Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

4 March 2015 *

(Reference for a preliminary ruling — Article 191(2) TFEU — Directive 2004/35/EC — Environmental liability — National legislation under which no provision is made for the administrative authorities to require owners of polluted land who have not contributed to that pollution to carry out preventive and remedial measures, and the sole obligation imposed concerns the reimbursement of the measures undertaken by those authorities — Whether compatible with the 'polluter pays' principle, the precautionary principle and the principles that preventive action should be taken and that environmental damage should be rectified at source as a matter of priority)

In Case C-534/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 8 July 2013, received at the Court on 10 October 2013, in the proceedings

Ministero dell'Ambiente e della Tutela del Territorio e del Mare,

Ministero della Salute,

Ispra — Istituto Superiore per la Protezione e la Ricerca Ambientale

v

Fipa Group Srl,

intervening parties:

Comune di Massa,

Regione Toscana,

Provincia di Massa Carrara,

Comune di Carrara,

Arpat — Agenzia regionale per la protezione ambientale della Toscana,

Ediltecnica Srl,

Versalis SpA,

and

* Language of the case: Italian.

Ministero dell'Ambiente e della Tutela del Territorio e del Mare,

Ministero della Salute,

Ispra — Istituto Superiore per la Protezione e la Ricerca Ambientale

v

Tws Automation Srl,

intervening parties:

Comune di Massa,

Regione Toscana,

Provincia di Massa Carrara,

Comune di Carrara,

Arpat — Agenzia regionale per la protezione ambientale della Toscana,

Ediltecnica Srl,

Versalis SpA,

and

Ministero dell'Ambiente e della Tutela del Territorio e del Mare,

Ministero della Salute,

v

Ivan Srl,

intervening parties:

Edison SpA,

Comune di Massa,

Regione Toscana,

Provincia di Massa Carrara,

Comune di Carrara,

Arpat — Agenzia regionale per la protezione ambientale della Toscana,

Ediltecnica Srl,

Versalis SpA,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh, C. Toader (Rapporteur), E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 5 November 2014,

after considering the observations submitted on behalf of:

— Tws Automation Srl, by R. Lazzini and S. Prosperi Mangili, avvocati,

— Ivan Srl, by G.C. Di Gioia, F. Massa, L. Acquarone and G. Acquarone, avvocati,

— Edison SpA, by M.S. Masini, W. Troise Mangoni and G.L. Conti, avvocati,

— Versalis SpA, by S. Grassi, G.M. Roberti and I. Perego, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, and C. Gerardis, avvocato dello Stato,

— the Polish Government, by B. Majczyna, acting as Agent,

— the European Commission, by L. Pignataro-Nolin and E. White, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 November 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the principles of EU environmental law, namely, the 'polluter pays' principle, the precautionary principle and the principles that preventive action should be taken and that environmental damage should be rectified at source as a matter of priority, as laid down in Article 191(2) TFEU, and in Articles 1 and 8(3) of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56), reflecting recitals 13 and 24 of the preamble thereto.

2 The request has been made in three sets of proceedings, respectively between: (i) the Ministero dell'Ambiente e della Tutela del Territorio e del Mare (Ministry of the Environment and the Protection of the Land and the Sea; 'the Environment Ministry'), the Ministero della Salute (Ministry of Health; 'the Health Ministry') and Ispra — Istituto Superiore per la Protezione e la Ricerca Ambientale ('Ispra'), on the one hand, and Fipa Group Srl, on the other; (ii) the Environment Ministry, the Health Ministry and Ispra, on the one hand, and Tws Automation Srl, on the other; and (iii) the Environment Ministry and the Health Ministry, on the one hand, and Ivan Srl, on the other. All three sets of proceedings concern specific emergency safety measures relating to properties contaminated by various chemical substances.

Legal context

EU law

3 The first subparagraph of Article 191(2) states:

'Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.'

4 Recitals 1, 2, 13, 18, 20, 24 and 30 to Directive 2004/35 are worded as follows:

'(1) There are currently many contaminated sites in the Community, posing significant health risks, and the loss of biodiversity has dramatically accelerated over the last decades. Failure to act could result in increased site contamination and greater loss of biodiversity in the future. Preventing and remedying, insofar as is possible, environmental damage contributes to implementing the objectives and principles of the Community's environment policy as set out in the Treaty. Local conditions should be taken into account when deciding how to remedy damage.

(2) The prevention and remedying of environmental damage should be implemented through the furtherance of the "polluter pays" principle, as indicated in the Treaty and in line with the principle of sustainable development. The fundamental principle of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.

…

(13) Not all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there need to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the identified polluter(s). Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts or failure to act of certain individual actors.

…

(18) According to the "polluter-pays" principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures. In cases where a competent authority acts, itself or through a third party, in the place of an operator, that authority should ensure that the cost incurred by it is recovered from the operator. It is also appropriate that the operators should ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring.

…

(20) An operator should not be required to bear the costs of preventive or remedial actions taken pursuant to this Directive in situations where the damage in question or imminent threat thereof is the result of certain events beyond the operator's control. Member States may allow

that operators who are not at fault or negligent shall not bear the cost of remedial measures, in situations where the damage in question is the result of emissions or events explicitly authorised or where the potential for damage could not have been known when the event or emission took place.

…

(24) It is necessary to ensure that effective means of implementation and enforcement are available, while ensuring that the legitimate interests of the relevant operators and other interested parties are adequately safeguarded. Competent authorities should be in charge of specific tasks entailing appropriate administrative discretion, namely the duty to assess the significance of the damage and to determine which remedial measures should be taken.

…

(30) Damage caused before the expiry of the deadline for implementation of this Directive should not be covered by its provisions.'

5 In accordance with Article 1 thereof, Directive 2004/35 establishes a framework of environmental liability based on the 'polluter pays' principle.

6 Point (6) of Article 2 of that directive defines 'operator' as 'any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in 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 authorisation for such an activity or the person registering or notifying such an activity'.

7 In point (7) of Article 2 of Directive 2004/35, 'occupational activity' is defined as any 'activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character'.

8 Points (10) and (11) of Article 2 of the directive lay down the following definitions:

'(10) "preventive measures" means any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage;

(11) "remedial measures" means any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II'.

9 Paragraph 1 of Article 3 of Directive 2004/35, entitled 'Scope', states:

'This Directive shall apply to:

(a) environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities;

(b) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.'

10 Under Article 4(5) of Directive 2004/35, that directive 'shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators'.

11 Article 5 of the directive, entitled 'Preventive action', is worded as follows:

'1. Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures.

…

3. The competent authority may, at any time:

…

(b) require the operator to take the necessary preventive measures;

…

(d) itself take the necessary preventive measures.

4. The competent authority shall require that the preventive measures are taken by the operator. If the operator fails to comply with the obligations laid down in paragraph 1 or 3(b) or (c), cannot be identified or is not required to bear the costs under this Directive, the competent authority may take these measures itself.'

12 Article 6 of Directive 2004/35, entitled 'Remedial action', provides:

'1. Where environmental damage has occurred the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:

(a) all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services and

(b) the necessary remedial measures …

2. The competent authority may, at any time:

…

(c) require the operator to take the necessary remedial measures;

…

(e) itself take the necessary remedial measures.

3. The competent authority shall require that the remedial measures are taken by the operator. If the operator fails to comply with the obligations laid down in paragraph 1 or 2(b), (c) or (d), cannot be identified or is not required to bear the costs under this Directive, the competent authority may take these measures itself, as a means of last resort.'

13 Under Article 8(1) and (3) of that directive:

‘1. The operator shall bear the costs for the preventive and remedial actions taken pursuant to this Directive.

…

3. An operator shall not be required to bear the cost of preventive or remedial actions taken pursuant to this Directive when he can prove that the environmental damage or imminent threat of such damage:

(a) was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or

(b) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator’s own activities.

In such cases Member States shall take the appropriate measures to enable the operator to recover the costs incurred.’

14 Article 11(2) of Directive 2004/35 is worded as follows:

‘The duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which remedial measures should be taken with reference to Annex II shall rest with the competent authority. …’

15 Paragraph 1 of Article 16 of Directive 2004/35, which is entitled ‘Relationship with national law’, specifies that the directive ‘shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and remediation requirements of this Directive and the identification of additional responsible parties’.

16 Under Article 17 of Directive 2004/35, read in conjunction with Article 19 of that directive, the directive is to apply to damage caused by an emission, event or incident which took place after 30 April 2007 only if the damage derives from an activity which took place after the date in question or from an activity which took place, but did not finish, before that date.

17 Annex III to Directive 2004/35 lists 12 activities considered by the legislature to be dangerous for the purposes of Article 3(1) of the directive.

Italian law

18 Article 240(1)(m) and (p) of Legislative Decree No 152 of 3 April 2006 on environmental standards (ordinary supplement to GURI No 88 of 14 April 2006), in the version in force at the material time (‘the Environmental Code’), is to be found in Title V of Part IV of that decree and defines emergency safety measures and measures for the rehabilitation of sites.

19 Article 242 of the Environmental Code, entitled ‘Operational and administrative procedures’, governs in some detail the obligations of the polluter, whether the pollution is recent or historic, as regards adoption of the necessary preventive, restoration and emergency safety measures, notification of the competent public authorities and implementation of rehabilitation work.

20 Article 244 of the Environmental Code, entitled 'Orders', governs situations in which the actual pollution has exceeded contamination threshold concentrations. In such a situation, the province is to put the polluter on notice by reasoned order to adopt the measures set out in Article 240 et seq. of the code. Article 244(3) of the code provides that, in any event, the order is also to be notified to the owner of the site. Moreover, Article 244(4) of the code states that, if the polluter cannot be identified or fails to adopt the necessary measures, and neither the owner of the site nor any other interested party adopts those measures, they are to be adopted by the competent administrative authorities.

21 Paragraph 1 of Article 245 of the code, entitled 'Intervention and notification obligations incumbent upon persons not responsible for the potential contamination', provides:

'The procedures relating to the safety, rehabilitation and environmental restoration measures governed by this Title may, in any event, be implemented on the initiative of interested parties who are not responsible.'

22 Under Article 245(2) of the Environmental Code:

'Without prejudice to the obligations incumbent upon the person responsible for the potential contamination, as referred to in Article 242, the owner or the administrator of the land who finds that the contamination threshold concentrations (CTCs) have been exceeded, or are specifically and genuinely at risk of being exceeded, is required to inform accordingly the region, province or municipality with territorial competence and to implement preventive measures in accordance with the procedure set out in Article 242. After receiving such information and after consulting the municipality, the province shall identify the polluter with a view to the implementation of rehabilitation measures. The owner or any other interested person may, however, intervene on a voluntary basis at any time in order to undertake the requisite rehabilitation measures for the site of which he is the owner or has the use.'

23 Article 250 of the Environmental Code, entitled 'Rehabilitation by the administrative authorities', provides:

'If the persons responsible for the contamination do not immediately adopt the measures provided for under the present Title or if they cannot be identified, and if neither the owner of the site nor any interested party adopts those measures, the procedures and measures referred to in Article 242 shall be implemented on its own initiative by the municipality that is territorially competent and, if that municipality does not adopt those measures, by the region, in accordance with the order of priority set by the regional plan for the rehabilitation of polluted land, which may also call upon other public or private persons, appointed following a specific public tendering procedure …'

24 Paragraphs 1 to 4 of Article 253 of the code, entitled 'Encumbrances and special security interests', state:

'1. The measures referred to in the present Title constitute encumbrances ['oneri reali'] on contaminated sites where they are implemented by the competent authority on its own initiative in accordance with Article 250. …

2. The costs incurred for the measures referred to in paragraph 1 shall be coupled with a special security interest in the same land, under the terms and for the purposes of the second paragraph of Article 2748 of the Civil Code. That security interest may also be asserted to the detriment of the rights acquired by third parties over the property.

3. The security interest and the recovery of costs may not be claimed vis-à-vis the owner of the site where that person is in no way connected with the pollution or the risk of pollution, except by reasoned decision of the competent authority attesting, inter alia, to the impossibility of identifying the person responsible or of bringing an action for damages against that person, or to the unsuccessful outcome of such an action.

4. In any event, owners not responsible for the pollution may be required to reimburse … the costs relating to the measures adopted by the competent authority only within the limits of the market value of the land, determined after the implementation of those measures. If an owner who is not responsible for the pollution has rehabilitated the polluted site on a voluntary basis, that person shall be entitled to bring an action for damages against the person responsible for the pollution in respect of costs incurred and any additional damage suffered.'

The dispute in the main proceedings and the question referred for a preliminary ruling

25 From the 1960s to the 1980s, according to the documents before the Court, Farmoplant SpA and Cersam Srl — two companies belonging to the industrial group Montedison SpA (now Edison SpA) — operated an industrial site for the manufacture of insecticide and herbicide in a municipality of the Province of Massa Carrara, in Tuscany (Italy). As the land covered by that site had been seriously contaminated by various chemical substances, including dichloroethane and ammonia, some of that land was decontaminated in 1995. Since the 'decontamination' proved to be inadequate, the land was classed in 1998 as the 'Massa Carrara Site of National Interest' for the purposes of its rehabilitation.

26 In 2006 and 2008, Tws Automation and Ivan, two private companies, became the owners of various plots of land on the site. Tws Automation's corporate purpose is the sale of electronic devices. Ivan is a real estate agency.

27 In 2011, a private company called Nasco Srl ('the Fipa Group') merged with LCA Lavorazione Compositi Apuana Srl, thereby becoming the owner of another plot of land on the same site. Fipa Group is active in the construction and boat repair business.

28 By administrative acts of 18 May 2007 and 16 September and 7 November 2011, respectively, the competent directorates of the Environment Ministry, the Health Ministry and Ispra ordered Tws Automation, Ivan and Fipa Group to adopt specific 'emergency safety' measures, for the purposes of the Environmental Code, consisting in the erection of a hydraulic capture barrier in order to protect the groundwater table and the submission of an amendment to a project, dating back to 1995, for the rehabilitation of the land. Those decisions were addressed to the three undertakings, in their capacity as 'guardian[s] of the land'.

29 Relying on the fact that they were not responsible for the pollution, those companies brought proceedings before the Tribunale amministrativo regionale per la Toscana (Regional Administrative Court of Tuscany), which, by three separate judgments, annulled the acts in question on the ground that, by virtue of the 'polluter pays' principle, specific to EU law and the national environmental legislation, the administration could not, on the basis of Title V of Part IV of the Environmental Code, impose the measures at issue on undertakings which bear no direct responsibility for the contamination observed on the site.

30 The Environment Ministry, the Health Ministry and Ispra brought an appeal against those judgments before the Consiglio di Stato.

31 The Environment Ministry, the Health Ministry and Ispra submit that, on a proper construction of Title V of Part IV of the Environmental Code in the light of the 'polluter pays' principle and the precautionary principle, the owner of a polluted site may be compelled to adopt emergency safety measures.

32 The chamber of the Consiglio di Stato hearing the case referred to the plenary assembly of that court the question whether, on the basis of the 'polluter pays' principle, the national administrative authorities may impose on owners of polluted land who are not responsible for pollution the obligation to implement the emergency safety measures referred to in Article 240(1)(m) of the Environmental Code or whether, in such circumstances, the owner is bound only by the encumbrances expressly provided for in Article 253 of that code.

33 By act of 21 November 2013, Versalis SpA, which also owns land on the site at issue, acquired from Edison SpA, intervened in support of an order dismissing the appeal.

34 In its order for reference, the plenary assembly of the Consiglio di Stato observes that the Italian administrative courts are divided on the question of how to interpret the provisions laid down in Part IV of the Environmental Code and, more generally, of how to construe those relating to the obligations of the owner of a contaminated site.

35 Accordingly, whereas one line of authority — based, inter alia, on the precautionary principle, the principle that preventive action should be taken and the 'polluter pays' principle, all of which are specific to EU law — considers the owner to be under an obligation to adopt emergency safety measures and rehabilitation measures even where that owner is not the polluter, other Italian courts rule out the possibility that owners not responsible for the pollution should incur any liability and, consequently, refuse to accept that the administrative authorities are competent to require such owners to adopt those measures. The plenary assembly of the Consiglio di Stato takes the latter view, which marks the prevalent approach in Italian administrative case-law.

36 In that regard, the referring court, citing the judgments of the Court in *ERG and Others* (C-378/08, EU:C:2010:126) and *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127), bases its approach on a literal interpretation of the Environmental Code and on the principles of civil liability, which require a causal link between the act and the damage. The existence of such a link is necessary to establish either fault-based or strict liability in respect of the damage concerned. That link is missing if the owner is not the polluter. Consequently, the liability of an owner in those circumstances would be based solely on that person's status as owner, given that the pollution cannot be attributed to that person either for reasons relating to the individual or on the basis of objective criteria.

37 In those circumstances, the Consiglio di Stato decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the European Union principles relating to the environment, laid down in Article 191(2) TFEU and in Articles 1 and 8(3) of Directive 2004/35 and recitals 13 and 24 thereto — specifically, the 'polluter pays' principle, the precautionary principle and the principles that preventive action should be taken and that environmental damage should be rectified at source as a matter of priority — preclude national legislation, such as the rules set out in Articles 244, 245 and 253 of [the Environmental Code], which, in circumstances in which it is established that a site is contaminated and in which it is impossible to identify the polluter or to have that person adopt remedial measures, do not permit the administrative authority to require the owner (who is not responsible for the pollution) to implement emergency safety and rehabilitation measures, merely attributing to that person financial liability limited to the value of the site once the rehabilitation measures have been carried out?'

Consideration of the question referred for a preliminary ruling

38 By its question, the referring court is essentially asking whether the EU principles of environmental law, as set out in Article 191(2) TFEU and in Directive 2004/35, in particular the 'polluter pays' principle, must be interpreted as precluding national legislation such as that at issue in the main proceedings, 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.

Applicability of Article 191(2) TFEU

39 Article 191(2) TFEU provides that EU policy on the environment is to aim at a high level of protection and is to be based, inter alia, on the 'polluter pays' principle. That provision thus does no more than define the general environmental objectives of the European Union, since Article 192 TFEU confers on the European Parliament and the Council of the European Union, acting in accordance with the ordinary legislative procedure, responsibility for deciding what action is to be taken in order to attain those objectives (see judgments in *ERG and Others*, EU:C:2010:126, paragraph 45; *ERG and Others*, EU:C:2010:127, paragraph 38; and order in *Buzzi Unicem and Others*, C-478/08 and C-479/08, EU:C:2010:129, paragraph 35).

40 Consequently, since Article 191(2) TFEU, which establishes the 'polluter pays' principle, is directed at action at EU level, that provision cannot be relied on as such by individuals in order to exclude the application of national legislation — such as that at issue in the main proceedings — in an area covered by environmental policy for which there is no EU legislation adopted on the basis of Article 192 TFEU that specifically covers the situation in question (see judgments in *ERG and Others*, EU:C:2010:126, paragraph 46; *ERG and Others*, EU:C:2010:127, paragraph 39; and order in *Buzzi Unicem and Others*, EU:C:2010:129, paragraph 36).

41 Similarly, the competent environmental authorities cannot rely on Article 191(2) TFEU, in the absence of any national legal basis, for the purposes of imposing preventive and remedial measures.

42 It should be noted, however, that the 'polluter pays' principle is capable of applying in the main proceedings to the extent that it is implemented by Directive 2004/35. According to the third sentence of recital 1 to that directive, the aim of Directive 2004/35, which was adopted on the basis of Article 175 EC, now Article 192 TFEU, is to '[implement] the objectives and principles of the [European Union's] environment policy as set out in the Treaty' and, in that context, to further the application of the 'polluter pays' principle, in accordance with recital 2 to that directive.

Temporal applicability of Directive 2004/35

43 Given that, according to the facts described in the documents before the Court, the historic environmental damage at issue in the main proceedings stems from economic activities undertaken by former owners of the land currently held by Fipa Group, Tws Automation and Ivan, respectively, it is unlikely that Directive 2004/35 is applicable *ratione temporis* in the main proceedings.

44 It follows from the first and second indents of Article 17 of Directive 2004/35, read in conjunction with recital 30 thereto, that the directive applies only to damage caused by an emission, event or incident which took place on or after 30 April 2007, where the damage derives from activities which took place on or after that date or from activities which took place before that date, but were not

brought to completion before that date (see, to that effect, judgments in *ERG and Others*, EU:C:2010:126, paragraphs 40 and 41; *ERG and Others*, EU:C:2010:127, paragraph 34; and order in *Buzzi Unicem and Others*, EU:C:2010:129, paragraph 32).

45 It is important that the referring court ascertain, on the basis of the facts, which it alone is in a position to assess, whether, in the cases before it, the damage in respect of which preventive and remedial measures were imposed by the competent national authorities falls within the scope of Directive 2004/35 as delimited in Article 17 thereof (see, to that effect, judgment in *ERG and Others*, EU:C:2010:126, paragraph 43).

46 If that court reaches the conclusion that Directive 2004/35 is not applicable in the cases pending before it, such a situation will be governed by national law, with due observance of the rules of the Treaty and without prejudice to other secondary legislation (see judgments in *ERG and Others*, EU:C:2010:126, paragraph 44; *ERG and Others*, EU:C:2010:127, paragraph 37; and order in *Buzzi Unicem and Others*, EU:C:2010:129, paragraph 34).

47 In case the referring court concludes that Directive 2004/35 is applicable *ratione temporis* in the cases before the referring court, it is necessary to consider the question referred.

The concept of 'operator'

48 It follows from Article 3(1) of Directive 2004/35, read together with Article 2(6) and (7) and Articles 5, 6, 8 and 11(2) of that directive and recitals 2 and 18 thereto, that one of the essential conditions for the application of the liability arrangements laid down therein is the identification of an operator who may be deemed responsible.

49 The second sentence of recital 2 to Directive 2004/35 states that the fundamental principle of that directive should be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable.

50 As the Court has held, under the system provided for in Articles 6 and 7 of Directive 2004/35, it is as a rule for the operator who caused the damage to put forward proposals for the remedial measures which it considers appropriate to the situation (see judgment in *ERG and Others*, EU:C:2010:127, paragraph 46). By the same token, it is that operator on whom the competent authority may impose the adoption of the necessary measures.

51 Similarly, paragraph 1 of Article 8 of Directive 2004/35, entitled 'Prevention and remediation costs', provides that it is that operator who is to bear the costs for the preventive and remedial actions taken pursuant to the directive. Under Article 11(2) of the directive, the competent authorities are required to determine which operator caused the damage.

52 On the other hand, persons other than those defined in point (6) of Article 2 of Directive 2004/35 — namely, those who do not carry out an occupational activity, within the meaning of point (7) of Article 2 of that directive — fall outside the scope of the directive as defined in Article 3(1)(a) and (b) thereof.

53 In the present case, it is apparent from the facts as set out by the referring court, and confirmed at the hearing by all the parties to the main proceedings, that none of the respondents in the cases before the referring court currently engages in any of the activities listed in Annex III to Directive 2004/35. In those circumstances, it must be determined to what extent those respondents may be covered by the directive pursuant to Article 3(1)(b) thereof, which concerns damage caused by activities other than those listed in that annex, where the operator has been at fault or negligent.

Conditions for incurring environmental liability

54 As follows from Articles 4(5) and 11(2) of Directive 2004/35, read in conjunction with recital 13 thereto, in order for the environmental liability mechanism to be effective and for remedial measures to be required of an operator, the competent authority must establish a causal link between the activity of one or more identifiable operators and concrete and quantifiable damage, irrespective of the type of pollution at issue (see, to that effect, judgment in *ERG and Others*, EU:C:2010:126, paragraphs 52 and 53, and order in *Buzzi Unicem and Others*, EU:C:2010:129, paragraph 39).

55 In construing Article 3(1)(a) of Directive 2004/35, the Court has held that the competent authority's obligation to establish a causal link applies in the context of the system of strict environmental liability of operators (see judgment in *ERG and Others*, EU:C:2010:126, paragraphs 63 to 65, and order in *Buzzi Unicem and Others*, EU:C:2010:129, paragraph 45).

56 As is clear from Article 4(5) of Directive 2004/35, that obligation also applies in the context of the fault-based liability system — under which liability arises from fault or negligence on the part of the operator — provided for in Article 3(1)(b) of that directive in respect of occupational activities other than those listed in Annex III thereto.

57 The particular importance for the application of the 'polluter pays' principle, hence for the liability mechanism provided for in Directive 2004/35, of the condition relating to a relationship of causality between the operator's activity and the environmental damage is also apparent from the provisions of that directive which relate to the inferences to be drawn from the fact that the operator did not contribute to the pollution or to the risk of pollution.

58 In that regard, it should be borne in mind that, under Article 8(3)(a) of Directive 2004/35, read in conjunction with recital 20 thereto, the operator is not required to bear the costs of preventive or remedial action taken pursuant to that directive if he can prove that the environmental damage was caused by a third party, and occurred despite the fact that appropriate safety measures were in place, or resulted from an order or instruction emanating from a public authority (see, to that effect, judgment in *ERG and Others*, EU:C:2010:126, paragraph 67 and the case-law cited, and order in *Buzzi Unicem and Others*, EU:C:2010:129, paragraph 46).

59 Where no causal link can be established between the environmental damage and the activity of the operator, the situation falls to be governed by national law in accordance with the conditions referred to in paragraph 46 above (see, to that effect, judgment in *ERG and Others*, EU:C:2010:126, paragraph 59, and order in *Buzzi Unicem and Others*, EU:C:2010:129, paragraphs 43 and 48).

60 In the present case, it can be seen from the documents before the Court and from the very wording of the question referred that the respondents in the main proceedings did not contribute to the occurrence of the environmental damage at issue, which is a matter for the referring court to confirm.

61 Admittedly, Article 16 of Directive 2004/35 allows Member States, in accordance with Article 193 TFEU, to maintain and to adopt more stringent measures in relation to the prevention and remedying of environmental damage, including the identification of additional responsible parties, provided that such measures are compatible with the Treaties.

62 In the present case, however, it is common ground that, according to the referring court, the legislation at issue in the main proceedings does not permit the competent authority to compel owners who are not responsible for pollution to adopt remedial measures, merely providing in that regard that an owner may, in those circumstances, be required to reimburse the costs relating to the actions undertaken by the competent authority, within the limit of the value of the land, determined after those measures have been carried out.

63 In the light of all the foregoing considerations, the answer to the question referred is that Directive 2004/35 must be interpreted as not precluding national legislation such as that at issue in the main proceedings, 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.

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage must be interpreted as not precluding national legislation such as that at issue in the main proceedings, 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.

[Signatures]