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To what extent can the liability of the owner of a polluted site be incurred?

The soil remediation market has experienced a significant growth over the past few years. The expenses incurred by the remediation of polluted sites and soils have reached 690 million Euros in 2010, and continue to grow every year[1].

Several factors may explain such growth: the tightened environmental regulatory provisions applicable to industrials, the rising demand in the real-estate market but also the number of polluted sites to be rehabilitated.

The management of polluted sites is governed by the "polluter pays principle": in case of pollution, the obligation to clean the pollution (more precisely the "site rehabilitation" and/or the "waste disposal" obligation(s) pursuant to the French Environmental Code) affecting the polluted site will lie on the person who caused the pollution.

Today, it represents a cost that varies according to the nature of the pollution and to the implemented remediation techniques, but that remains considerable for a number of companies.

It is therefore easy to understand the challenge represented by what has been called the "administrative quest for a liable person"[2] for the site rehabilitation, but also by the determination of consequences thereof on the sphere of private relationships.

The principal difficulty encountered by the administrative authorities in this quest is due to the disappearance or the insolvency of the person who caused the pollution.

The polluter not being able to pay, then the question arises of whether the owner of the polluted site may be the one who pays…

In two decisions issued on the same day in 1997, the *Conseil d'Etat* (French administrative Supreme Court) refused to hold the owner liable "*in its sole capacity as owner*"[3]. While the liability of the owner of polluted sites and facilities cannot be incurred on the sole ground that this person is the owner, it cannot be excluded that this person be held liable on another ground.

As previously discussed in an article published in our July/August 2012 e-newsletter, unlike Article L541-3 of the French Environmental Code (legislation governing waste materials) (hereinafter the "FEC") which refers to the producer but also to the holder of the waste materials, the provisions of Article L511-1 et seq. of the FEC (legislation governing so-called classified facilities) refer only to the entity carrying the activity, i.e. the site operator, as the person bound by the obligation to conduct site rehabilitation (i.e. remediation, and so incidentally disposal of the waste materials stored on the site).

As such, pursuant to the legislation governing classified facilities, only the entity carrying out the business activity on the site will be responsible for the remediation works that can under no circumstances be assumed by the owner of the site (provided that the owner is not the same person as the one carrying out the business activity). It is the application of the polluter pays principle (Article L110-1of the FEC).

However, pursuant to the legislation governing waste materials (in practice, waste materials very often result from activities listed in the nomenclature of classified facilities), the outcome may be different even if the same "the polluter pays principle" applies.

Indeed, under this legislation, the administrative judge has held that "*considering that the owner of the land where waste materials have been stored may, in the absence of a known holder of these materials, be considered as the holder within the meaning of Article L.542-2 of the FEC, in particular if it has been negligent with respect to materials abandoned on the land* » (so-called *Wattelez II case law*)[4].

Following the example of the administrative judge in 2011, the civil judge also ruled a year later that the owner of the site could indeed be liable as holder, "*unless he proves that he is not involved in the abandonment of the relevant waste materials and that he did not allow or facilitate such abandonment by negligence or indulgence*"[5].

It is then only in this capacity (as holder of the waste materials) that the owner may be held liable, i.e. subsidiarily (if there is no other person liable) and in a limited number of cases (only for negligence).

In two decisions dated March 1, 2013, the *Conseil d'Etat* has reaffirmed the subsidiary liability of the owner[6]:

"the person responsible for the waste materials within the meaning of Article L.541-3 of the FEC, as interpreted in the light of the above-mentioned provisions of the European Directive dated April 5, 2006, can be the waste producers or holders;

If, in the absence of any known producer or holder of the waste materials, the owner of the land where were stored such waste materials may be considered as the holder within the meaning of Article L. 541-2 of the FEC, in particular if it has been negligent with respect to the materials abandoned on the land, and may, as a result, be subject to the waste disposal obligation, the land owner's liability under waste legislation remains subsidiary to the liability of any waste producer or other holders and can only be sought if it appears that any other holder of such waste materials is unknown or has disappeared".

Accordingly, one has to understand that the liability of the owner, as holder of the waste materials, may only be incurred if it is impossible to identify any other waste holder or, if such a person was identified, to obtain from it the funds necessary to cover the remediation works because such person has ceased to exist. This is illustrated in the two cases assigned to the *Conseil d'Etat*.

In the first case[7], the Administrative Court of Appeals had ruled that the two owners of the land where waste materials have been stored were, in their sole capacity as owners, holders of the waste regardless of the fact that the person carrying out the activity, the waste producer, was known.

By application of the above-mentioned principles, the *Conseil d'Etat* cancelled the Administrative Court of Appeals' decision on the ground that the waste producer was known. In this case, the owner escaped liability thanks to the fact that a waste holder was known.

In the second case[8], the *Conseil d'Etat* upheld the decision of the Administrative Court of Appeals who acknowledged the liability of the waste producer that was the company which carried out the business and owned the land, even though it was no longer the owner of the land at the time the Court rendered its decision. In this case, the owner was held liable only because it was above all the waste producer.

As shown in these cases, the easier it is to identify a waste producer or a waste holder, the greatest are the chances for a land owner to avoid liability. In practice, it is doubtful whether "*any waste producer or any other waste holder*" could be identified to cover the remediation costs, and it is highly recommended to the owner of a site where an industrial activity is or was carried out (and where waste materials may be stored) to request from the person carrying out the business activity on site to provide up-to-date information on the measures implemented to comply with the waste legislation requirements and, in any case, the measures implemented to dispose of the waste materials when terminating the activity.

If the competent administrative authorities request him to assume the site rehabilitation costs, he will be able to provide evidence that there is a waste producer or holder who is primarily liable for it, and thus to avoid his own liability which may be sought only subsidiarily.

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[1] Environmental Economics in 2010 – Report of the Environmental Accounts and Economics Committee,

2012

[2] Fanny Deliessche, *"La quête administrative d'un responsable dans la remise en état des installations classées »*, Cahiers de l'Université d'Artois, n°20

[3] *Conseil d'Etat*, February 21, 1997, n°160787, Société Wattelez ; *Conseil d'Etat*, February 21, 1997, n°160250, SCI Les Peupliers

[4] *Conseil d'Etat*, July 26, 2011, n°328651, Commune de Palais-sur-Vienne

[5] 3rd Civil Chamber of the *Cour de Cassation*, July 11, 2012, n°11-10478

[6] *Conseil d'Etat*, March 1, 2013, n°354188, Sociétés Natiocrédimurs et Finamur c/ Commune d'Issoire ; *Conseil d'Etat*, March 1, 2013, n°348912, Mr D. c/ Commune de Coutiches

[7] *Conseil d'Etat*, March 1, 2013, n°354188, Sociétés Natiocrédimurs et Finamur c/ Commune d'Issoire

[8] *Conseil d'Etat*, March 1, 2013, n°348912, Mr D. c/ Commune de Coutiches