

ENVIRONMENTAL DAMAGE IN ITALY IN RELATION TO DIRECTIVE 2004/35/EC

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SUMMARY

This paper looks at current Italian legislation and case law on environmental damage in light of the new European Directive (Directive 2004/35/EC), which is dedicated to the prevention and remedying of environmental damage.

1 INTRODUCTION

Directive 2004/35/EC on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage is important because:

- 1) it recognises that the environmental situation in Europe has accelerated due to the loss of biodiversity and the dangerous contamination of many sites;
- 2) it recognises - implicitly - that the principles of “prevention” and the “polluter pays” have not been effective, thereby making it necessary to establish downstream common legal regulations on environmental damage to avoid further negative consequences;
- 3) for the first time in Europe, a common framework of regulations has been introduced within the Member States, mirroring the preventive model (EIS, SEA and Integrated Pollution Prevention and Control), closing downstream the European legal system, according to a principle of integration, proportionality and subsidiarity;
- 4) it introduces an element of certainty in a delicate and complex area, taking the first positive step, in view of gradually harmonising the regulations of the individual Member States;
- 5) the common sectors involved (water, land and protected species and natural habitat) are the sectors most at risk;
- 6) special attention is focused on prevention, on the imminent threat of concrete environmental damage;
- 7) the privileged form of remediation is not the monetary form but that of an effective natural return to original conditions, with strict application of the principle that the polluter pays for the damage it has caused;
- 8) proper space has been dedicated to strict liability in relation to intrinsically risky activities, whilst accepting, in other cases, liability for fault or negligence;
- 9) individuals and NGOs are given rights to information, participation and access in administrative and legal proceedings with the resulting possibility of channelling environmental damage in its personal and social dimension towards the institutions;
- 10) apart from having a “natural”

dimension, “environmental damage”, as a legal category, acquires a “Community” dimension and promotes the evolution of commonly integrated legal systems in the sense of also bringing the objective of humanising the international dimension closer.

Anti-legal environmental damage also exists in the “international sphere” and it appears to be urgent that the International Community becomes aware of this by creating adequate mechanisms for “governance” and for a global jurisdiction, giving access to men and women, as individuals, and not merely to the States.

2 DIRECTIVE 2004/35/EC

2.1 Legal Basis

Directive 2004/35/EC legally entered into force for the Member States from its date of publication on 30th April 2004 with the obligation of the Member States in relation to the common basic nucleus to implement it by 30th April 2004. Member States may maintain their national regulations if they are more comprehensive or more stringent (before and after 30th April 2007). The part of the Directive which is sufficiently clear, precise, and detailed enters into force by 30th April 2007, even without formal reception by the Member States. It is the European Court of Justice which is the competent court for deciding whether Member States have failed, even partially, to comply with the Directive.

2.2 Environmental Damage – Main Characteristics

2.2.1 Subject matter

The subject matter covered in the Directive includes: (1) damage to any aspect of biodiversity (Habitat Directive 79/409/EEC; Birds Directive 92/43/EEC); (2) water damage indicated in the Framework Directive 2000/60/EEC; and (3) land damage.

2.2.2 Definitions

In the Directive, damage to protected species and natural habitats is understood as being “any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species” and on the return of the natural resources to their baseline condition.

Likewise, water damage includes damage that significantly adversely affects the “ecological status” and the “ecological potential”, as well as the chemical and/or quantitative status, of the waters involved. Also, in this case, the measure for remediation is return to the original conditions.

Land damage is restricted to “contamination” creating a significant risk to human health.

2.2.3 Scope

In the Directive, the damage must have some general characteristics. It must be concrete, measurable (or quantifiable) and significant.

Preventive measures are also provided for in the case of imminent threat of damage, that is, the “sufficient likelihood that damage will occur”, or an actual and concrete threat of future damage.

2.2.4 Activities Which Can Cause Environmental Damage

The Directive, under Art. 3, applies to two kinds of occupational activities: (1) those listed in Annex III (these are 12 occupational activities deemed to be intrinsically risky and already regulated by special directives) and (2) other occupational activities (that is, those not listed in Annex III), where damage or a threat of damage to protected species and natural habitats is always caused by fault or negligence.

2.2.5 Parties Subject to Liability

Under the Directive, not only private persons and public persons but also multiple parties causing the damage are subject to liability for causing environmental damage.

2.2.6 Criteria for Remedial Action

With regard to remedial action under the Directive, the two basic rules are that the operator bears the cost of remedial action and that remediation is understood as material restoration (full or equivalent). Only in exceptional cases is compensation provided for as set out in Annex III of the Directive.

2.2.7 Prevention and Remediation Costs

In the Directive, the operator bears all the costs for the damage. However, whenever there are multiple parties, national regulations are applied. Also whenever there is pollution of a diffuse or general character, liability is excluded if there is no causal link to the damage and the identified polluters.

The cost includes damage to the environment; damage to related services; administrative, legal, and enforcement costs; costs of data collection; and monitoring and supervision costs.

The competent authority has the right to enforce the measures (including the right to recovery of the sums spent within 5 years). Whereas, although private persons have the right to health and the environment, they do not have the right to compensation for environmental damage.

2.2.8 The Economic Valuation Of Environmental Damage

The “polluter pays” principle requires that all the costs for natural primary restoration or for its equivalent are considered. No specific economic model for valuation is provided although the following criteria are indicated:

- priority for primary remediation;
- in cases of impossibility or difficulty, to guarantee equivalent natural resources and services (complementary remediation) in an alternative location geographically linked to the damaged site;
- to compensate (and, therefore, to

- include in the costs) interim losses whilst awaiting natural recovery;
- if it is not possible to use resource-to-resource or service-to-service equivalence, then the method of monetary valuation is adopted;
- the choice of remedial options takes into account the need to use best available technologies, considering its cost, its effect (including in the future), the time frame for recovery, the specific nature of the situation of the site, and other social and cultural factors.

For the remediation of land damage, there are specific procedures for risk assessment and for the elimination of the harmful substances. If the use of the land is changed, land use regulations are resorted to. There are also provisions for the marginal case of natural recovery in which there is no direct human intervention in the recovery process (where this is possible).

2.2.9 Standing

It is well known that environmental damage has a three-fold dimension – personal, social and public. The Directive, in Art. 12, therefore, recognises that both natural and legal persons, and NGOs, have a role in being able to put an administrative procedure before the competent authorities, consisting in a request for action, accompanied by relevant information and data, as well as to take part in the proceedings taken by the competent authorities on their own initiative.

Art. 13 enables natural and legal persons to have access to a review procedure before a judicial or administrative body. This is, of course, without prejudice to any provisions of national law which regulate access to justice.

2.2.10 Civil Liability

It is expressly stated in Art. 3 (b) of the Directive that there is liability for fault or negligence for occupational activities (other than those listed in Annex III) which cause damage to protected species and natural habitat. Implicitly, it can therefore be

argued that there is strict liability for the activities provided for in Annex III (with the resulting shifting of the burden of proof).

2.2.11 Cases Of Exceptions To Civil Liability

The Directive, in Art. 4, sets out that it will not cover environmental damage or its imminent threat in cases of: (1) a natural phenomenon of exceptional, inevitable and irresistible character; (2) marine transport of nuclear substances; (3) pollution of a diffuse character; (4) national defence; and (5) international security and measures for protection against natural disasters.

2.2.12 Further Cases Of Exceptions To Civil Liability

Under the Directive, further cases of exceptions to civil liability relate to the lack of a causal link, the lack of fault or negligence, the lack of proof of the damage, authorised activities (on certain conditions), and delegated activities.

3 ITALIAN LAW

3.1 Legal Basis

The main rule on environmental damage, under current Italian law, is to be found in Article 18 of Law No. 349 of 8 July 1986, which established the Italian Ministry of the Environment (today known as the Ministry of the Environment and Territory).

3.2 Environmental Damage – Main Characteristics

3.2.1 Unitary Nature

Environmental damage is considered to be any damage to one of the components of the environment (air, energy, flora, fauna, landscape, land set-up, nature, noise, soil, waste, water, etc.)

3.2.2 Public Nature

It is considered damage to the State or to other territorial public bodies (Region, Province, Municipality, Park Administrations).

3.2.3 Social Nature

Environmental damage is not only considered as damage to the State, but also to society and, therefore, to social groups (NGOs). As a result, standing (access to justice) is also granted to national and local environmental protection associations. These social groups may request the administrative courts to declare administrative acts void as illegal. They can take action before the civil courts for restoration (but, in the case of compensation for damages, only the State and the other public parties are entitled to this, except for the right to reimbursement for legal costs).

In the same way, environmental protection associations may act as an aggrieved party in criminal proceedings to recover damages (“parte civile”) in proceedings regarding offences against the environment, but damages are only paid to the State, save for the right to reimbursement for legal costs.

3.2.4 Personal Nature

Environmental damage can cause damage to the health and property of individuals. These may take action against the perpetrator of the damage in accordance with general principles.

Any individual, even when there is no direct damage to his/her health or property, may join a “popular action” which is of a substitutive and supplementary kind, directed at reinforcing the autonomous duties of local bodies (Municipalities and Provinces).

3.2.5 Patrimonial Nature

Environmental damage has an economic value. The damage is of both a patrimonial nature and a fiscal nature, in the sense that it includes not only the financial losses of public bodies but also damage to the community, encumbered with additional economic charges.

3.2.6 “Unjust” Nature

Not all environmental damage is taken into consideration, but only that

which is “contra ius”, namely, that which is legally pertinent. It is necessary, case by case, for the courts to verify which “legal provisions” or “administrative measures” adopted on the basis of the law have been infringed.

3.2.7 Behavioural Nature

“Substantive” and not merely “formal” damage to the environment is required, that is, an “alteration”, a “deterioration”, the “total or partial destruction”, a “compromising” in some way that can be measured and quantified. The courts will only hear an action when there is an existing and concrete danger to the environment.

3.2.8 Perpetrator Of The Damage

This may be “anyone” or, in other words, a private or also a public party. The activity exercised by the perpetrator does not need to be “occupational” in nature, except in the case of some dangerous activities.

3.2.9 Liability for Fault or Negligence

In Italy, the principle of “subjective” liability (for fault and negligence) is in force, which is to be proven case by case. Strict or “objective” liability (with the shifting in the burden of proof) constitutes the exception.

It should, however, be stressed that liability for negligence is interpreted very strictly in case law, in the sense that it not only arises in the case of negligence, recklessness or inexperience, but also when there has been a failure to take proper preventive technical and organisational measures for avoiding the damage.

Except in extreme cases (earthquakes, floods), liability is always recognised, with the exception of ordinary cases of exemptions to liability (fortuitous event, force majeure, economic grounds due the excessive nature of the costs of adopting the best available technology, social grounds caused by a drop in employment, etc.).

3.2.10 Priority For The Restoration Of Places To Their Prior State

This aspect has been underlined in case law but, in practice, the monetary quantification of the environmental damage still prevails, fixed “on equitable grounds” by the courts on a case by case basis. There are some cases of the assessment of damage which consider “the cost required for restoration” and “the profit gained by the perpetrator as a result of his illegal behaviour towards the environment” more strictly.

3.2.11 Parties Subject To Liability

The principle is in force whereby each party answers in court within the limits of its own liability.

3.2.12 Contaminated Sites

Regulations have been introduced ad hoc within the sectors of water (Art. 55 of Law 152/99) and waste (Arts. 17 and 51 bis of Law 22/97). The failure to reclaim contaminated sites is considered an offence, as well as a civil wrong, although liability is not retroactive.

4 IMPORTANT CASES IN ITALY

4.1 Case of Air Pollution from the Enichem Plant of Marghera

The case took place on 27/12/1998 in Venice. The Court of Venice, in its judgment of 27 November 2002, No.1286 (published in www.giuffrè.it/riviste/2ga) found those in charge of the plant to be criminally responsible for failing to adopt the necessary measures for preventing the occasional emission of toxic gas (ammonia) with resulting harm to the employees and the natural resources.

The decision is important due to the criteria applied in quantifying the civil damages.

Even if this emission of gas only lasted two hours, the damages to be awarded were 225,000 Euro, of which 25,000 Euro were for the cost of restoring the environment and 200,000 Euro corre-

sponded to the illegal profit made.

The specific provision on environmental damage (Art.18 of Law 349/86) was strictly interpreted, in the sense that the damage was held to encompass the exact wealth produced thanks to the failure to act which caused the environmental damage (to the air and water).

4.2 The Wreck of the Oil Tanker Haven in the Ligurian Sea

On 11 April 1991, there was a fire on board the oil tanker Haven in the Genoa – Arenzano roadstead. The oil tanker sank on 14 April. The serious accident resulted in the death of the captain and some members of the crew as well as serious environmental damage.

The Court of Genoa, in its judgment of 21/11/1997 No.945, failed to find any definite cause for the damage and therefore the defendants were acquitted. Under Law 16 July No. 239, a compromise was reached whereby the State was to be compensated for damages of 117,6 thousand million Italian lire (recognising in this way the civil damages of this serious accident).

4.3 Vicissitude of the Red Mud of Scarlino, dumped by the Montedison Company in the Sea off Corsica

The Court of Bastia, in Corsica, in its judgment of 4 July 1985, No.422, convicted the Italian Montedison company and ordered it to pay 180,000 French francs to the Prud'Homme of the fishermen of Bastia (for damages for the increase in costs of production due to the fishing boats having to lengthen their voyages in order to avoid the polluted zones and for damage due to the loss of fish) and 250,000 French francs to the Department of Haute Corse and that of Corse-du-Sud (damage to their image). The French judges held that the burden of proof rests on those who claim they have suffered harm, according to general principles, but that in environmental matters, the particular difficulty with regard to proof must be taken into consideration. This is a

case of transborder environmental damage, at least partially, resolved with the rules of judicial collaboration between different countries, according to international law.

4.4 Dumping Hazardous Waste Into The Sea (Titanium Dioxide)

The Auditors' Court, in joint session, in a decision of 16 June 1984 (in *Il Foro Italiano*, Rome, 1985, 38) once again dealt with the so-called red mud of Scarlino, that is, the waste of the industrial processing of titanium dioxide, dumped by Montedison in the Tyrrhenian Sea.

The decision upheld the conviction of the Harbour Master of the Port of Leghorn (for having granted the permit for the discharges) and of the Director of the Central Hydrobiology Laboratory of the Ministry of Agriculture and Forests (for having given a favourable technical opinion), in violation of their duties.

The decision is very important because:

- it considers environmental heritage (including the open sea) as legal heritage (as legislation protecting it exists), apart from whom it “belongs to”;
- it considers environmental damage as public damage which the State must restore;
- it considers public officials, who intentionally or negligently, in breach of their official duties, cause the damage, responsible for the damage.

Therefore, so-called environmental damage comes within the attempt to construct a new, wider concept of public damage, through case law (see Paolo Maddalena, <<Danno ambientale, danno pubblico e responsabilità amministrativa, in *Il Consiglio di Stato*, Rome, 1982, The, 1423; on the red mud of Scarlino: K. Sieher, *Protezione dell'ambiente trasfrontaliero: esperienze europee di un problema mondiale*>> in *Il Foro Italiano*, Rome, 1981, V,314).

4.5 Porto Marghera (Venice)

This is one of the most important cases to have taken place in Italy on the disposal of toxic and dangerous waste. Montedison, through three plants (Fertimont, Montefluos and Ausiodet) in Marghera, dumped (by using special tankers) about 1 million tons of phosphorous-based substances (waste from the production of phosphoric acid and hydrofluoric acid) and other noxious substances (arsenic, chromium, zinc, iron, radium266, phosphates) into the sea. However, at the end of an investigation that lasted three years, the Public Prosecutor of the Court of Venice, on 28 July 1980, called for the acquittal of the 11 managers from Montedison and another company (Alumental), on the grounds that the industrial discharges were not dangerous.

4.6 Genoa

The Stoppani company of Cogoleto (25kms from Genoa) produced dichromat for tanneries and dumped the related sludge into the sea (70 thousand tons of chromite per year). Following the damage claimed by fishermen, to swimming and to flora, and to marine fauna, the Magistrate of Sestri Ponente opened an inquiry.

Another inquiry began before the Magistrate of Genoa, with a complaint lodged on 3 July 1985 by a group of citizens and by environmental associations (such as Lega per l'Ambiente). It was claimed in this complaint that the dumping of toxic and noxious waste into the sea was absolutely prohibited because it was illegal and, as a result, there was no justification for the Minister for the Merchant Navy to grant permits to the Stoppani company on 17/6/1983, with subsequent extensions until 19/7/1984 and 31/12/1985 and up until July 1986.

Subsequently, the Ministry for the Environment prohibited this activity with a special ordinance that finally closed the case: no more dumping into the sea.

4.7 Sinking of the Greek cargo ship Klearchos in Sardinia

On 20 July 1979 the Greek cargo ship Klearchos sank between the islands of Molara and Tavolara in Sardinia with a cargo of toxic substances on board.

The Magistrate of Olbia intervened on 10 August 1979, instructing an expert to inspect the holds of the wreck.

4.8 Sinking of the Cavtat off Otranto

The cargo ship Cavtat was carrying 909 drums of tetramethylead, a very poisonous substance, and it sank on 4 July 1974 off Otranto. With the great commitment of the Magistrate of Otranto, 863 drums were recovered. The captain of the ship was found guilty on 29 May 1985 by the Court of Lecce.

4.9 Augusta (Sicily)

On 29 September 1979, the Magistrate of Augusta sequestered three large industrial plants (Esso, Montedison and Liquichimica) for dangerous industrial discharges into the soil and water (bay of Augusta) and emissions into the air. The trade unions had previously called a strike (on 16 September) to demand the ecological protection of the roadstead polluted by the petrochemical plants. The criminal proceedings ended on 21 January 1981 with the sentencing of the managing director of the Esso refinery to 2 months 10 days in jail.

4.10 Gela (Sicily)

On 15/11/1979, the Magistrate of Gela sequestered the Anic petrochemical plant of Gela.

The proceedings ended on 21 February 1981 with the manager of the plant being sentenced to 20 days jail.

4.11 Dumping of Toxic Substances in the Tremiti Islands

In the course of 20 trips between Manfredonia (Puglia) and the beautiful Tremiti Islands in front of it, the ship "Irene" discharged toxic substances without a permit (9 thousand tons). The Tremiti Islands were used as a place for dumping the

waste. The Magistrate of Manfredonia took action and, on 3 April 1981, arrested the captain and the owner of the ship.

The situation has now changed.

4.12 Seveso

This case is famous at an international level. On 10 July 1976, a toxic cloud containing dioxin was released from the ICMESA plant in Seveso near Milan, causing serious harm to persons and things over a vast territory. The Court of Monza, in a judgment of 24 September 1983, convicted the technical manager of the ICMESA plant (to 5 years imprisonment); the technical director of the Givaudan group, of which ICMESA was a part (to 5 years imprisonment); the head of designing and engineering of the ICMESA plant at the time of the construction of the reactor (to 4

years imprisonment); the chairman of the Board of Directors of ICMESA (to 4 years imprisonment); the head of engineering and security systems sector (to two and a half years imprisonment).

The defendants and ICMESA were ordered to pay damages to the aggrieved parties acting in criminal proceedings to recover damages (the mayor and 17 groups of persons).

At Community level, the Seveso case gave impulse to the Directive 82/501/EEC on the major-accident hazards of certain industrial activities. Despite the sad experience it had, Italy was slow to implement the Directive, thereby deserving a finding by the European Court of Justice in Luxembourg that it had failed to fulfil its obligations under Community law (on 1 March 1983 in *Commission v. Italy*).