

Conclusions on Exemptions and Disproportionate Costs

Water Directors' meeting under Slovenian Presidency, Brdo, 16-17 June 2008

Common grounds on exemptions and disproportionate costs

Previously agreed common grounds

During the discussions on the topic of disproportionate costs over the past years, a certain level of common understanding has already been reached and this is reflected in various documents¹. Below, these common grounds are listed.

Application of exemptions in general

In the endorsed policy paper on exemptions 2007 it was agreed that the WFD is an environmental directive and exempting from its objectives should not be the rule but exceptional². And already in the 2005 environmental objectives paper, it was agreed that the exemptions are an integral part of the environmental objectives set out in Article 4 and the planning process. Furthermore, the Water Directors agreed in November 2007 that it is of key importance to ensure that the exemptions are applied in a comparable way ensuring a high level of ambition, despite the different circumstances and starting points of the different Member States.

Interpretation of 'disproportionate costs'

In the WATECO guidance, and re-emphasised in the 2007 policy paper, it was agreed that 'disproportionality' is a political judgement informed by economic information, and that an analysis of the costs and benefits of measures is necessary to enable a judgement to be made on exemptions.

Furthermore, it was concluded in the WATECO guidance that, given the uncertainty around estimates of costs and benefits one should bear in mind that,

- Disproportionality should not begin at the point where measured costs simply exceed quantifiable benefits;

¹

See http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/guidance_documents&vm=detail&sb=Title.

² The French Water Director underlines that this statement is a political commitment and that it does not refer to any specific percentage.

- The assessment of costs and benefits will have to include qualitative costs and benefits as well as quantitative;
- The margin by which costs exceed benefits should be appreciable and have a high level of confidence;
- In the context of disproportionality the decision-maker may also want to take into consideration the ability to pay of those affected by the measures and some information on this may be required.

In the 2007 policy paper, it was agreed that an assessment of disproportionate costs only makes sense after a combination of the most cost-effective solutions has been identified. Most importantly, for all cases where an exemption is applied, all measures that are feasible should still be taken to reach the best status possible.

An important element of the discussions on the interpretation of disproportionate costs is the role of ‘affordability’, i.e. whether the ability of a certain actor to pay for a measure can play a role and if so, against which criteria. The Water Directors already discussed this topic and agreed at their meetings in June 2007 and November 2007 that ‘ability to pay’ should not water down the ambition of the Directive, but they recognised that the issue of social and economic aspects might play a role in the decision-making on exemptions. Furthermore, the Water Directors agreed that Member States may phase the implementation of measures to spread the costs of the implementation, but there is the need for clear and demonstrable action in the first cycle.

In Lisbon in November 2007, the Water Directors highlighted that in cases where exemptions are considered the consequences of non-action needed to be weighed against the specific costs of the measures.

Also in November 2007, the Water Directors agreed that all possible financing mechanisms need to be explored as a first step (including public funding, private investment, EU and international funding possibilities, cost recovery, etc.) when looking into affordability.

Transparency

On all occasions where the assessment of disproportionate costs or the application of exemptions was discussed, the importance of transparency was emphasised. In the policy paper endorsed in November 2007, it was stated that, as a minimum, the public should be given insight in the reasons for applying exemptions (eg as mentioned in Article 4(a)i, ii and iii) per water body for which an exemption is applied. Also in November 2007, the Water Directors concluded that in cases where criteria related to “disproportionality” are used to justify an exemption, it should be done in a transparent way and the reasons, underlying data and assessments should be made public.

In order to ensure 'full and consistent implementation'³ of the Directive and to ensure that exemptions are applied in a comparable way, it is necessary that the reasons for application of exemptions are fully described transparently in the RBMP.

Already from Article 4(4) and 4(5) itself and the related recitals it is clear that the following information should be provided in the river basin management plans⁴:

- the reasons for an extension of the deadline should be specifically set out
- the reasons for the establishment of less stringent environmental objectives should be specifically mentioned;
- a summary of the measures to bring the bodies of water *progressively* to the required status;
- the reasons for any significant delay in making the measures operational;
- the expected timetable for the implementation of the measures (that are delayed);
- the appropriate, evident and transparent criteria used for applying exemptions

Furthermore, it has been agreed that:

- there is the need for clear and demonstrable action in the first cycle;
- when applying the 'disproportionality justification', the reasons, underlying data and assessments should be made public;
- all relevant financing mechanisms need to be explored as a first step when looking into affordability.
- in cases where exemptions are considered the consequences of non-action need to be taken into account.

³ See recital 30: 'In order to ensure a full and consistent implementation of the Directive any extensions of timescale should be made on the basis of appropriate, evident and transparent criteria and be justified by the Member States in the river basin management plans' and recital 31 'In cases where a body of water is so affected by human activity or its natural condition is such that it may be unfeasible or unreasonably expensive to achieve good status, less stringent environmental objectives may be set on the basis of appropriate, evident and transparent criteria, and all practicable steps should be taken to prevent any further deterioration of the status of water'.

⁴ See 4.4(b): 'Extension of the deadline, and the reasons for it, are specifically set out and explained in the river basin management plan required under Article 13'

and 4.4(d): 'A summary of measures required under Article 11 which are envisaged as necessary to bring the bodies of water progressively to the required status by the extended deadline, the reasons for any significant delay in making these measures operational, and the expected timetable for their implementation are set out in the river basin management plan.'

and 4.5(d): 'the establishment of less stringent environmental objectives and the reasons for it, are specifically mentioned in the river basin management plan required under Article 13 and those objectives are reviewed every six years', including reasons why 'the environmental and socioeconomic needs served by such human activity cannot be achieved by other means, which are a significantly better environmental option not entailing disproportionate costs' (4.5(a)).'

Additional common grounds agreed at the Slovenian Water Directors' meeting

Costs of measures required under other Community legislation

It is agreed by the Water Directors that the earlier agreed statement that 'costs of basic measures cannot be considered when deciding on disproportionate costs' needs to be refined into 'the costs of measures required under existing Community legislation already agreed at the time of the adoption of the Directive cannot be considered when deciding on disproportionate costs.' Without prejudice to the transitional arrangements in the Accession Treaties, this also applies to Member States which acceded the EU in 2004 and 2007.

General approaches/prioritisation approaches

The Water Directors agreed that a proportionate selection of the different analyses (cost-benefit analysis, benefits assessment, assessment of the consequences of non-action, distribution of costs, social and sectoral impacts, affordability, cost-effectiveness etc) is useful to inform decision making.

It was also agreed by the Water Directors that prioritisation approaches for ranking measures that are considered technically feasible can be the first operational steps in the assessment of cost disproportionality, but that a justification of an extension of the deadline following these approaches should respect the relevant provisions of the Water Framework Directive. The results of prioritisation have to be developed on or transformed to the water body level when relevant.

It was emphasised that prioritisation takes place on different geographic / administrative levels (e.g. MS, River Basin, Region, sub unit, water body) and should consider the different basic conditions in the area. The prioritisation process should take into account a set of relevant criteria, for example:

- synergies with other directives, e.g. habitat directive, flood risk management directive
- cost-efficiency / benefits of measures
- consequences of non-action
- certainty / uncertainty ("no regret measures")
- measures which could be implemented short term
- urgency of problem to be solved(severe consequences/high cost of non action: e.g. protection of drinking water supplies)
- existence of available financing mechanisms
- acceptance by the public

Prioritisation criteria and results should be transparent and should be disclosed to the public. The prioritisation approach should also give information on the further timescale to reach the environmental objectives.

Alternative financing mechanisms

The Water Directors agreed that:

- When affordability arguments are used to extend the deadline, the possibility to use relevant alternative financing mechanisms should be fully considered. The alternative financing mechanisms could include distribution of costs among polluters and users, use of the public budget (at different levels), European funds, etc.
- Relevant alternative financing mechanisms should be considered at the appropriate scale.

Extension of the deadline because of affordability issues

The Water Directors agreed that:

- Affordability can be one element for justifying the decision on a time extension, if based on a clear explanation
 - of the non-availability of relevant alternative financing mechanisms which would not result in affordability issues,
 - of the consequences of non-action in deciding on an extension of the deadline and
 - of steps to resolve the affordability issues in the future.
- Non-action by one player does not automatically lead to non-action by other players within the same sector.

Administrative/legal constraints

It was agreed that some changes of the institutional framework for putting alternative financing mechanisms in place, or addressing other administrative or legal constraints, may need time. In some cases, pursuing these changes within the first management cycle may lead to disproportionate costs.

It was therefore agreed that in cases where certain procedural requirements need to be fulfilled to take measures, the deadline for achieving the environmental objectives may need to be extended. In all cases where administrative or legal constraints occur, a description of the constraints has to be given in the river basin management plan as well as an explanation of how these constraints will be addressed in the future.

Additionally, several Member States pointed at the different calendars of the implementation of the funding instruments within the framework of the EU financial perspectives (2007-2013) and the elaboration of the first river basin management plans (22 December 2009). In this context, a particular emphasis was put on the European Rural Development Regulation and possible adaptations of the rural development plans of Member States in relation to water related issues.

Transparency

The Water Directors agreed that the following elements of the disproportionality assessment are made available during the consultation of the public and clearly explained in the RBMP:

- In cases where the deadline will be extended:
 - a description of relevant reasons (including the applied criteria) for invoking the 'disproportionality justification';
 - if affordability arguments are used, an explanation that there are no relevant alternative financing mechanisms available;
 - an explanation of how consequences of non-action are taken into account and what action will be taken to address these reasons, so that in the future a time extension is no longer needed.
- In cases where the objectives will be lowered:
 - a description of relevant reasons (including the applied criteria) for invoking the 'disproportionality justification';
 - an explanation of how consequences of non-action are taken into account;

Remaining open points

On the role of public budget constraints in the disproportionality assessment and on the role of affordability in Article 4(5), no common understanding could be achieved by the Water Directors at this stage of the implementation of the Water Framework Directive. The different view points are therefore briefly set out below.

Public budget constraints

Most Water Directors indicated that constraints of the public budget may be used as a reason for extending the deadline as there are limits to the available budget for water management. The Commission indicated that in its views the adoption of the Water Framework Directive by the Council and the European Parliament entails obligations for Member States to make available the necessary means for its implementation.

Role of affordability in Article 4(5)

For some Water Directors affordability could play a role in setting less stringent objectives, as both Article 4(4) and 4(5) use the same terminology 'disproportionately expensive'. They indicated that in practice affordability arguments may be used less frequently in Article 4(5) than in Article 4(4). Some other Water Directors argued that affordability can not be used as an argument for setting less stringent objectives as the context of 'disproportionate expenses' is different in 4(5) from the context in Article 4(4) as it concerns setting lower objectives permanently (subject to revision every 6-years). These Water Directors consider that application of this provision requires it to be set out clearly that the costs outweigh the benefits of achieving the targets.