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Environment - Switzerland

Federal Supreme Court confirms scope of 'polluter pays' principle

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The Federal Supreme Court⁽¹⁾ recently confirmed the scope of the 'polluter pays' principle. In particular, the decision addressed the position of persons who own or possess contaminated sites but who did not cause the pollution through their own conduct.

Facts

The landfill concerned operated between 1962 and 1975. During that time, approximately 1.5 million cubic metres of waste was deposited on the site. In 2001 and the following years, site assessments showed that a clean-up was necessary in order to protect certain water bodies.

In 2010 the Canton of Berne's water and waste authority issued a cost-allocation ruling regarding investigation and monitoring measures, as well as certain initial clean-up measures. The authority allocated the costs as follows:

- 30% to the City of Berne, which participated in the operation and supply of the site;
- 60% to the landfill operator; and
- 10% to the current owners of the site.

The current owners were the legal successors of the owners from the time when the landfill was in operation.

The owners challenged the ruling and requested an exemption from bearing any costs. In particular, they claimed that they did not qualify as polluters according to Swiss environmental laws and therefore should not bear costs relating to the landfill. The owners argued that:

- they were the mere possessors of the site and did not cause the pollution;
- they were the legal successors of the former owners and were not in a position to prevent the pollution; and
- they did not benefit from the landfill.

The court disagreed with the owners. Nevertheless, it set aside the contested judgment and returned the case to the cantonal water and waste authority for further clarification of the facts and new decision.

'Polluter pays' principle

The Environmental Protection Law⁽²⁾ determines that the polluter must bear the costs of the measures required to assess, monitor and clean up a polluted site (Article 32d). The same provision also governs the liability where two or more persons are involved. They bear the costs according to their share of the responsibility. The first to bear costs is the person who caused the measures through his or her conduct. Anyone who is responsible simply as the possessor of the site concerned bears no costs if, by exercising the required care, he or she could have had no knowledge of the pollution.⁽³⁾

The law does not further define the meaning of the term 'polluter'. Jurisprudence and prevailing legal doctrine base their interpretation of 'polluter' on the disturber concept pursuant to police law principles. Accordingly, a disturber is not only the person who caused the disturbance by his or her own behaviour but is also the person who controls the source of disturbance. Consequently, the possessor of a contaminated site at the time of its clean-up is always a polluter for environmental law purposes, even if it acquired the site when it was already polluted and therefore had no possibility to avoid the contamination.

The Federal Supreme Court confirmed the interpretation even though it had been criticised from different sides. The court based its view on the wording of the law, which explicitly mentions the possessor as a

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possible cost bearer regardless of whether it acquired the site before or after the pollution occurred. Further, the court referred to the historical interpretation of the law and held that the broad scope of the term 'polluter' corresponds to the original intention of the law. It also held that the exception clause for diligent possessors would be irrelevant if the acquirer of a polluted site is not entailed in the definition of 'polluter'.

Cost share of possessor

As to the cost allocation, the court held that a general rule allocating 10% to 30% to the possessor of a contaminated site is not in any case appropriate. In particular, the mere position as possessor of the concerned site at the time of cost allocation is insufficient for such a cost share. Rather, the court held that such a cost share is justified only if further circumstances are present, for instance:

- if the current possessor was already responsible for the site at the time of the contamination and if it was in the position to prevent the pollution;
- if the current possessor is liable for the causation of its legal predecessor; or
- if the current possessor obtains a substantial economical benefit from the pollution or clean-up.

In the absence of such circumstances the court held that even a 10% cost share is excessive and therefore unlawful. Depending on the circumstances of a particular case, the entire release of a possessor from bearing costs can be justified – even if that particular possessor was unable to escape liability as a diligent possessor which could have had no knowledge of the pollution.

Transfer of cost bearing duty

The court also summarised the situation regarding the transfer of the cost-bearing duty in the case of legal succession. Thereby, cases of singular succession (eg, sales of contaminated sites) and cases of universal succession (eg, transfers of assets and liabilities and transfers of businesses) must be distinguished. Also, disturbers who caused the situation of disturbance by their own behaviour must be distinguished from persons who control the source of disturbance (eg, owners and possessors). The following rules apply:

- In the case of a sale of a site, the possessor's latent cost-bearing duty passes to the acquirer (technically, a new latent cost-bearing duty originates at the acquirer due to its position as the new owner).
- In contrast, on the sale of a site, the cost-bearing duty of the selling disturber which caused the pollution by its own behaviour is not transferred to the acquirer but remains with the seller as its personal obligation.
- In certain cases of universal succession (transfer of assets and liabilities and transfer of businesses), the cost-bearing duty of the disturber which caused the pollution by its own behaviour is transferred to the acquirer.
- The same also applies to inheritance cases, where the debt of the deceased is transferred to the heirs through universal succession.

Comment

The Federal Supreme Court confirmed that the possessor of a contaminated site at the time of its clean-up is always a polluter for environmental law purposes, even if it acquired the site when it was already polluted and could therefore not avoid the contamination.

The court further confirmed that not only must the persons who caused pollution through their own conduct bear the costs of assessing, monitoring and cleaning up a polluted site, but such costs may also be allocated to persons who are only the possessors of the sites concerned if, by exercising the required care, they could have had knowledge of the pollution.

As to the amount of costs to be allocated to possessors, the court specified that a cost share of between 10% and 30% might be inappropriate if the persons concerned are in no way responsible for the pollution and if they do not benefit from the pollution or clean-up. For such cases, the court considers it possible to entirely release the possessors from bearing costs.

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Endnotes

(1) Federal Supreme Court, 1C_231/2012, November 29 2012.

(2) *Bundesgesetz über den Umweltschutz*, SR 814. 01.

(3) For further details regarding the treatment of polluted sites please see "[Overview \(January 2013\)](#)", "[Clean-up of polluted sites: relative and absolute time limitation](#)" and "[New provision on clean-up of contaminated sites](#)".

Comment or question for author

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