Abstract

The remedial measures in the protection of the environment. This thesis focus on the remedial measures which belong to legal instruments and create an integral part of the public law. The public bodies, which are responsible for the enforcement of public interests, are in charge of enforcement of remedial measures to be done. As in the international law, the state is primarily responsible for remedying of damages arising from activities under its jurisdiction. Despite the remedial measures are incorporated into almost all legal enactments, the quality of the legislature is rather low and this legal tool has been beyond the academical interest.

The remedial measures represent one of the most important instruments of the environment protection and are closely connected with the principles of the environment protection, i.e. the principle of the sustainable development, the polluter-pays principle, the preventive principle and the principle of the State responsibility. The remedial measures create a part of the measures within the environment protection, which primarily work as subsequent measures and partly as continuous and preventive ones.

The remedial measures comprise different kinds of measures, the main goal of which is to remedy changes which are considered to be undesired from the legal and factual point of view (pollution, contamination etc.). Both in the literature and in the legislature, the wording is not uniformally used and differently used terms are not always of the same meaning (compensation, restitution, remedy, restoration etc.). The Directive itself defines the remedial measures as any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or services, or to provide an equivalent alternative to these resources or services. In general, the responsible party may be asked to restore the damaged environment to a previous state or to compensate this damage in case the restoration is not possible or effective.

In a wider context, the remedial measures shall be considered as an instrument which is aimed to remedy „undesirable state“ which is contradictory to the public interest protected and guaranteed by the public authority. The primary aim thereof is not to punish but rather to remedy and to affect the future. The remedial measures are based on the system of the lability in the environmental law. The environment is primarily the general subject to be protected by the remedial measures including the „un-owned“ environment or res communes as air, wild animals etc. As the responsible party, is considered a person who has caused the breach of the law, in particular an owner, operator, transporter etc. In case there are more persons to be hold responsible, they shall be responsible severally and jointly. To assure that all necessary remedial measures will be undertaken, the owner of the contaminated land can be hold responsible secondarily. In case of the insolvency or dissolution of the responsible person or for any other reason causing it´s failure to act, the public authority shall guarantee that all necessary remedial measures will be undertaken by itself or by a third party. The liability shall be defined as strict and there are only limited posibilities for the breaching party to release from liability (e.g. in case of force majeure). A prerequisite for the arising of the liability is the causal link between activity or inactivity of the responsible party and the considerable negative impact on the environment foreseen by the law. However, in case of the damage caused to the environment, the possibility to prove the causal link is very limited for many reasons. To solve this problem, the limited causal link scheme was adopted (see article 10 Lugano Convention). Furthermore, it is often almost impossible to quantify the negative impact itself, because the un-owned environment can be affected as well. Therefore the „harm to the environment“ scheme was created, which covers as well harmfull effect to the res communes. This approach should limit the shortages of the traditional damage scheme predominantly based on the financial quantification. Harm to the environment can be caused accidentally or gradually and it can often occur in the form of the historic pollution (e.g. contaminated land).

Looking at the history of the Czech environmental law, we can find the first regulation concerning the remedial measures in some of the laws from the fifties of the last century, e.g. in regulations concerning the forest management. The real progress in

this field was made in the protection of the ground and subterestrial waters. § 27 of the Water Act from 1973 as amended later regulated the remedial measures concerning not only the water protection itself but indirectly the protection of the non-water environment as well, in particular the soil. Recently, both in the Czech Republic and in the EU, we can see the gradual evolution from the „piece-meal“ approach to the overall regulation. The result of this effort represents the EC Directive No. 2004/35/EC, which was adopted to address effectively and efficiently site contamination and the loss of biodiversity in the Community. To implement this Directive in the Czech Republic, the new Act on evironmental harm and its restoration was adopted in 2008. This Act should play the key role in the scheme of the restoration of the environmental damage, in particular in the protection of the water, soil and biodiversity, and it is to ensure, in accordance with the polluter-pays principle, that those who contaminate clean-up the pollution or pay for the clean-up.

If we want to describe and assess remedial measures in the protection of the environment, not only the substantive law but the procedural law shall be taken into the consideration as well. The responsible party shall be obliged to undertake remedial measures as soon as it gets the knowledge of their necessity. In case of inactiveness of the responsible party, the competent authority may require the responsible party to take the necessary restoration measures or alternatively the competent authority may implement the measures itself or it makes them implemented by a third party. The process of the law enforcement comprises three stages, i.e. the inspection, the administrative procedure and, if necessary, the execution. In-process, the material limits, which are to be achieved by the respective remedial measure, shall be defined by the competent authority (administrative body), as well as the time framework whithin the remedial measure is to be undertaken, must be included in an obiter dictum of the rendered administrative decision. In case of an accident or other state of emergency, the competent authority shall be entitled to render the decision promptly and on-site. Because some of the remedial measures completion can be time-demanding and the conditions during the pending time can change, the competent authority shall be entitled to amend its decision to cope with these changes. Taking into consideration that environmental assets (biodiversity and waters to a greater

extent) are often not a subject of propriety rights, provisions should be made to allow qualified entities (e.g. the NGOs) not only to request the competent authority to take an appropriate action but to participate in the administrative process itself either.

To assure that all imposed remedial measures are taken properly and timely, the system of quarantees shall be created as a part of the regime. In particular, the financial securities as the mandatory insurance, monetary reserve or various kinds of ecological funds can play an important role in the enforcement of the legal rules.

As a mixed approach to the issue, the US Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was adopted in 1980 which represents a „hybrid“ solution between the public and private law approaches, whrereas the public law elements prevail. The CERCLA focuses primarily on cleaning-up of contaminated lands. This act became an inspiration for the Directive itself; contrary to the Directive, it has the retroactive effect.

The conclusion is that the remedial measures in the protection of the environment shall remain under the public law regulation scheme and the public authority shall be responsible for the enforcement of the respective law. In the Czech Republic, the general rules concerning the remedial measures could become either an integral part of the possibly adopted Environmental Code or they could remain in existence in particular legal enactments. Probably, more important issue than the way of the enactment is the enforcement of the existing law and the environmental efficiency of the regulation. As the results of the efficiency test of the CERCLA in U.S. showed, the avarage period for the clean-up of one contaminated area was from 8 to 13 years and only 217 from 1200 registred contaminated lands were cleaned up during the period from 1980 to 1993.