

JUDGMENT OF THE COURT (Grand Chamber)

9 March 2010*

In Joined Cases C-379/08 and C-380/08,

REFERENCES for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale della Sicilia (Italy), made by decisions of 5 and 19 June 2008 respectively, received at the Court on 21 August 2008, in the proceedings

Raffinerie Mediterranee (ERG) SpA (C-379/08),

Polimeri Europa SpA,

Syndial SpA

v

Ministero dello Sviluppo economico,

* Language of the case: Italian.

Ministero della Salute,

Ministero Ambiente e Tutela del Territorio e del Mare,

Ministero delle Infrastrutture,

Ministero dei Trasporti,

Presidenza del Consiglio dei Ministri,

Ministero dell'Interno,

Regione siciliana,

Assessorato regionale Territorio ed Ambiente (Sicilia),

Assessorato regionale Industria (Sicilia),

Prefettura di Siracusa,

Istituto superiore di Sanità,

Commissario Delegato per Emergenza Rifiuti e Tutela Acque (Sicilia),

Vice Commissario Delegato per Emergenza Rifiuti e Tutela Acque (Sicilia),

Agenzia Protezione Ambiente e Servizi tecnici (APAT),

Agenzia regionale Protezione Ambiente (ARPA Sicilia),

Istituto centrale Ricerca scientifica e tecnologica applicata al Mare,

Subcommissario per la Bonifica dei Siti contaminati,

Provincia regionale di Siracusa,

Consorzio ASI Sicilia orientale Zona Sud,

Comune di Siracusa,

Comune di Augusta,

Comune di Melilli,

Comune di Priolo Gargallo,

Azienda Unità sanitaria locale N° 8,

Sviluppo Italia Aree Produttive SpA,

Invitalia (Agenzia nazionale per l'attrazione degli investimenti e lo sviluppo d'impresa) SpA, formerly Sviluppo Italia SpA,

intervening parties:

ENI Divisione Exploration and Production SpA,

ENI SpA,

Edison SPA,

and

ENI SpA (C380/08)

v

Ministero Ambiente e Tutela del Territorio e del Mare,

Ministero dello Sviluppo economico,

Ministero della Salute,

Regione siciliana,

Istituto superiore di Sanità,

Agenzia per la Protezione dell'Ambiente e per i Servizi tecnici,

Commissario delegato per l’Emergenza rifiuti e la Tutela delle Acque,

intervening parties:

Invitalia (Agenzia nazionale per l’attrazione degli investimenti e lo sviluppo d’impresa) SpA, formerly Sviluppo Italia SpA,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta, P. Lindh and C. Toader (Rapporteur), Presidents of Chambers, C.W.A. Timmermans, K. Schiemann, P. Küris, E. Juhász, A. Arabadjiev and J.-J. Kasel, Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 September 2009,

after considering the observations submitted on behalf of:

- Raffinerie Mediterranee (ERG) SpA, by D. De Luca, M. Caldarera, L. Acquarone and G. Acquarone, avvocati,

- Polimeri Europa SpA and Syndial SpA, by G.M. Roberti, I. Perego, S. Grassi and P. Amara, avvocati,

- ENI SpA, by G.M. Roberti, I. Perego, S. Grassi and C. Giuliano, avvocati,

- Sviluppo Italia Aree Produttive SpA and Invitalia (Agenzia nazionale per l'attrazione degli investimenti e lo sviluppo d'impresa) SpA, formerly Sviluppo Italia SpA, by F. Sciaudone, avvocato,

- the Italian Government, by G. Palmieri, acting as Agent, and D. Del Gaizo, avvocato dello Stato,

— the Commission of the European Communities, by C. Zadra and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 October 2009,

gives the following

Judgment

- 1 The references for a preliminary ruling concern the interpretation of the ‘polluter pays’ principle and Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56).

- 2 The references were made in proceedings between Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA, Syndial SpA and ENI SpA and various national, regional and municipal authorities in Italy concerning the measures for remedying environmental damage adopted by those authorities in relation to the Augusta roadstead (Italy), around which are located the installations and/or land of those companies.

Legal context

European Union law

- 3 The recitals in the preamble to Directive 2004/35 which are relevant to the present cases are worded as follows:

- ‘(1) ... Local conditions should be taken into account when deciding how to remedy damage.
- (2) The prevention and remedying of environmental damage should be implemented through the furtherance of the “polluter pays” principle, as indicated in the Treaty and in line with the principle of sustainable development. The fundamental principle of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.
- (3) ... [T]he objective of this Directive, namely to establish a common framework for the prevention and remedying of environmental damage at a reasonable cost to society, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level ...

...

- (7) For the purposes of assessing damage to land as defined in this Directive, the use of risk assessment procedures to determine to what extent human health is likely to be adversely affected is desirable.

...

- (24) It is necessary to ensure that effective means of implementation and enforcement are available, while ensuring that the legitimate interests of the relevant operators and other interested parties are adequately safeguarded. Competent authorities should be in charge of specific tasks entailing appropriate administrative discretion, namely the duty to assess the significance of the damage and to determine which remedial measures should be taken.

...

- (30) Damage caused before the expiry of the deadline for implementation of this Directive should not be covered by its provisions.

...'

4 Article 2(11) of Directive 2004/35 defines ‘remedial measures’ as ‘any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II.’

5 Article 6 of the directive, entitled ‘Remedial action,’ provides as follows:

‘1. Where environmental damage has occurred the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:

(a) 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, and

(b) the necessary remedial measures, in accordance with Article 7.

2. The competent authority may, at any time:

(a) require the operator to provide supplementary information on any damage that has occurred;

- (b) take, require the operator to take or give instructions to the operator concerning, 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 effect on human health, or further impairment of services;
- (c) require the operator to take the necessary remedial measures;
- (d) give instructions to the operator to be followed on the necessary remedial measures to be taken; or
- (e) itself take the necessary remedial measures.

3. The competent authority shall require that the remedial measures are taken by the operator. If the operator fails to comply with the obligations laid down in paragraph 1 or 2(b), (c) or (d), cannot be identified or is not required to bear the costs under this Directive, the competent authority may take these measures itself, as a means of last resort.'

- 6 Article 7 of Directive 2004/35, entitled 'Determination of remedial measures', provides as follows:

'1. Operators shall identify, in accordance with Annex II, potential remedial measures and submit them to the competent authority for its approval, unless the competent authority has taken action under Article 6(2)(e) and (3).

2. 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.

3. 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.

4. The competent authority shall invite the persons referred to in Article 12(1) and in any case the persons on whose land remedial measures would be carried out to submit their observations and shall take them into account.’

7 The first subparagraph of Article 8(2) of Directive 2004/35 is worded as follows:

‘Subject to paragraphs 3 and 4, 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.’

8 Article 11 of Directive 2004/35, entitled ‘Competent authority’, provides as follows:

‘1. Member States shall designate the competent authority(ies) responsible for fulfilling the duties provided for in this Directive.

2. The duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which remedial measures should be taken with reference to Annex II shall rest with the competent authority. To that effect, the competent authority shall be entitled to require the relevant operator to carry out his own assessment and to supply any information and data necessary.

3. Member States shall ensure that the competent authority may empower or require third parties to carry out the necessary preventive or remedial measures.

4. Any decision taken pursuant to this Directive which imposes preventive or remedial measures shall state the exact grounds on which it is based. Such decision shall be notified forthwith to the operator concerned, who shall at the same time be informed of the legal remedies available to him under the laws in force in the Member State concerned and of the time-limits to which such remedies are subject.’

9 Article 12 of Directive 2004/35, entitled 'Request for action', is worded as follows:

'Natural or legal persons:

(a) affected or likely to be affected by environmental damage or

(b) having a sufficient interest in environmental decision making relating to the damage or, alternatively,

(c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive.'

10 Article 16 of Directive 2004/35, entitled 'Relationship with national law', provides in paragraph 1 thereof that the directive 'shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional activities

to be subject to the prevention and remediation requirements of this Directive and the identification of additional responsible parties’

- ¹¹ Article 17 of Directive 2004/35, entitled ‘Temporal application,’ provides that the directive is not to apply to:

‘...

- damage caused by an emission, event or incident that took place before the date referred to in Article 19(1);

- damage caused by an emission, event or incident which takes place subsequent to the date referred to in Article 19(1) when it derives from a specific activity that took place and finished before the said date;

- damage, if more than 30 years have passed since the emission, event or incident, resulting in the damage, occurred.’

- ¹² The first subparagraph of Article 19(1) of Directive 2004/35 states that Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 30 April 2007.

¹³ Annex II to Directive 2004/35 is entitled ‘Remedying of environmental damage’. Section 1.3 of that annex, which deals with the choice of the remedial options, is worded as follows:

‘1.3.1. 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 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 site.

...'

National law

¹⁴ The Tribunale amministrativo regionale della Sicilia refers to Legislative Decree No 22 of 5 February 1997 transposing Directive 91/156/EEC [of the Council, of 18 March 1991, amending Directive 75/442/EEC on waste] (OJ 1991 L 78, p 32), Directive 91/689/EEC [of the Council, of 12 December 1991] on hazardous waste (OJ 1991 L 377, p. 20) and Directive 94/62/EC [of the European Parliament and of the Council, of 20 December 1994] on packaging and packaging waste (OJ 1994 L 365, p. 10) (GURI No 38, Ordinary Supplement, of 15 February 1997) ('Legislative Decree

No 22/1997'). That decree was repealed and replaced by Legislative Decree No 152 of 3 April 2006 on environmental standards (GURI No 88, Ordinary Supplement, of 14 April 2006), Articles 299 to 318 of which transpose Directive 2004/35 into Italian law.

- 15 Article 17 of Legislative Decree No 22/1997 provides that ‘... any person who exceeds the limits laid down in paragraph 1(a), albeit inadvertently, or creates a tangible and genuine risk of those limits being exceeded, shall be required, at his own expense, to take measures for the safety, decontamination and environmental reinstatement of the polluted areas and the installations which present a threat of pollution.’
- 16 Article 9 of Ministerial Decree No 471 of 25 October 1999 laying down the criteria, procedures and detailed rules for the safety, decontamination and environmental reinstatement of polluted sites, in accordance with Article 17 of Legislative Decree No 22 of 5 February 1997, as amended and supplemented, (GURI No 293, Ordinary Supplement, of 15 December 1999) is worded as follows:

‘The owner of a site or any other person who ... intends of his own initiative to initiate the procedures for emergency safety measures and measures for decontamination and environmental reinstatement, in accordance with Article 17(13)(a) of Legislative Decree [No 22/1997], shall be required to communicate to the region, the province and the municipality the situation concerning the pollution found and any emergency safety measures necessary for the protection of health and the environment which have been adopted and are being implemented. The communication must be accompanied by appropriate technical documentation which must disclose the nature of those measures ... [T]he municipality or, where the pollution affects the territory of a number of municipalities, the region, shall verify the effectiveness of the

emergency safety measures adopted and may impose additional requirements and measures, in particular monitoring measures to be implemented to assess the level of pollution and the controls to be carried out to assess the effectiveness of the measures implemented to protect public health and the immediate environment ...'

- 17 Article 311(2) of Legislative Decree No 152 of 3 April 2006 provides as follows:

'Any person who, by committing an unlawful act or by failing to act or to exhibit due conduct, thereby infringing the law, regulations or administrative measures, as a result of negligence, incompetence, recklessness or breach of technical rules, damages the environment by altering, spoiling or destroying it in whole or in part shall be required to restore it to its previous condition or, failing which, to pay an equivalent amount by way of compensation to the State.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 18 The disputes in the main proceedings form part of a series of cases brought by the companies bordering the Augusta roadstead against the decisions of various Italian administrative authorities, as a result of which those companies were required to remedy the pollution identified in the Priolo Site of National Interest.
- 19 The applicants in the main proceedings essentially complain that the administrative authorities acted unilaterally in determining measures for remedying the environmental damage to that site. In particular, they criticise the authorities for radically altering, without prior consultation of the interested parties, projects which had

already been approved by the authorities. Work had already begun on those projects, which involved, inter alia, the construction of a hydraulic dyke to contain the groundwater. The project currently proposed, in particular for the construction of a physical barrier along the entire shoreline adjacent to the industrial sites of the applicants in the main proceedings, was radically different from the previous project and no environmental impact assessment was carried out in connection with that project. Lastly, the authorities are criticised for unjustly requiring, as a condition for them being able to use their industrial land, that the applicants carry out those works, which, in actual fact, relate to other land or areas owned by the State rather than to land which they own.

²⁰ The applicants in the main proceedings had previously brought actions before the Tribunale amministrativo regionale della Sicilia, which annulled the measures adopted by those administrative authorities, in particular in Judgment No 1254/2007 of 21 July 2007. That court stated that, since the original projects had already been approved by interministerial decree, which made them definitive, and were at an advanced stage of implementation, any changes to those projects could only be sanctioned by a new interministerial decree. It also considered that it was illogical to seek to conclude the works more quickly by using technology which was totally different from that which had already been approved. Lastly, it was of the view that no reasons were given for the authorities' decision, which did not entail the slightest technical analysis, and that no assessment had been carried out as to the environmental impact of the new remedial measures imposed on the applicants in the main proceedings.

²¹ Notwithstanding that judgment, the Italian administrative authorities subsequently repeated their requirements for the construction, inter alia, of a physical barrier. Decree No 4486 of 16 April 2008 concerning 'a final measure ... for the adoption of the decision of the interdepartmental meeting held on 6 March 2008 relating to the Priolo Site of National Interest' was thus adopted. The applicants in the main proceedings brought new proceedings before the Tribunale amministrativo regionale

della Sicilia, which entertains doubts as to whether such administrative practice is compatible with the law of the European Union. According to that court, the specific situation of the environmental pollution affecting the Priolo Site of National Interest, which might render any analysis of the risks and liability relating to that site pointless or inconclusive, could nevertheless justify those authorities in, first, acting on their own initiative without complying with the rule that the parties should be heard or the rule that reasons must be given for administrative acts and, second, thus imposing the solutions which they consider the most appropriate in order to contain the effects of industrial production on the environment.

22 Those were the circumstances in which the Tribunale amministrativo regionale della Sicilia decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Does ... [Directive 2004/35] ... (and, in particular, Article 7 of and Annex II thereto) preclude national legislation which allows the authorities to require, as “reasonable options for remedying environmental damage”, that actions be taken concerning environmental matrices (comprising, in this case, the “physical containment” of the groundwater along the entire seafront) which are different from and go further than those originally chosen at the conclusion of an appropriate investigation carried out on a consultative basis, which have already been approved and put into effect and are being implemented?

- (2) Does ... [Directive 2004/35] ... (and, in particular, Article 7 of and Annex II thereto) preclude national legislation which allows the authorities to impose such requirements on its own initiative, that is, without having assessed the site-specific conditions, the costs of implementation of the measures in relation to the reasonably foreseeable benefits, the possible or probable collateral damage and adverse effects on public health and safety, and the necessary time scales for implementation?

(3) Given the specificity of the situation prevailing in the Priolo Site of National Interest, does ... [Directive 2004/35] ... (and, in particular, Article 7 of and Annex II thereto) preclude national legislation which allows the authorities to impose such requirements on its own initiative as conditions for authorisation for the lawful use of areas of land not directly affected by the decontamination measures, in so far as they have already been decontaminated or were not, in any event, polluted, and situated within the confines of the Priolo Site of National Interest?’

²³ By order of the President of the Court of 21 October 2008, Cases C-379/08 and C-380/08 were joined for the purposes of the written and oral procedure and of the judgment.

The questions

Admissibility

²⁴ The Italian Government submits that the reference for a preliminary ruling is inadmissible, in particular because, first, the questions referred would require the Court to examine national legislation and, second, the referring court’s objective is not to resolve the disputes before it but to call into question the case-law of its appeal court.

²⁵ In that connection, it is sufficient to point out that, although the Court does not, in a reference for a preliminary ruling, have jurisdiction to give a ruling on the compatibility of a national measure with European Union law, it does have jurisdiction to supply the national court with a ruling on the interpretation of that law so as to enable

that court to determine whether such compatibility exists and decide the case before it (Case C-439/06 *citiworks* [2008] ECR I-3913, paragraph 21 and the case law cited).

- 26 Moreover, a lower court must be free, if it considers that a higher ruling court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it (see, to that effect, Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, paragraph 4).
- 27 In view of the foregoing observations, it is necessary to answer the questions referred by the Tribunale amministrativo regionale della Sicilia concerning the interpretation of Directive 2004/35.

Questions 1 and 2

- 28 By its first two questions, which it is appropriate to consider together, the Tribunale amministrativo regionale della Sicilia asks, in essence, whether Articles 7 and 11(4) of Directive 2004/35, in conjunction with Annex II to the directive, permit the competent authority to impose on its own initiative a substantial change in measures for remedying environmental damage which were chosen at the conclusion of a procedure carried out on a consultative basis with the operators concerned and which have been implemented or begun to be put into effect, without that authority having carried out any assessment, before imposing those measures, of the costs and advantages of the changes contemplated from an economic, environmental or health point of view.

- 29 In the light of the facts of the cases in the main proceedings, as set out by the referring court and as referred to by the Italian Government and the Commission of the European Communities, it is necessary to determine the requirements for the applicability *ratione temporis* of Directive 2004/35 in the light of those facts, before replying to the questions referred.

The applicability *ratione temporis* of Directive 2004/35

- 30 The Italian Government and the Commission doubt whether Directive 2004/35 is applicable *ratione temporis* to the facts of the disputes in the main proceedings, since the environmental damage occurred before 30 April 2007 and/or is the result, in any event, of earlier activities which ceased before that date. However, the Commission suggests that the directive could be applicable in so far as concerns damage occurring after 30 April 2007 as a result of the current activities of the operators in question. It cannot be applicable, however, to any pollution occurring before that date caused by operators other than operators currently active in the Augusta roadstead but which is being attributed to the latter operators.
- 31 As is apparent from recital 30 in the preamble to Directive 2004/35, the legislature of the European Union took the view that ‘damage caused before the expiry of the deadline for implementation of [the] Directive should not be covered by’ the provisions of the environmental liability mechanism established by the directive, that is to say, damage caused before 30 April 2007.
- 32 The EU legislature expressly set out, in Article 17 of Directive 2004/35, the types of situation in which the directive is not applicable. Since the situations which fall outside the scope *ratione temporis* of the directive were thus determined in negative

terms, it must be concluded that any other temporal situation is, in principle, covered by the environmental liability mechanism established by that directive.

- 33 It is apparent from the first and second indents of Article 17 of Directive 2004/35 that the directive does not apply to damage caused by an emission, event or incident which took place before 30 April 2007 or to damage caused after that date which derives from a specific activity that was carried out and finished before that date.
- 34 It must be concluded that Directive 2004/35 applies to damage caused by an emission, event or incident which took place after 30 April 2007 where such damage derives either from activities carried out after that date or activities which were carried out but had not finished before that date.
- 35 Article 267 TFEU is based on a clear division of functions between the national courts and the Court of Justice, so that the Court may rule on the interpretation or validity of a provision of EU law only on the basis of the facts which the national court puts before it. It follows that, within the framework of the procedure under Article 267 TFEU, it is not for the Court of Justice but for the national court to apply to national measures or situations the rules of EU law as interpreted by the Court of Justice (see Case C-279/06 *CEPSA* [2008] ECR I-6681, paragraph 28).
- 36 It is therefore for the referring court to ascertain, on the basis of the facts, which it alone is in a position to assess, whether, in the main proceedings, the damage in respect of which environmental remedial measures were imposed by the competent national authorities falls within one of the situations referred to at paragraph 34 above.

- 37 If that court reaches the conclusion that Directive 2004/35 is not applicable in the cases pending before it, such a situation will therefore be governed by national law, in compliance with the rules of the Treaty and without prejudice to other secondary legislation.
- 38 Article 174 EC states that European Community policy on the environment is to aim at a high level of protection and is based, *inter alia*, on the principle that the polluter should pay. That provision is therefore confined to defining the general environmental objectives of the Community, since Article 175 EC confers on the Council of the European Union responsibility for deciding what action is to be taken, where appropriate following the codecision procedure with the European Parliament (see, to that effect, Case C-379/92 *Peralta* [1994] ECR I-3453, paragraphs 57 and 58).
- 39 Since Article 174 EC, which establishes the ‘polluter pays’ principle, is directed at action at Community level, that provision cannot be relied on as such by individuals in order to exclude the application of national legislation — such as that at issue in the main proceedings — in an area covered by environmental policy for which there is no Community legislation adopted on the basis of Article 175 EC that specifically covers the situation in question.
- 40 If the Tribunale amministrativo regionale della Sicilia reaches the conclusion that, first, Directive 2004/35 is applicable *ratione temporis* in the main proceedings and, second, the conditions for the application *ratione materiae* of the directive are satisfied, in particular those set out at paragraphs 53 to 59 of the judgment of 9 March 2010 in Case C-378/08 *ERG and Others* [2010] ECR I-1919, the questions referred should be addressed as follows.

The conditions under which recovery measures are to be adopted under Directive 2004/35

— Observations submitted to the Court

- ⁴¹ The applicants in the main proceedings submit, in essence, that under the system set up by Directive 2004/35, environmental remedial measures must be determined upon a proposal from the relevant operators or, at the very least, after the operators have been consulted. It follows that the competent authority cannot, unilaterally and without consulting the operators, change measures for remedying environmental damage which have already been accepted by that authority — all the more so where the original remedial measures have already begun — and were sufficient to attain the objective of remedying the environmental damage and eliminating any significant risk of adverse effects on human health.
- ⁴² Moreover, in determining environmental remedial measures, the competent authority must carry out a cost-benefit analysis of the measures contemplated as well as a technical feasibility analysis, in so far as the only valid options are ‘reasonable remedial options’, that is to say, options which are not disproportionate and are based on the ‘best available techniques’. Lastly, the authority must also take account of the potential damage which might result from the remedial measures themselves for the environment and human health.
- ⁴³ The Italian Government takes the view that its legislation is compatible with Article 7 of Directive 2004/35, since the competent authority can impose not only remedial measures which comply with those set out in Annex II to the directive but also more onerous measures, which may be different from those adopted on a proposal from the operators concerned after prior consultation with them. In the actions in the main

proceedings, the fact that there was no consultation in connection with the measures subsequently adopted by the competent authority is not in any way contrary to the requirements laid down in the directive.

- ⁴⁴ The Commission considers that, even if it were accepted that Directive 2004/35 were applicable to the disputes in the main proceedings, the directive does not preclude unilateral action on the part of the competent authority. Articles 6(2) and 7(2) of the directive confer a broad discretion on that authority for the purpose of determining appropriate environmental remedial measures, since it is just provided that such measures are to be determined ‘with the cooperation of the relevant operator, as required.’ Annex II to the directive does not provide that the remedial measures should take any specific, mandatory form or lay down any specific procedural rules in that connection. The annex simply sets out the criteria to be followed and the objectives to be attained in choosing the most appropriate measures.
- ⁴⁵ Moreover, Article 16(1) of Directive 2004/35 permits Member States to maintain or adopt more stringent national provisions in relation to environmental liability, in accordance with the requirements laid down in Article 176 EC. Although Article 7(4) of the directive provides that the competent authority must invite ‘the persons ... on whose land remedial measures would be carried out to submit their observations and [must] take them into account’, the Commission considers that the authority is not bound by such observations, provided that it is possible as a result of the procedure adopted in accordance with Annex II to the directive to attain the environmental objectives laid down in the directive.

— The Court’s reply

- ⁴⁶ Under the system set up by Articles 6 and 7 of Directive 2004/35, as a rule, it is for the operator who caused the damage to put forward proposals for the remedial measures

which it considers appropriate to the situation. In view of the knowledge which the operator is deemed to have as regards the nature of the damage to the environment caused by his activities, such a system may enable appropriate environmental remedial measures to be identified and implemented swiftly.

47 Accordingly, under Article 6(1) of Directive 2004/35, where environmental damage has occurred, the operator must, without delay, inform the competent authority and take, *inter alia*, the necessary remedial measures, in accordance with Article 7 of the directive.

48 However, Articles 6(2) of Directive 2004/35 provides that the competent authority may, at any time, *inter alia*, require the operator to take the necessary remedial measures, give him the instructions to be followed in order to implement those measures or indeed, as a means of last resort, itself take those measures.

49 Moreover, Article 7(2) of Directive 2004/35 provides that the competent authority is to decide which remedial measures are to be implemented in accordance with Annex II to the directive, and do so with the cooperation of the relevant operator, as required.

50 According to Article 11 of Directive 2004/35, the duty to determine which remedial measures should be taken with reference to Annex II to the directive rests, in any event and as a means of last resort, with the competent authority.

51 In those circumstances, as the Advocate General pointed out at points 141 and 142 of her Opinion, the competent authority must be regarded as also being entitled to alter environmental remedial measures previously adopted, and to do so on its own

initiative, that is, even without an initial proposal from the operator. In fact, that authority may find in practice, in particular, that it is necessary to take measures in addition to those already adopted, and even reach the conclusion that the measures originally decided upon are ineffective and that other measures are necessary to remedy specific environmental pollution.

- 52 However, recital 24 in the preamble to Directive 2004/35 states that, in implementing and enforcing effective means for the application of the environmental liability mechanism laid down by the directive, the legitimate interests of the relevant operators and other interested parties must be adequately safeguarded.
- 53 Whereas Article 7(4) of Directive 2004/35 requires the competent authority, in all circumstances, to invite, inter alia, the persons on whose land remedial measures are to be carried out to submit their observations and to take them into account, Article 7, in particular Article 7(2), is not worded in the same terms with regard to the operator affected by the remedial measure which the authority intends to impose on him.
- 54 However, the principle of the right to be heard, whose observance is ensured by the Court, requires a public authority to hear interested parties before adopting a decision which concerns them (see Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich and Austria v Commission* [2007] ECR I-7141, paragraph 35 and the case-law cited).
- 55 Accordingly, even though Article 7(2) of Directive 2004/35 does not expressly state that the relevant operator has the right to be heard in all circumstances, it must be acknowledged that that provision cannot be interpreted as meaning that, in determining remedial measures, including those referred to in Article 6(2)(c) and (d) of the

directive, the competent authority is not required to give the operator the opportunity to be heard.

56 It follows that, in order to alter substantially environmental recovery measures already approved by the competent authority, which the authority is authorised to do under Directive 2004/35, Article 7(2) of the directive requires the authority to give the operators on whom such measures are imposed the opportunity to be heard, except where the urgency of the environmental situation requires immediate action on the part of the competent authority. Moreover, Article 7(4) of the directive provides that the competent authority is required to invite, *inter alia*, the persons on whose land such measures are to be carried out to submit their observations and to take them into account.

57 As regards the factors to be taken into account in the procedure for implementing the necessary recovery measures, it is apparent from Articles 7(2) and 11(2) of Directive 2004/35 that the competent authority is required to assess the significance of the damage and to determine such measures with reference to Annex II to the directive.

58 Annex II to Directive 2004/35 sets out a common framework to be followed by the competent authority in order to choose the most appropriate measures to ensure that environmental damage is remedied. Section 1.3.1. of the Annex states that the remedial options 'should be evaluated, using best available technologies' based on a range of criteria set out in that section.

59 The legislature of the European Union has not set out in a precise and detailed manner the specific methodology to be followed by the competent authority in determining recovery measures, principally because, as is apparent from recital 24 in the preamble to Directive 2004/35, in order to discharge the duty imposed on it under the system

set up by the directive, the competent authority must have appropriate discretionary powers to assess the significance of the damage and to determine which remedial measures should be taken. However, for that purpose, Annex II to the directive sets out a number of factors considered relevant by the legislature, which must therefore be taken into account by the competent authority, although the implications of those factors for the authority in a specific instance of pollution are not stated.

- 60 Where the competent authority is called upon, in the performance of the duties entrusted to it by the directive in question, to make complex assessments, its discretion applies also, to a certain extent, to the finding of facts underlying its action (see, by analogy, Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, paragraph 25; Case C-120/97 *Upjohn* [1999] ECR I-223, paragraph 34; and Case C-425/08 *Enviro Tech (Europe)* [2009] ECR I-10035, paragraph 62).
- 61 In exercising that discretion, the competent authority is nevertheless required, in such circumstances, to examine carefully and impartially all the relevant aspects of the individual case (see, by analogy, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and Case C-405/07 P *Netherlands v Commission* [2008] ECR I-8301, paragraph 56).
- 62 In those circumstances, where the question arises as to the choice between different remedial options, which is the case where the competent authority intends to alter remedial measures which it had adopted previously, the authority is required, in accordance with Article 7(2) of Directive 2004/35, in conjunction with Section 1.3.1 of Annex II to the directive, to assess each of those options on the basis, inter alia, of the criteria set out in that section.

- 63 Accordingly, where the competent authority intends to alter substantially measures for remedying environmental damage which were chosen at the conclusion of a procedure carried out on a consultative basis with the operators concerned and which have already been implemented or begun to be put into effect, that is, where the remedial option has been changed, that authority is required, in principle, to take account of the criteria set out at Section 1.3.1. of Annex II to Directive 2004/35 and, in accordance with Article 11(4) of the directive, must also state in the decision which it adopts in that connection the exact grounds on which its choice is based and, where appropriate, the grounds which justify the fact that there was no need for a detailed examination in the light of those criteria or that it was not possible to carry out such an examination due, for example, to the urgency of the environmental situation.
- 64 In particular, the competent authority must ensure that it is in fact possible, as a result of the option finally chosen, to achieve the best results from an environmental point of view, without thereby causing the operators concerned to incur manifestly disproportionate costs by comparison with those they had or would have had to incur in connection with the first option chosen by that authority. However, such considerations are irrelevant where the authority can demonstrate that the option originally chosen was, in any event, inappropriate for the purpose of restoring, rehabilitating or replacing damaged natural resources and/or impaired services, for the purpose of Article 2(11) of Directive 2004/35.
- 65 Lastly, a Member State cannot validly rely on Article 16(1) of Directive 2004/35, that is, the pursuit of the same objective of protecting the environment as laid down in the directive (see Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, paragraph 41), if it maintains or adopts provisions or authorises a practice enabling the competent authority to disregard, first, the operators' right to be heard and the obligation to invite the persons on whose land remedial measures are to be carried out to submit their observations and, second, the obligation to carry out a detailed examination of the potential options for environmental recovery.

66 The operators' right to be heard and the right of the persons whose land is affected by remedial measures to submit their observations clearly constitute a minimum level of protection guaranteed by Directive 2004/35, which cannot reasonably be called into question. Moreover, a decision on the choice of an environmental remedial option adopted by the competent authority without carrying out a detailed examination of the situation in the light of the criteria set out at Section 1.3.1 of Annex II to Directive 2004/35 could lead, contrary to the objectives laid down in the directive, to an inappropriate assessment of the significance of the damage and/or the remedial measures which should be taken.

67 In the light of the foregoing, the answer to the first two questions is that Articles 7 and 11(4) of Directive 2004/35, in conjunction with Annex II to the directive, must be interpreted as permitting the competent authority to alter substantially measures for remedying environmental damage which were chosen at the conclusion of a procedure carried out on a consultative basis with the operators concerned and which have already been implemented or begun to be put into effect. However, in order to adopt such a decision, that authority:

- is required to give the operators on whom such measures are imposed the opportunity to be heard, except where the urgency of the environmental situation requires immediate action on the part of the competent authority;
- is also required to invite, *inter alia*, the persons on whose land those measures are to be carried out to submit their observations and to take them into account; and
- must take account of the criteria set out in Section 1.3.1 of Annex II to Directive 2004/35 and state in its decision the grounds on which its choice is based, and, where appropriate, the grounds which justify the fact that there was no need for

a detailed examination in the light of those criteria or that it was not possible to carry out such an examination due, for example, to the urgency of the environmental situation.

Question 3

- ⁶⁸ By its third question, the Tribunale amministrativo regionale della Sicilia asks whether Directive 2004/35 must be interpreted as precluding national legislation which permits the competent authority to make the exercise by operators at whom environmental recovery measures are directed of the right to use their land subject to the condition that they carry out the works required by the authority, even though that land is not affected by those measures because it has already been decontaminated or has never been polluted.

Observations submitted to the Court

- ⁶⁹ The applicants in the main proceedings submit that, where land has been decontaminated or has never been polluted, the competent authority does not in any way have the power to make use of that land subject to the carrying out of environmental remedial measures on another site, in the present case the seafront and the seabed. Such a practice would impose an excessive restriction on their right to property and would be contrary to the principle of proportionality. An operator's own interest in a remedial environmental measure being implemented lies precisely in the prospect of productive activity being resumed on his land. Moreover, the land of the applicants in the main proceedings has already been decontaminated or indeed has never been polluted. Finally, such restrictions were imposed on them even though they had of their own volition carried out reinstatement work on their land and were not responsible for the pollution in question.

- 70 The Italian Government considers that the competent authority's practice of making use of the land of the applicants in the main proceedings subject to the condition that they implement the environmental remedial measures is entirely lawful and compatible with EU legislation. Such a practice is also consonant with the precautionary principle because, if the operators in question were able to use the decontaminated areas without restriction, they could thus create other industrial infrastructures, which would constitute an insurmountable barrier to the implementation of the remedial measures chosen by the competent authority.
- 71 According to the Commission, Directive 2004/35 does not preclude the competent authority from imposing environmental decontamination measures on an operator and requiring, as a condition for authorisation for the operator to use land owned by him which is not directly affected by the rehabilitation, that he carries out those measures. It submits that such measures could even be outside the scope of EU law.

The Court's reply

- 72 As a preliminary point, it should be noted, first, that, as is apparent from the information provided by the referring court, the pollution in question in the main proceedings is wholly exceptional both in terms of its extent and the seriousness of its impact on the environment.
- 73 Second, even if, as the applicants in the main proceedings maintain, the remedial measures in question do not affect their land because it has already been decontaminated or was never polluted, the fact remains that that land is adjacent to the whole

shoreline at which those remedial measures are directed and any new activity on that land could render the decontamination of the whole area more difficult.

- ⁷⁴ As already stated at paragraphs 37 and 40 above, if the Tribunale amministrativo regionale della Sicilia reaches the conclusion that Directive 2004/35 is not applicable *ratione temporis* and/or *ratione materiae* in the cases pending before it, such a situation will then be governed by national law, in compliance with the rules of the Treaty and without prejudice to other secondary legislation.
- ⁷⁵ If, on the other hand, the directive were to apply, it must be noted that, under the system set up by Directive 2004/35, operators are under a duty both to prevent and remedy environmental damage. Accordingly, in particular in accordance with the precautionary principle and as is apparent from recital 2 in the preamble to the directive, those operators must, first, take the preventive measures necessary to ensure that environmental damage does not occur.
- ⁷⁶ Second, where environmental damage has occurred, as in the cases in the main proceedings, Article 6(1) of Directive 2004/35 provides that operators must take, *inter alia*, the necessary remedial measures, in accordance with Article 7 of the directive. Where appropriate, the competent authority has special powers to oblige them to do so or to take such measures itself.
- ⁷⁷ In the cases before the referring court, the applicants object to the measures which were imposed by the Italian authorities because those measures do not concern the land they occupy, which, moreover, has already been decontaminated. However, according to those authorities, the pollution affecting the Augusta roadstead derives from that land, since it has spread into the sea.

- 78 In exceptional circumstances, such as those described at paragraphs 72 and 73 above, Directive 2004/35 must be interpreted as allowing the competent authority to require the operators on the land adjacent to the whole shoreline at which the remedial measures are directed to implement those measures themselves.
- 79 Directive 2004/35 does not specify the precise conditions under which the competent authority may require the operators concerned to take the remedial measures identified by the authority. In such circumstances, it is for each Member State to determine those conditions, which must, first, seek to attain the objective of the directive, as set out in Article 1 thereof, namely to prevent and remedy environmental damage and, second, comply with EU law, in particular its general principles.
- 80 As regards infringement of their right to property, invoked by the applicants in the main proceedings, the Court has consistently held that, while the right to property forms part of the general principles of EU law, it is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (Case 44/79 *Hauer* [1979] ECR 3727, paragraph 23; Case 265/87 *Schröder HS Kraftfutter* [1989] ECR 2237, paragraph 15; Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraph 54; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, paragraph 355).
- 81 As regards the objectives of general interest referred to above, established case-law also shows that protection of the environment is one of those objectives (see Case

240/83 *ADBHU* [1985] ECR 531, paragraph 13; Case C-302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 8; and Case C-213/96 *Outokumpu* [1998] ECR I-1777, paragraph 32).

⁸² In those circumstances, it may be justified to make the right of the operators concerned to use their land subject to the condition that they implement the necessary environmental remedial measures, in order to oblige them actually to take those measures.

⁸³ As the Italian Government correctly observed, the competent authority has a legitimate right, pending the implementation of environmental remedial measures determined by it, to take any appropriate measures in order to prevent the environmental situation deteriorating further in the area in which such measures are put into effect, or indeed, pursuant to the precautionary principle, to prevent the occurrence or resurgence of further environmental damage in sites adjacent to the areas at which such measures are directed.

⁸⁴ It may be necessary to make the use of the land of the operators concerned subject to the requirement that they implement remedial measures in relation to sites adjacent to that land which are in need of rehabilitation, in order to prevent other industrial activity, which might aggravate the damage in question or hinder measures aimed at remedying it, being carried out in the vicinity of those sites.

⁸⁵ It follows that it is for the Tribunale amministrativo regionale della Sicilia to ascertain whether, in the cases before it, the suspension of certain property rights of the operators in respect of their land adjacent to the whole shoreline at which

remedial environmental measures are directed is justified by the objective of preventing a deterioration of the environmental situation in the area in which the remedial environmental measures are implemented, namely in the Augusta roadstead, or, pursuant to the precautionary principle, by the objective of preventing the occurrence or resurgence of further environmental damage to that land.

- ⁸⁶ However, it is necessary to consider whether such measures, which are permitted under national legislation, exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, Case C-534/06 *Industria Lavorazione Carni Ovine* [2008] ECR I-4129, paragraph 25, and Case C-170/08 *Nijemeisland* [2009] ECR I-5127, paragraph 41).
- ⁸⁷ It is clear that under Directive 2004/35 the operators concerned must carry out the remedial measures determined by the competent authority and the authority must be able to oblige them to do so.
- ⁸⁸ Admittedly, Article 6(2)(e) and the first subparagraph of Article 8(2) of Directive 2004/35 provide that the competent authority may itself take the necessary remedial measures and recover the cost of such measures by means of security over property or other appropriate guarantees.
- ⁸⁹ However, it should be pointed out that that is simply one option available to the competent authority. It might prefer to require the operators in question to implement the necessary recovery measures rather than implement them itself.

- 90 Moreover, the interference with the right to property of such operators is limited to their right to use their land and is temporary in so far as, provided that they have carried out the recovery measures imposed on them by the competent authorities, they can recover full enjoyment of their property rights.
- 91 In those circumstances, such measures on the part of the competent authority do not appear to go beyond what is necessary to attain the basic objective of Directive 2004/35, namely to prevent and remedy environmental damage, which means that, in this instance, the operators in question must implement the remedial measures determined by that authority.
- 92 The answer to the third question is therefore that, in circumstances such as those in the main proceedings, Directive 2004/35 does not preclude national legislation which permits the competent authority to make the exercise by operators at whom environmental recovery measures are directed of the right to use their land subject to the condition that they carry out the works required by the authority, even though that land is not affected by those measures because it has already been decontaminated or has never been polluted. However, such a measure must be justified by the objective of preventing a deterioration of the environmental situation in the area in which those measures are implemented or, pursuant to the precautionary principle, by the objective of preventing the occurrence or resurgence of further environmental damage on the land belonging to the operators which is adjacent to the whole shoreline at which those remedial measures are directed.

Costs

- 93 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Articles 7 and 11(4) of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, in conjunction with Annex II to the directive, must be interpreted as permitting the competent authority to alter substantially measures for remedying environmental damage which were chosen at the conclusion of a procedure carried out on a consultative basis with the operators concerned and which have already been implemented or begun to be put into effect. However, in order to adopt such a decision, that authority:**
 - **is required to give the operators on whom such measures are imposed the opportunity to be heard, except where the urgency of the environmental situation requires immediate action on the part of the competent authority;**
 - **is also required to invite, inter alia, the persons on whose land those measures are to be carried out to submit their observations and to take them into account; and**
 - **must take account of the criteria set out in Section 1.3.1. of Annex II to Directive 2004/35 and state in its decision the grounds on which its choice is based, and, where appropriate, the grounds which justify the fact that there was no need for a detailed examination in the light of those criteria or that it was not possible to carry out such an examination due, for example, to the urgency of the environmental situation.**

2. **In circumstances such as those in the main proceedings, Directive 2004/35 does not preclude national legislation which permits the competent authority to make the exercise by operators at whom environmental recovery measures are directed of the right to use their land subject to the condition that they carry out the works required by the authority, even though that land is not affected by those measures because it has already been decontaminated or has never been polluted. However, such a measure must be justified by the objective of preventing a deterioration of the environmental situation in the area in which those measures are implemented or, pursuant to the precautionary principle, by the objective of preventing the occurrence or resurgence of further environmental damage on the land belonging to the operators which is adjacent to the whole shoreline at which those remedial measures are directed.**

[Signatures]