

EFFACE Public Workshop

Directive 2004/35 – Remedies and Sanctions

Prof. Barbara Pozzo
University of Insubria -
Como

Directive 2004/35

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Art. 5 – Preventive action

- 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.
- operators have to inform the competent authority of all relevant aspects of the situation, as soon as possible.
- Activities of the competent authorities

Art. 6 – Remedial action

- Where environmental damage **has occurred** the operator shall, without delay, inform the competent authority of all relevant aspects of the situation
- Operator need to take 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

Art. 6 – Remedial action

- The operator further needs to take the necessary remedial measures, in accordance with Article 7.
- The competent authority may require the operator to take supplementary measures, may give instructions to the operator to be followed on the necessary remedial measures to be taken, or itself take the necessary remedial measures.

Art. 7 Determination of remedial action

- Operators shall identify, in accordance with Annex II, potential remedial measures and submit them to the competent authority for its approval.
- The competent authority shall decide which remedial measures shall be implemented in accordance with Annex II, and with the cooperation of the relevant operator, as required

Art. 7 Determination of remedial action

- Where **several instances** of environmental damage have occurred in such a manner that the competent authority cannot ensure that the necessary remedial measures are taken at the same time, **the competent authority shall be entitled to decide which instance of environmental damage must be remedied first.**
- In making that decision, the competent authority shall have regard, inter alia, to **the nature, extent and gravity of the various instances** of environmental damage concerned, and to the possibility of natural recovery. **Risks to human health** shall also be taken into account.

Art. 8 – Prevention and remediation costs

- The **operator shall bear the costs** for the preventive and remedial actions taken pursuant to this Directive.
- The **competent authority shall recover**, inter alia, via security over property or other appropriate guarantees from the operator who has caused the damage or the imminent threat of damage, **the costs it has incurred in relation to the preventive or remedial actions** taken under this Directive.

Art. 8 – Prevention and remediation costs

- the competent authority may decide **not** to recover the full costs:
 1. where the expenditure required to do so would be greater than the recoverable sum, or
 2. where the operator cannot be identified.

Art. 8 – Prevention and remediation costs

- **An operator shall not be required to bear the cost** of preventive or remedial actions when he can prove that the environmental damage or imminent threat of such damage:
 - was caused by a **third party and occurred despite the fact that appropriate safety measures were in place**, or
 - 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.

Annex II

- REMEDYING OF ENVIRONMENTAL DAMAGE
- I Remediation of damage to water or protected species or natural habitats
- II Remediation of land damage

Annex II

- The subdivision reflects the way environmental damage has been defined in art. 2
- Damage to water and biodiversity are defined with reference to previous EU legislation
- Damage to land is defined with reference to risk to human health

Remediation of damage to water or protected species or natural habitats

Remedying of environmental damage, in relation to water or protected species or natural habitats, is achieved through the restoration of the environment to its baseline condition by way of:

- primary,
- complementary and
- compensatory remediation

New terminology

- New concepts
- Neologisms in the various official languages
- Needed to defined by the Directive

Primary remediation

any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition.

Complementary remediation

any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services

Purpose of complementary remediation

- to provide a similar level of natural resources and/or services, including, as appropriate, at an alternative site, as would have been provided if the damaged site had been returned to its baseline condition.
- Where possible and appropriate the alternative site should be geographically linked to the damaged site, taking into account the interests of the affected population

Compensatory remediation

any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect;

Interim losses

losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect. **It does not consist of financial compensation to members of the public**

Purpose of compensatory remediation

- Compensatory remediation shall be undertaken to compensate for the interim loss of natural resources and services pending recovery.
- This compensation consists of additional improvements to protected natural habitats and species or water at either the damaged site or at an alternative site. It does not consist of financial compensation to members of the public

Process of remediation

Where **primary remediation** does not result in the restoration of the environment to its baseline condition, then **complementary remediation** will be undertaken. In addition, **compensatory remediation** will be undertaken to compensate for the **interim losses**.

Identification of remedial measures

Identification of primary remedial measures:

- Options comprised of actions to directly restore the natural resources and services towards baseline condition on an **accelerated time frame**, or through **natural recovery**, shall be considered

Identification of complementary and compensatory remedial measures

- When determining the scale of complementary and compensatory remedial measures, the use of **resource-to-resource** or **service-to-service** equivalence approaches shall be considered first. Under these approaches, actions that provide natural resources and/or services **of the same type, quality and quantity as those damaged shall be considered first.**
- Where this is not possible, then **alternative natural** resources and/or services shall be provided. For example, a reduction in quality could be offset by an increase in the quantity of remedial measures

Identification of complementary and compensatory remedial measures

- If it is not possible to use the first choice resource-to-resource or service-to-service equivalence approaches, then **alternative valuation techniques** shall be used.
- The competent authority may prescribe the method, for example **monetary valuation**, to determine the extent of the necessary complementary and compensatory remedial measures.
- If valuation of the lost resources and/or services is practicable, **but valuation of the replacement natural resources and/or services cannot be performed within a reasonable time-frame or at a reasonable cost**, then the competent authority may choose remedial measures **whose cost is equivalent to the estimated monetary value of the lost natural resources and/or services**

Choice of the remedial options

- The **reasonable remedial options** should be evaluated, using best available technologies, based on the following criteria:
- The effect of each option on public health and safety, The cost of implementing the option, The likelihood of success of each option, The extent to which each option will prevent future damage, and avoid collateral damage as a result of implementing the option, The extent to which each option benefits to each component of the natural resource and/or service, The extent to which each option takes account of relevant social, economic and cultural concerns and other relevant factors specific to the locality, The length of time it will take for the restoration of the environmental damage to be effective, The extent to which each option achieves the restoration of site of the environmental damage, The geographical linkage to the damaged sit

- the competent authority is entitled to decide that no further remedial measures should be taken if:
- (a) the remedial measures already taken secure that there is no longer any significant risk of adversely affecting human health, water or protected species and natural habitats, and
- (b) the cost of the remedial measures that should be taken to reach baseline condition or similar level would be disproportionate to the environmental benefits to be obtained

Remediation of land damage

- The necessary measures shall be taken to ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer poses any significant risk of adversely affecting human health.
- The presence of such risks shall be assessed through risk-assessment procedures taking into account the characteristic and function of the soil, the type and concentration of the harmful substances, preparations, organisms or micro-organisms, their risk and the possibility of their dispersion. Use shall be ascertained on the basis of the land use regulations, or other relevant regulations, in force, if any, when the damage occurred

Remediation of land damage

- If the use of the land is changed, all necessary measures shall be taken to prevent any adverse effects on human health.
- If land use regulations, or other relevant regulations, are lacking, the nature of the relevant area where the damage occurred, taking into account its expected development, shall determine the use of the specific area.
- A natural recovery option, that is to say an option in which no direct human intervention in the recovery process would be taken, shall be considered

Conclusions and some comparisons with Directive 2008/99:

- Directive 2004/35 provides innovative Guidelines as far as remedies and sanctions are concerned
- *Restitutio in integrum* is always preferable
- No criteria on the monetary evaluation of environmental damages, but national initiatives (évaluation du préjudice écologique; Ökonomische Bewertung von Umweltschäden)

Conclusions and some comparisons with Directive 2008/99:

- Very different legislating technique in the ECD
- Art. 5 and Art. 7 of ECD simply refer to the fact that *Member States shall take the necessary measures to ensure that the offences taken in consideration by the Directive are punishable by effective, proportionate and dissuasive criminal penalties*

Conclusions and some comparisons with Directive 2008/99:

- At national level the interpretation of «effective, proportionate and dissuasive» does not necessarily mean a preference towards restitution in integrum and reinstatement measures
- On the contrary: it generally means a preference towards monetary compensation