Chapter 26

Italy

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1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in Italy and which agencies/bodies administer and enforce environmental law?

In Italy many public agencies and bodies are involved in the enforcement and administration of environmental law. At a state level the Ministry of the Environment is entrusted with the responsibility to ensure the promotion, maintenance and restoration of the environment and the protection of natural resources from pollution. The Ministry of the Environment is the most important body at a national level; however, other Ministries such as the Ministry of Cultural Goods, the Ministry Health and the Ministry of Public Works are also entrusted with powers that involve environmental issues.

Regions, Provinces and Municipalities have a significant role in the enforcement of environmental law. Regions are entrusted with many legislative and planning powers in relation to environmental issues, such as for instance with regards to waste management and disposal and water protection, and the power to grant some types of environmental permits. Regions exercise these powers in coordination with the Provinces and Municipalities involved. Municipalities and Provinces are entrusted with local planning powers and are entitled to grant some environmental permits. Regions, Municipalities and Provinces are all involved in the proceeding for the remediation of contaminated soil and groundwater.

Other agencies are entrusted with powers in relation to environmental issues. At a state level the ANPA (*Agenzia Nazionale per la Protezione Ambientale* - the National Agency for Environmental Protection) and at a regional level the ARPAs (*Agenzia Regionale per la Protezione Ambientale* - the Regional Agency for Environmental Protection) are vested with monitoring powers and provide statements as to compliance with environmental regulation (e.g. in the EMF sector). Furthermore, local health Authorities (ASL) established in each Municipality are entrusted with powers related to health and safety issues.

There are no general enforcement and prosecution guidelines for the above bodies and agencies that set out the general environmental policy in Italy.

The Ministry of the Environment sets out in some cases some guidelines concerning the interpretation and enforcement of specific pieces of environmental legislation, such as for example the Guidelines of 13 July 2004 on the interpretation and application of the statutory provisions set out by Legislative Decree 4 August 1999, n. 372, on Integrated Pollution Prevention Control (IPPC), now regulated by Legislative Decree 18 February 2005, n. 59, and the Guidelines issued by the Ministry of the Environment on 18 June 2003 n. 3934 on the duties and liabilities of transporters of waste.

From a practical standpoint, whether or not the above bodies and agencies take a more proactive approach in enforcing environmental legislation will depend on a number of factors, among which is the impact of the issue on public opinion.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

See the answer to question 1.1 above.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

The general rule under Italian law regarding disclosure of documents held by public authorities is that only those persons who demonstrate that they have a specific interest to review such documents (e.g. in order to protect their rights in a litigation or in a administrative procedure) can obtain, upon a specific request, access to documents held by public authorities. Therefore, public authorities are generally not obliged to allow members of the general public to review the documents they hold.

With regards to environment-related documents, however, specific legislation (Section 14 of Law No. 349/1986 and Legislative Decree No. 195/2005) provides that any member of the general public is entitled to review and, under certain circumstances, receive a copy of environment-related documents, upon a specific request filed to the public authority that holds the documents. The public authorities are, however, entitled to refuse to provide these documents for review in a number of cases, e.g. when confidentiality reasons or IP rights are at stake, or when pending investigations by public authorities prevent disclosure of these documents.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

In general in Italy a prior environmental permit is required in order to carry out activities that release potentially dangerous substances into the environment or that may, in any event, have an adverse effect on the environment or on human health. A number of laws require separate environmental permits with regards to air

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emissions, waste management and disposal, discharges of effluents into water and abstraction of water. Generally the local public authorities (Regions, Provinces and Municipalities) competent for the area in which the activity or the plant is located are entrusted with the power to grant such permits.

Under the atmospheric pollution legislation (Part V of the Legislative Decree No. 152 of 3 April 2006, hereinafter the "***Code of Environmental Law***") the building and operation of any industrial plant releasing air emissions which might cause atmospheric pollution are subject to the requirement of a prior licence which is issued by the Region in which the plant is located. The licence approval procedure aims at ensuring the integrated protection of the total environment and of public health. This includes an evaluation by the granting authority of the impact of the plant's activity on the atmosphere, taking into consideration the characteristics of the area in which the plant is located. The air emissions licence sets out the type and quantity of the air emissions allowed, the measures to be adopted to prevent atmospheric pollution and the controls and inquiries to be carried out.

Under Part IV of the Code of Environmental Law a licence is required in order to carry out waste treatment and disposal activities. The waste treatment and disposal licence details the types and quantity of waste for which the disposal is authorised, the measures to be adopted with regards to safety and pollution prevention, and the technical requirements concerning the equipment used. Waste collection and transportation can only be performed by entities enrolled in the National Register of Waste Management Enterprises. Also the building of waste treatment and disposal plants must be specifically authorised by the Region in which the plant is located. In granting the authorisation, the Region evaluates the suitability of the location of the plant, taking into account the use of land, environmental aspects and the compliance of the design of the plant with the technical regulations concerning urban planning, safety and environmental considerations. When a prior Environmental Impact Assessment (EIA) is required for the waste treatment and disposal plant, the authorisation is issued only after the project has received a favourable EIA evaluation. Mobile waste disposal plants require a prior authorisation as well.

Under Part III of the Code of Environmental Law, discharges of wastewater into surface water must also be specifically licensed. The licence prescribes what is permitted, the amount and composition of wastewater that can be discharged, and the controls and inquiries to be carried out. In addition, according to Regal Decree 1775/1933, any abstraction of water, except for domestic use, requires a specific authorisation.

Under Legislative Decree 18 February 2005, n. 59, which has implemented in Italy the Council Directive 96/61/EC on integrated pollution prevention and control, those industrial activities listed in annex I of the Directive which are regarded as being highly dangerous for human health or the environment are subject to an integrated environmental permit that covers all air and noise emissions, wastewater discharges and waste management arising out of the permitted activities.

In some cases, environmental permits can be transferred from one person to another, in connection with the transfer of the business or the plant to which the permits refers, by means of an amendment of the environmental permit (the so-called "*voltura*") that must be performed by the environmental regulator that granted the permit, upon request of the interested party. In other cases, such as for example waste disposal permits, the permit cannot be transferred and the new operator of the business or of the plant must require the issuance of a new permit.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

Generally speaking, the applicant for a permit could appeal to the authority that is hierarchically superior to the regulator against the regulator's refusal to grant a permit or against any unduly onerous conditions contained in the permit. Such appeals must be filed within 30 days of the regulator's decision being communicated to the applicant. Third parties directly affected by the decision of the regulator and recognised non-governmental organisation may submit briefs and documents to the hierarchically superior authority. The decision of the superior authority can be appealed to the administrative courts.

Alternatively, the applicant can appeal such matters directly to the administrative courts. This takes the form of a judicial review that aims to ascertain the legality of the decision of the regulator. Where the regulator's decision is found to be illegal, it will be repealed by the administrative court for the reasons set out in the appeal decision. The appeal must be filed within 60 days following the communication to the applicant of the environmental regulator's decision.

The appeal can challenge the decision of the environmental regulator on one or more of the following grounds: (a) that the decision does not fall within the powers and functions of the regulator which issued it ("lack of competence"); (b) that such decision would be in breach of any statutory provision ("violation of law"); or (c) that the decision has been adopted by an abuse or misuse of administrative power ("*eccesso di potere*"). The latter includes, *inter alia*, cases of unreasonableness of the environmental regulator's decision, inconsistency with previous decisions and lack of due investigation by the regulator in issuing the decision.

Third parties which are directly affected by the environmental regulator's decision and recognised environmental non-governmental organisations are entitled to participate in the administrative court proceedings, to submit briefs and documents to the court and to attend the hearings before the court.

If the judicial review is successful, the court shall repeal the decision of the environmental regulator not to grant the permit or repeal the permit that contains the excessively onerous conditions. Where the administrative court's judgment repeals a previous decision of the environmental regulator, the regulator must issue a new decision on the granting of the permit which must comply with the court's judgment and, therefore, not contain those elements that have been determined by the court as illegal. When the environmental permit is successfully challenged before the administrative court by a third party directly harmed by the activity permitted, the administrative court will repeal the permit.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

Statutory provisions or requirements attached to certain environmental permits may require the holder of the licence to conduct environmental audits. For example, with regards to permits for the building and operation of plants that produce noxious air emissions, following the start-up of the plant the holder of the permit must provide the granting authorities with data concerning the quality and quantity of air emissions for the first 10 days following the start up of the plant. The permits also generally establish the terms for the monitoring of air emissions throughout the duration of the permit.

Legislative Decree 18 February 2005, n. 59, on integrated pollution and prevention control, provides that the applicant for an integrated

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environmental permit must submit to the environmental regulator a description of the characteristics of the site on which the plant is located and of the type and entity of emissions or effluents released into the environment by the plant. The holders of integrated environmental permits must also provide to the authorities on an annual basis the data concerning emissions and discharges to air, soil and water.

The development of certain industrial and infrastructure projects, both public and private, which have the potential to have a significant effect on the environment, requires a prior Environmental Impact Assessment (EIA). The EIA procedure is governed by Article 4 and following of the Code of Environmental Law and Decree of the President of the Council of Ministries dated 27 December 1988.

The EIA procedure may be broken down into three phases. First comes the notification phase, when the applicant must notify the relevant authorities. The applicant must publish an announcement of the notification of the project in one national newspaper and in a newspaper that is more widely read in the region in which the project is located. Thereafter comes the phase for preliminary evidence-gathering in which a commission evaluates the compatibility of the project with respect to the criteria for protecting the environment. Any person and, as well, any non-governmental organisations, may file written submissions on the project within 30 days from the publication of the announcement. Finally, there is the decision phase. Depending on the type of project, decisions regarding 'environmental compatibility' are made either by the Minister of the Environment (for those plants listed in Annex II of the Code of Environmental Law) or by the authority, at a regional or local level, identified by the applicable regional laws (for those plants listed in Annexes III and IV of the Code of Environmental Law).

The new Code of Environmental Law rules also the strategic environmental assessment pursuant to Directive 2001/42/EC.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

Violation of environmental permits may give rise to the issuance by the relevant environmental regulator of an order which requires the holder of the permit to ensure compliance with the permit within a fixed term and, if necessary, to carry out remedial works, and the application of an administrative penalty of an amount which will depend on the nature and degree of the violation. In the case of significant violations and risks for the environment or human health, the regulator may also suspend the permit for a certain period or, in case of repeated violations, revoke the permit and order the closedown of the plant.

Generally, environmental laws also provide that the infringement of the requirements attached to environmental permits is also a criminal offence punishable by imprisonment, generally of up to two years, and/or the application of a fine. Criminal sanctions or fines are usually also provided by environmental legislation in the case of carrying on an activity without the required permit or in violation of some requirements set out by the relevant legislation. In connection with the application of the criminal sanction, the criminal court is entitled to levy a seizure on the plant and/or on other relevant equipment.

In the event the violation of the permit causes damage to third parties, the third party who suffers damage is entitled to sue for compensation under the rules set out by the Italian Civil Code concerning civil liability for non-contractual damages to third parties (mainly Articles 2043 and 2050). When the violation has caused damage to the environment in general, the government and the relevant local authorities are entitled to sue for compensation in respect of the damage (see also question 4.1 below).

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

"Waste" is defined by Article 183, letter a), of the Code of Environmental Law as any substance or object falling within the categories listed in Attachment A to part IV of the Code, which the producer or the holder of which discards or intends to discard or is obliged to discard. The concept of waste is still highly debated, in light of conflicting court decisions.

Part IV of the Code of Environmental Law provides mainly for two types of general classification of waste. With regards to its origin, waste is classified either as "urban waste" or "special waste". It is further sub-classified with reference to its chemical-physical characteristics, and therefore to its noxious nature, as either "noxious waste" or "non-noxious waste".

Urban waste includes domestic waste, and waste deriving from the cleaning of streets, beaches, parks, gardens and cemeteries. Certain types of non-noxious special waste are assimilated with urban waste based on certain criteria set out by regulations. Special waste includes vehicles and equipment and waste deriving from demolition and construction works, excavations, agricultural, commercial or industrial activities. Noxious waste is exclusively non-domestic waste that falls within the categories listed in the relevant attachments to the Decree.

Each of these classifications corresponds to a different regime with regards to waste storage, treatment and disposal. Special waste and noxious waste are subject to a more restrictive regime, which charges the producer or holder of such waste with additional duties.

With regards to waste, the distribution of competences is quite complex. In summary, the State sets out general rules concerning waste management. The Regions are entitled, *inter alia*, to grant the authorisations for the building and operation of waste disposal plants and the carrying out of waste disposal activities (see question 2.1 above). The functions of the Province include the general duty to control waste management and transportation activities. The Municipalities provide for the collection, transportation and disposal of urban waste and waste that is assimilated to urban waste.

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

The producer of waste is entitled to store on his property limited quantities of waste arising from its activity for limited periods of time.

In general, disposal of special waste can be performed only by entities holding a waste disposal permit (see question 2.1 above). With regards only to non-noxious waste, the producer of the waste itself is entitled to dispose of it on the area in which it was produced without the need for a prior permit but following a prior formal notification to the relevant Province. Specifically, the waste producer must notify the relevant Province of its request to carry out the waste disposal activity 90 days prior to the commencement of such activity. In such communication the applicant must provide the regulator with certain information concerning the disposal activity, e.g. the type and quantities of waste it intends to dispose of and the characteristics of the waste disposal plant. The waste disposal activity can commence after 90 days following the communication, without the need for the issuance of a permit, provided that the Province does not expressly prohibit the commencement of the waste disposal activity. The waste disposal activities can be carried out for five years following the communication.

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3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

In accordance with the "polluter pays" principle the waste producer or holder has the duty to provide for the disposal of the waste, at its own expenses, either directly or by transferring the waste to third parties who are duly authorised to carry out waste disposal activities.

In principle, the produce or holder of urban and special (noxious or non-noxious) waste fulfils its duties and is not further liable for the disposal of its waste only when it has: (a) transferred the waste to enterprises duly authorised for waste disposal; and (b) received back, within three months after the waste has been handed to the carrier, the relevant certification concerning the waste ("*formulario di identificazione dei rifiuti*") signed by the duly authorised waste disposer upon delivery of the waste (Article 188 of the Code of Environmental Law). As mentioned under question 2.1 above, the entities that perform waste disposal must hold a valid permit and must carry out the disposal activities in an authorised waste disposal plant. Entities that perform waste transport must be enrolled in the National Register of Waste Management Enterprises.

Thus, in order not to retain residual liability in respect of the waste, the producer of waste must ensure that the carrier and final disposer of the waste are, respectively, duly enrolled in the aforementioned Register in order to transport waste, and duly authorised to carry out waste disposal, and that the waste has been effectively delivered to the final duly authorised disposer and been duly disposed of. In fact, the producer might retain a residual liability if it was aware (or should have been aware using ordinary diligence) of the fact that the waste would be unduly disposed of.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

Specific law provisions establish the obligation of waste producers to take back and recover their waste. For example Legislative Decree 25 July 2005, n. 151 that implemented Directives 2002/95/EC, 2002/96/EC and 2003/108/EC concerning waste electrical and electronic equipment establishes that producers are responsible for taking back and recycling electrical and electronic equipment.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Italian environmental laws generally establish that the breach of their provisions and/or of permits is a criminal offence. Environmental offences are generally punishable with imprisonment, which may range from six months to three years, and by a fine. With regard to soil or groundwater contamination events, causing a contamination or even the risk of contamination is a criminal offence punishable by imprisonment up to two years and by a fine. However, the criminal sanction does not apply when the polluter has duly and timely notified the contamination and has duly performed the remediation of the site in accordance with the statutory provisions concerning remediation procedures for soil and groundwater contamination. Other criminal offences are set out in the Italian Criminal Code, such as, for example, Articles 674 and 479, under which dangerous emissions released into neighbouring property and water or food poisoning give rise to criminal liability.

As detailed in question 4.3 below, corporate entities cannot be held criminally liable and the criminal liability rests with those who have taken the relevant decisions on behalf of the corporate entity (i.e. directors, officers, employees who have directly committed the criminal offence and/or who did not prevent its commission when committed by individuals under their supervision).

With regards to the defences available in respect of criminal liability, Italian courts have been willing to exclude the criminal liability of an employer or director who would otherwise be liable, where the employer or director has "adequately" delegated an employee or manager to be "in charge" of specific tasks and the criminal offence has been committed by the employee/manager in performing the tasks in question. The criteria set out by the courts as to what constitutes an "adequate" delegation in order to exclude the employer's or director's liability are however quite restrictive (*Corte di Cassazione*, the Italian Supreme Court, Section IV, 1 April 2004 "*Mongillo*" and *Corte di Cassazione* Section III, 26 May 2004 "*Carraturo*").

When a breach of environmental laws and/or permits has caused personal injuries or damage to assets owned by another, the latter is entitled to require the court to issue an injunction to stop the activity that is damaging his health or property (when it is continuing) and/or to obtain compensation for the damage that has occurred. In order to bring a claim for civil liability successfully, the plaintiff must demonstrate that: (a) the defendant is at fault i.e. has acted in a fraudulent, malicious or negligent manner; (b) the plaintiff has suffered damage; and (c) there is a direct connection between the fault and damage (Article 2043 of the Italian Civil Code). Where the damage is caused by hazardous activities or the use of hazardous substances, under Article 2050 of the Italian Civil Code the liability is strict and the burden of proof rests with the defendant who, in order to avoid liability, must prove that he took all reasonable measures to avoid such damage.

Contamination or a serious risk of contamination and unauthorised storage of waste on the soil and/or underground also gives rise to remediation obligations in accordance with the requirements and under the supervision of the environmental regulators.

Concerning soil and groundwater contamination, according to the Code of Environmental Law, in compliance with the "polluter pays principle" the polluter is liable for any damage caused by the contamination and obliged to perform the relevant remediation activities. For the purposes of the remediation obligations a contamination of soil or groundwater occurs when the maximum value allowed for a noxious substance is exceeded in soil or in groundwater or when there is a serious risk that such maximum values shall be exceeded. Ministerial Decree 471/1999 sets out the maximum values allowed in soil or groundwater for each type of noxious substance, which vary depending on the use of the area (residential, industrial etc.).

In case of unauthorised storage of waste on the soil and/or underground, the responsible person must provide, at his expense, for the removal of the waste and the remediation of the site. Even the owner and/or occupier of the site is bound by such obligations but only when the unauthorised storage can be attributed to them due to their negligence in not avoiding the occurrence of the unauthorised storage.

According to article 299 and followings of the Code of Environmental Law, the State and the local authorities competent in the area in which the damage to the environment has occurred may claim for compensation of damage caused to the environment. Also, recognised environmental protection organisations are able to sue for compensation on behalf of the local authorities following environmental damage. In this case any compensation awarded is paid to the authority, while legal costs are refunded to the organisation. Environmental damage is considered a public damage

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and consists in any case of alteration, deterioration or destruction, in whole or part, of the environment. The Court estimates on an equitable basis the damages to be refunded by the polluter and orders the remediation of the site at the polluter's expenses.

Liability *vis-à-vis* the State and local authorities for environmental damage is not strict, and therefore the plaintiff must prove that the defendant in causing the damage has acted in a fraudulent, malicious or negligent manner.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

Generally, an operator can be held liable for environmental damage notwithstanding that the polluting activity is operated within permit limits. The general principle is that the holder of a permit for an activity is required to carry out his activity within the limits set by the administrative permit in order to protect the public interest, but also within the limits provided by the laws governing private relationships, including the general provisions of civil laws. Therefore, if the licensed activity impinges on the rights of third parties, these may require the relevant Court to issue an order requiring the cessation of the offending activity and allow compensation for the damage that has occurred in accordance with the provisions on the protection of property and the general provisions concerning civil liability for non-contractual damages to third parties (judgment of the *Tribunale Superiore delle Acque Pubbliche*, 5 July 1995 No. 51). However, the assessment of whether or not the operation of the activity within permit limits might remove the "negligence" of the holder of the permit, in the event of fault-based liabilities (see question 4.1 above), should be carried out on a case-by-case basis as it might depend on the type of permit and on the specific circumstances of the case.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Under Italian law, generally corporate entities cannot be held liable for criminal offences. Consequently criminal sanctions are applied to those individuals who have taken the relevant decisions on behalf of the corporate entity or who have been responsible for the wrongdoing in question. As to the allocation of criminal liability, generally all the members of the board of directors and the officers entrusted with the task of carrying out the activities that gave rise to the criminal offence are held criminally liable, as such liability rests on those individuals who have directly committed the offence or have not adopted all the measures necessary to prevent the commission of the offence by individuals under their supervision (as to the possibility of excluding the liability of the directors when an "appropriate" delegation has been granted to an employee, see question 4.1 above). According to Article 197 of the Italian Criminal Code, directors or officers face the possibility of imprisonment and/or fines as a consequence of the criminal offence they committed, and the company itself is obliged to pay the fine only when the individuals concerned are insolvent. Since the enactment of Legislative Decree No. 231 of 8 June 2001, however, a corporate entity can be subject to administrative penalties for wrongdoing committed by directors, officers and employees in its interest.

As to civil liability for environmental wrongdoing, according to Article 2049 of the Italian Civil Code, corporations bear civil liability for wrongdoings committed by directors, officers and employees in performing the activities carried out for the corporation, jointly and severally with such individuals.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

In the case of a sale of the shares of a company, the environmental liabilities continue to attach to the target company. Consequently the purchaser of the shares will replace the position of the vendor with regards to all environmental liabilities which refer to the target company or to the assets owned by the said company, regardless of whether the liabilities occurred before or after the sale of the shares of the company to the purchaser. In these cases environmental indemnities may be agreed by the parties in order to limit exposure to actual or potential environmentally-related liabilities (see question 8.1 below).

In contrast, in the case of an asset sale such as the sale of the land or of the plant, the purchaser does not replace the vendor in its position with regards to environmental liabilities, but may, however, in certain circumstances, effectively inherit specific liabilities which attach to the assets.

For contaminated assets, in general terms, the related remediation obligations are to be borne by the entity that has caused the contamination. However, according to Article 253 of the Code of Environmental Law the remediation costs are an encumbrance (*onere reale*) on the site that is transferred to the new owner of the site, and a special levy is placed upon the site as to such costs, which may also be enforced by the regulator against the purchaser who has not caused the contamination. Therefore, while the new owner that has not caused the contamination would not be obliged to carry out the remedial works, if the remediation of the site is performed by the environmental regulator, the regulator is entitled to recover the costs for the remediation from the individual/entity that currently owns the site (see also question 5.1 below).

Accordingly, the purchaser should obtain adequate representations and warranties from the seller and agree sufficient indemnities to cover *inter alia* any remediation costs which may be charged by the regulator and/or any limitations on the use of the site (see question 8.1 below).

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

Environmental legislation does not specifically rule the position of lenders. Generally speaking, lenders would only be liable for environmental wrongdoing and/or remediation costs when by means of an action or an omission they have contributed to causing the wrongdoing or the contamination.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

Under Part IV of the Code of Environmental Law the entity who has caused the contamination or a serious risk of contamination (the polluter) is obliged to carry out, at his expenses, the remediation of the site, restoring the condition of the site to safe levels and redressing any related damage.

The remedial works are to be carried out in compliance with the procedure set out by Part IV of the Code of Environmental Law and by Ministerial Decree 471/1999. In summary, under this procedure

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the polluter must file a notice of the contamination to the Municipality, the Province and the Region competent for the area in which the contamination is located, and also to local technical bodies such as the local office of the Regional Agency for Environmental Protection (ARPA), within 48 hours following the discovery of contamination, and shortly thereafter inform such authorities of the measures adopted in order to avoid further damage or risks to the environment. The remediation plans must be submitted on a timely basis and be specifically approved by the relevant Municipality (or, when the contamination concerns an area falling with the territory of more than one Municipality, by the Region) prior to their implementation, and the Municipality (or the Region) may require different or additional works and/or impose conditions and requirements to carrying out the works. In some cases the Ministry of the Environment is the environmental regulator vested with the power to approve the remediation plans. A first characterisation plan must be submitted, for approval, to all the above-mentioned authorities within 30 days following the discovery of the contamination. Further to its approval and implementation, a preliminary remediation plan and then a final remediation plan must be approved and implemented. After the completion of the remediation works as approved by the environmental regulator, the relevant Province issues a final certification of completion of the remediation. The question as to whether, and to what extent, the rules and the timing provided therein are applicable to historical contamination of soil and groundwater is highly disputable and needs to be verified on a case-by-case basis.

If the Municipality, the Province or the Region or another public authority discovers the contamination, the Municipality (or the Region, as the case may be) must order the polluter to carry out the remediation of the site. The order is also notified to the current owner of the site when different from the polluter, but the current owner is not obliged to carry out the remediation works when he/she has not caused the contamination (judgment of *Tar Lombardia, Milano*, Section I, 13 February 2001, n. 987).

If the polluter cannot be identified or does not undertake the remediation, the environmental regulator shall directly carry out the remediation works and recover its expenses from the polluter or from the owner of the site. As mentioned in question 4.4 above, according to Article 253 of the Code of Environmental Law the remediation costs are an encumbrance on the site that is transferred to the new owner, and a special levy is placed upon the site as to such costs. The public authorities may recover the remediation costs only after having proved that it was not possible to identify the polluter or that it was not possible to obtain the redress of the costs from the polluter (e.g. if insolvent or bankrupt). In any event, the obligation of the owner of a site who has not caused or contributed to cause the contamination to redress the remediation costs in such circumstances is generally limited to the value of the site.

5.2 How is liability allocated where more than one person is responsible for the contamination?

The special legislation on contamination does not contain any specific rule with regards to the allocation of liability among individuals who are all responsible, in whole or in part, for the contamination. Consequently the general provisions of the Italian Civil Code apply, according to which all the persons responsible for the harmful event are jointly and severally liable to carry out, or pay the expenses of, the remediation works, and to redress the damage that has occurred to third parties or to the environment. Pursuant to Articles 1292 and 2055 of the Italian Civil Code, any person who is jointly and severally liable may be required by the creditor to pay the entire debt. In this case the person who has paid is entitled to recover from the other jointly and severally liable persons only the quota of the amount due which is referable to that party. Such quota shall be determined by evaluating the respective responsibility for causing the harmful events and the consequences that derived from the actions or omissions of the persons responsible for the contamination. If it is not possible to assess the respective liabilities, the amounts due are divided equally among the persons responsible.

5.3 If a programme of environmental remediation is ‘agreed’ with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

As mentioned in question 5.1 above, under Part IV of the Code of Environmental Law and Ministerial Decree 471/1999, the environmental regulator (the relevant Municipality or Region and in some cases the Ministry of the Environment) must always specifically approve the remediation works. Specifically, the polluter submits to the environmental regulator a characterisation plan and after having received the approval of the regulator and having implemented the plan, must submit a preliminary remediation plan and ultimately a final plan of remediation works. In approving all of the three programmes the regulator can always require different or additional works and/or impose conditions and requirements on carrying out the works, even on the basis of the results of the implementation of the previous programme. Once all the remediation works have been carried out in compliance with the approved plans, the relevant Province certifies the successful completion of the remediation of the site. In some cases of serious contamination such certification cannot be granted before five years following the Province’s first control on the carrying out of the remediation works. In specific circumstances Italian Courts have held that even after the final certification of the Province, the environmental regulator still can come back requiring additional works. In principle, a third party may be entitled to challenge the approvals by the environmental regulator of the remediation plans, but must prove that such approvals have directly caused a prejudice or harm to his person or assets.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

According to Article 253(4) of the Code of Environmental Law, the owner of a site, who has not caused or contributed to cause the contamination and who has spontaneously carried out the remediation works, has now a right of action to receive from the polluter compensation for the costs of the remediation works carried out and for any further damage. Additionally, provided that certain conditions are met in the specific case, the new owner could also base its right of action upon the general provisions of Article 2043 of the Italian Civil Code. Thus, provided that the new owner can prove that the previous owner or occupier has caused the contamination, that the contamination has caused a damage and that this was due to wilful misconduct or negligence, the new owner would have a right to claim compensation for the damage (or a relevant proportion) that has occurred, which may consist, for instance, in the charging by the regulator of the remediation costs, and/or in other limitations on the use of the site.

In the case of an asset sale, provided that the purchaser can prove that the seller that has caused the contamination was aware of the contamination of the site but did not inform the purchaser, the purchaser can seek to obtain compensation for the damage that has

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occurred under the provisions of the Italian Civil Code concerning hidden defects in sale contracts, provided that the contamination was not visible or easily discoverable by the purchaser. In this case, in the event of serious contamination that may affect the use of the land, the purchaser might also obtain the annulment of the sale purchase contract in addition to compensation for the damage that has occurred. The claim for the annulment of the contract is however time-barred after one year following the delivery of the site, whilst the claim for compensation for damage is time-barred after five years following the occurrence of the damage.

5.5 Does the government have authority to obtain from a polluter monetary damages for aesthetic harms to public assets, e.g., rivers?

Certain assets which are regarded as having a special aesthetic or natural value (such as certain rivers, parks etc.) are subject to special protection, and any damage or alteration of such assets would constitute a criminal offence under Article 734 of the Italian Criminal Code. In some cases, for example in the case of damage or alteration of such assets, the person responsible for the damage would be obliged to bear the costs of the remediation works or to pay monetary damages. In this respect Italian courts have held that this special regime may cover also the flora and fauna pertaining to such assets, applying Article 734 to the case of pollution that caused an extensive fish-kill in a river regarded has having a special natural value (*Corte di Cassazione*, Section II, 19 September 1990). In addition, the concept of damage to the environment provided by Articles 299 and following of the Code of Environmental Law, described in question 4.1 above, may also include in certain cases aesthetic harm to the environment. Consequently the State and/or local authorities may obtain from the polluter monetary compensation for such damages and/or the remediation of the site.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

Environmental national and regional regulators have a wide range of powers in order to ascertain the violation of environmental laws or permits. These powers are provided by specific environmental laws and by Law 689/1981 that sets out the general rules on procedures for the infliction of all administrative penalties by administrative authorities. In the context of investigations aimed at verifying whether administrative sanctions are to be applied, the investigating officials are entitled to require information and the submission of documents, to inspect all sites and premises, except for private homes, and to take samples.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

As detailed under question 5.1 above, under Part IV of the Code of Environmental Law and Ministerial Decree 471/1999, the party responsible for the contamination in the first instance must give notice within 48 hours of the occurrence of the contamination to the relevant Municipality, Province and Region as well as to the local technical bodies, such as the local office of the Regional Agency for Environmental Protection (ARPA). The timely notification and the performance of the remediation of the site in accordance with the procedure set out by the legislation on contamination allows the polluter to escape criminal liability for the contamination.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

Only when a contamination is discovered at a site by the polluter, or when the polluter receives an order by the environmental regulator to provide for the remediation, does the polluter have the obligation to investigate the land in order to establish the seriousness of the contamination and/or adopt the measures necessary to reduce the contamination or prevent its further spread. The owner and/or occupier of the land who has not caused or knowingly permitted the contamination does not have an affirmative obligation to investigate the land. However, when a contamination is or may still be continuing, the owner/occupier of the land could be considered liable for not preventing the further spreading of the contamination; therefore it would be obliged to investigate the land in order to establish the seriousness of the contamination and adopt the measures necessary to prevent its further spread.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

According to the prevalent opinion of commentators, the rules provided by the Italian Civil Code with regards to the disclosure obligations of the vendor related to hidden defects in the property he sells could only be triggered in relation to the characteristics of the shares that are the object of the transaction, and not in relation to the underlying assets and liabilities. However, the principle of good faith during the negotiations and execution of an agreement set out by Article 1337 of the Italian Civil Code could be interpreted as setting out a legal duty for the seller to disclose environmental problems to the prospective purchaser in the context of a merger or takeover transaction. In order to limit exposure for actual or potential environmental liabilities, the purchaser should obtain adequate representations and warranties from the seller concerning environmental issues.

As mentioned under question 5.4 above, in the event of an asset sale, failure to disclose environmental problems may, under certain conditions, trigger a compensation obligation of the seller for hidden defects. Even in this case, in order to limit exposure for actual or potential environmental liabilities the purchaser should obtain adequate representations and warranties from the seller concerning environmental matters.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

Environmental indemnities connected to the vendor's warranties are widely used in the context of merger and takeover transactions in order to limit exposure for actual or potential environmental liabilities. The agreements among private parties concerning the

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indemnities would not affect the liability regime *vis-à-vis* the environmental regulator, but would allow the purchaser to be redressed of the costs and damages which may occur to him in relation to remedial obligations or claims for damages connected to environmental liabilities of the target company. The parties may freely agree the duration and scope of the indemnities. Usually the indemnities agreed are limited in time and provide a financial cap.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

Under Italian law all existing and potential environmental liabilities must be included in the balance sheet in accordance with the principle of "caution" in drafting the balance sheet. In the case of a group restructuring, the transfer of the contaminated assets to a subsidiary would not exclude the liability of the parent company in its capacity as the previous owner which has caused the contamination. Generally speaking, the dissolution of the company would not be allowed to escape environmental liabilities for which, to a certain extent, the shareholders of the company would remain liable.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

Under Italian law the general rule is that each company belonging to a group of companies is autonomous from a legal standpoint, and a holding company is not subject to civil liability for damages which have been caused by its subsidiary, except for specific cases expressly provided for by the law.

However, in certain exceptional and very limited cases, the holding company has been held liable, together with its subsidiary, for damages caused directly by its subsidiary. This has been where the holding company has colluded in the activity which caused the damage by giving the subsidiary specific instructions with regards to the activity which caused the damage. In these cases evidence was given that the parent company had the effective power to determine the decisions/activity of the subsidiary that gave rise to the environmental liability (*Corte di Cassazione*, Sez. III *penale*, 27 October 1994).

8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

In Italy there is no specific legislation that protects "whistle-blowers" in environmental matters. Article 2105 of the Italian Civil Code establishes a general duty of confidentiality owed by the employee to the employer with regards to information concerning the organisation of the enterprise and the characteristics of the production activities. Breach of this duty may in certain cases cause the dismissal of the employee, and the employer would have the right to claim damages occurring as a consequence of such breach. The courts, however, have held in some cases that this duty of confidentiality would not cover any illegal activity of the employer, stating that the consequences of the breach of confidentiality owed to the employer would not apply when the employee reports to the authority the non-compliance of the employer with laws and regulations (for example, with regards to tax duties; the judgment of *Corte di Cassazione*, 16 January 2001, n. 519).

8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

Until recently group or "class" actions were not available in the Italian legal system. According to the general rules on civil proceedings, in order to pursue a claim, the plaintiff must always prove his interest in suing, i.e. that he has been directly and immediately harmed by the behaviour or event which he is claiming against and that the court's judgment on his claim would bring him a direct benefit.

Law 24 December 2007, n. 244 (paragraphs 445-449), has introduced in the Italian legal system the possibility to file "class actions" for the redress of damages due to, *inter alia*, non-contractual liability. This might include also damages caused from breach of environmental legislation. According to the new legislation if the class actions are successful the Court establishes the amount of damages to be paid to each individual who has participated in the class action. This legislation is very new and is virtually untested.

As to punitive or exemplary damages they are in general not available in Italy.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in Italy and how is the emissions trading market developing there?

The Italian Government has adopted national measures for the reduction of greenhouse gases with the CIPE Resolution 19 November 1998 that sets out the Guidelines for the reduction of greenhouse gases. The measures provided in this Resolution are the following: (a) increase in efficiency in the thermoelectric sector; (b) power reduction in the transportation sector; (c) increased renewable sources in power generation; (d) power reduction in the industrial sector; (e) reduction of greenhouse gas emissions except for the power sector; and (f) increase in foresting initiatives.

By means of CIPE Deliberation 19 December 2002, Italy has amended the CIPE Resolution 19 November 1998 and approved the National Plan for the Reduction of Greenhouse Gases for years 2008-2012. The Plan also makes reference to the development of Clean Development Mechanism (CDM) and Joint Implementation (JI) projects. In this respect there is a significant interest of the Italian Government as to the flexible mechanisms of the Kyoto.

Italy has implemented Directives 2003/87/EC and 2004/101/CE by means of Legislative Decree of 4 April 2006, No. 216.

10 Asbestos

10.1 Is Italy likely to follow the experience of the US in terms of asbestos litigation?

It is difficult to foresee whether in Italy asbestos litigation will assume the proportions and consequences of asbestos litigation in the US. However, it is to be noted that in Italy there is increasing litigation concerning death or serious illness of employees due to long-term exposure to asbestos in the workplace. This litigation is primarily a criminal litigation against employees. Italian courts have held employers criminally liable for employees' asbestos-related diseases/deaths, when the employers have failed to adopt all the measures necessary to protect their employees from exposure to asbestos, and have made employers redress damages to the injured person or to his/her heirs.

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10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

Law 257/1992 sets out the measures to be adopted in order to prevent the possible risks related to the presence of asbestos in premises. It provides that the owners of premises containing asbestos must communicate to the competent Region and to the Local Health Authorities (*Unità Sanitarie Locali*) all the data concerning the presence of asbestos in the premises. The Region must order the removal of asbestos from such premises when it is not possible to adopt other remediation techniques (such as sealing or enclosing the asbestos) and where such removal is deemed necessary. In such cases, all expenses for the removal of asbestos are borne by the owners and, in certain cases, by the occupier of the premises. In particular, the removal of the materials containing asbestos is necessary when such materials are in a poor condition and could not be repaired by sealing or enclosing the asbestos to prevent further damage. If the asbestos is duly sealed or enclosed, the owners of the premises are required to conduct periodical surveys of the premises in order to prevent any risk of exposure to the asbestos by the occupiers/employees. Employers have additional duties with regards to their employees in the case of risk of exposure to asbestos, which include disclosure obligations, the provision of periodic medical checks and the adoption of protective measures.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in Italy?

The Italian environmental insurance market has developed quite recently, although it has increased in activity in recent years.

In the past ten years a pool (so-called "pool *R.C. inquinamento*", environmental civil liability pool), participated in by 55 of the most important insurers and reinsurers operating in Italy and led by Swiss-Re Italia, has operated in the market with the aim of providing adequate insurance coverage for environmental risks. Each member of the pool bears part of the risk insured and therefore enables the underwriting of larger insurance policies and at the same the increase in and sharing of technical know-how acquired in the environmental insurance market. By pooling all of these insurance companies it has been possible to create an insurance policy standard to cover environmental risks that, given the pool reinsurers' capacity, may cover a maximum exposure of EUR 30 million.

In 2002 the environmental risks insurance premiums reached EUR 17 million. The market is constantly growing: premiums in 2001 amounted to EUR 16 million and in 1999 to EUR 11 million. As a comparison, in 2000 civil liability premiums and life insurance premiums reached EUR 67,659 million, and in 2001 the same market reached EUR 76,255 million. Environmental insurance is still rarely used as a method of allocating environmental risk, and traditional risk allocation tools such as warranties and indemnities are dominant. However, the environmental insurance market is definitely growing compared to innovative alternative financial products offered currently in other European markets such as derivatives or perpetual indemnities.

Considering the types of risks, companies buying insurance are essentially operating in the field of waste treatment (40.9% of the total premiums amount), chemical production (24.01%), metal mechanics/engineering (9.7%), and oil production (9%). The Italian insurance policy, called "*R.C. Inquinamento*", which is underwritten by the poll of insurers headed by Swiss-Re Italia mentioned above, is one of the latest and most efficient products available in the European market. This success was triggered in 1995 when, by adding several new clauses to the standard policy, the scope of damages covered was sensibly enlarged. These clauses are of the "claims made" type, under which coverage depends on the time of occurrence of the damage and determining a nexus between the remedy and the damage. In this Italian policy the coverage is available for damages produced by accidental pollution and gradual pollution, also known as residual or "structural" pollution or contamination, which is the inevitable consequence of the normal course of business of certain industrial activities.

Having identified and defined the two phenomena, it was possible to create two different policies:

- the insurance policy against companies' general civil liability (*R.C. Imprese*); and
- the insurance policy against civil liability for contamination (*R.C. Inquinamento*).

In the first policy, normally the insurance is limited to cases of accidental pollution; whereas in the other it is possible to provide coverage for both accidental and gradual contamination.

On the Italian market there are currently even other insurance policies offered to cover environmental risks, but issued by insurers who are not members of the *R.C. Inquinamento* pool, such as Zurig Financial Services and AIG.

11.2 What is the environmental insurance claims experience in Italy?

Accurate environmental insurance claims figures are not available on the Italian market. However, it appears that environmental insurance policies have not been the object of significant claims to date. The reasons probably lie in the current small market for these products and the relatively long coverage of the policies. Most of the actions so far filed or settled by courts concern property damage claims, but the majority have been settled with the backing of the relevant insurance policies.

12 Updates

12.1 Summary of new cases, trends and developments in Environment Law in Italy.

The main legislative development in Italy in the recent years has been the enactment of Legislative Decree 3 April 2006, n. 152 the so-called Code of Environmental Law, which has harmonised and codified the numerous pieces of legislation that previously ruled the various environmental issues (waste, water pollution, air pollution etc.) and has provided more specific rules with regards to issues that the previous legislative framework had not resolved, such as the rules applicable to the owner of a contaminated site who had not caused the contamination.

The Code of Environmental Law has been recently amended by Legislative Decree 16 January 2008, n. 4, which has, *inter alia*, set out specific rules concerning the environmental impact assessment procedures and the strategic environmental assessment procedure (see also question 2.3 above).

Another recent development regards the availability of class actions in the Italian legal system. Law 24 December 2007, n. 244, has introduced in the Italian legal system the possibility to file "class actions" for the redress of damages due to, *inter alia*, non-

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contractual liability. This might include also damages caused from breach of environmental legislation. According to the new legislation if the class actions are successful the Court establishes the amount of damages to be paid to each individual who has participated in the class action. This legislation is very new and is virtually untested (see also question 8.5 above).

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