not preclude national legislation authorising competent authorities, acting according to the terms of the Directive, from presuming the existence of a causal link between the operators and the pollution, including when the pollution is diffuse and generalised, simply because of their proximity to the polluted zone. However, in application of the 'polluter pays' principle, and in order to presume such a causal link, the authority must have plausible grounds upon which to base its presumption, such as the proximity of the facilities to the pollution and a match between the polluting substances found and the substances used by the operator's facility. Lastly, the Court affirmed that for operators whose activities are presumed to be polluting (included in Annex III), the competent authority does not have to establish fault, negligence, or a fraudulent or tortious intention. However, before ordering decontamination measures, the

authority does have to look for the source of the pollution, according to procedures, means, and an inquiry whose duration it determines by itself, according to subjective criteria. It must also establish, in application of national rules on the burden of proof, a causal link between the operators' activities and the pollution.

Furthermore, in one of the affairs, the Sicilian administrative tribunal asked the Court about the extent of the competent authority's powers to control operators' use of the land they own, especially as concerns property rights. Indeed, the Italian authorities had limited the right of the operators to use land that had been decontaminated, or which had not been polluted yet, until they got rid of the pollution on the land they were already using, on the grounds that such measures were necessary in order to oblige the operators to take decontamination measures. The Court judged that the Directive did not preclude national legislation from authorising competent authorities to forbid property owners from using their property until they have remedied the environmental damages they have been held liable for, and this even when the property in question is not concerned by the environmental damages because they have already been decontaminated or because they have never been polluted. However, such measures must be justified by the goal of preventing the aggravation of the environmental situation in places where remedial measures have already been implemented, or by, in application of the precautionary principle, the goal of preventing the apparition or resurgence of other environmental damages on the operator's property.

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BRIEF COMMENTARY

These decisions are of major importance because they clarify questions relating to the application of Directive 2004/35, but especially because of the place they give to environmental protection as a general interest goal that justifies and legitimises violation of individual rights. The concern for environmental protection has transformed tort law into regulatory law. Through these decisions, especially characteristic of this transformation, we can first observe that liability—traditionally established ex post facto when accounting for faults and damages committed in the past—is today being used as an incentive or a repressive tool in order to obtain satisfactory results in the future. In this light, more solid notions, such as the causal link, are going to be pushed aside in favour of more efficient notions, like proximity. Indeed, as the ECJ admits, the fact of being in a certain place at a certain time obliges the corporation to intervene, unless it can refute the presumption of such an obligation. This obligation is above all a collective duty, a notion which is very familiar, both to regulatory law and to the economic analysis of law.

Furthermore, the favour and wide scope of action given to administrative authorities by the text of the Directive as well as by the ECJ shows that even though such measures are presented to us under the legal label of 'liability', we are faced with veritable ex ante law enforcement measures, which again, is a characteristic feature of regulation. We can see the system sliding further and further

away from a law of moral and individual liability—or, in other words, a civil and judicial legal system—towards regulatory law, which is systemic, and perhaps repressive, and economic in nature. The basis of this shift is rationality, and doubtlessly, we must continue to evaluate this system by its ability to rationalise private behaviour through incentives.