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POLICY-LEGAL INSTRUMENTS OF INDIRECT ENVIRONMENTAL MANAGEMENT

Abstract

Effective environmental protection cannot be imagined without direct management of such protection by state authorities through legal prohibitions and orders, permits, approvals and exemptions, mandatory notifications, control, and repression measures of the state administration, etc. Yet, in modern environmental systems, instruments of indirect influence on the addressees of norms are gaining increasing importance, with the aim of influencing their desirable behaviour through citizens' awareness. Such instruments are used by law primarily in the field of prevention, with the aim of preventing environmental damage. When using indirect means, the state appeals to the addressees to act appropriately to protect the environment, but without forcibly sanctioning behaviour, if that appeals are not accepted. This paper analyses the nature of indirect instruments, such as public information, economic incentives of the classical and modern types, as well as environmental agreements, with an indication of their role and importance in modern environmental systems.

Keywords: environment, protection instruments, indirect protection management instruments, information system, economic incentives, consensual instruments.

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INTRODUCTORY NOTES

For the protection of the environment, it is of paramount importance to determine the objectives that its standards aim to attain, as well as the principles on which that protection will rest. However, once the goals have been set and the principles established, the instruments through which those goals will be pursued come to the fore.

In principle, environmental instruments should be such as to meet the general criteria of each policy, including environmental policy. They should therefore be effective, efficient, administratively easily enforceable, and politically acceptable. In addition, they should be legally comfortable (see Kotulla 2014: 40), their implementation should be understandable and acceptable to the addressees of legal norms but should also be easily enforceable for public authorities.

More specifically, environmental instruments are remarkably diverse, from planning, financial, public law to numerous others. Their abundance and diversity only testify to the fact that environmental protection is a highly interdisciplinary field with many intersections and overlaps of different objectives, principles, and systems of legal norms. Environmental law is justifiably said to cross public law, private law, and criminal law in their interplay (Pfeiffer 2015: 2).

Therefore, it is not at all simple to not only consistently systematise these instruments, but to list them precisely. However, for the purposes of the environmental protection system, perhaps the simplest way to systematize could be as follows: planning instruments, public-law instruments, private-law instruments, criminal-law instruments, and legal-political instruments.

The importance of particular types of instruments could be widely discussed. There is no doubt that due to the interdisciplinary nature of environmental rights, each of them has a corresponding importance. However, the totality of the system of norms of this field of law clearly shows that besides planning, public-law instruments are by far the most present and significant, despite the fact that, over time, instruments of a different character were success-

fully affirmed in environmental law. Environmental law is still unimaginable without the dominant legal prohibitions, authorizations, exemptions, repressive measures, administrative control, and supervision, as well as other well-known public-law measures of the state government. That is quite understandable. When looking at the genesis of environmental law, it is clear that it evolved through the instruments of administrative law, the so-called "Police law" and Trade Law (craft and trade). Just as today, the classic instruments of direct, imperative influence on environmental behaviours are irreplaceable, without orders, injunctions and force modern environmental law could not be imagined (Schmidt and Kahl 2010: 21). Such direct instruments of influence on the addressees of environmental norms are legal prohibitions and orders (injunctions) of permits, permits and exemptions, as well as the obligation to report, inform, etc. In addition, they are characterized by both controlling and repressive instruments of public administration. For direct instruments, therefore, it is characteristic that a legal norm or an administrative measure requires a certain person to behave in a certain manner or omission. If the addressee does not behave in the required manner, the public authorities may coerce him into such behaviour, or punish him with a fine or other sanction.

However, in modern systems of environmental protection, instruments of indirect influence on the addressees of norms are gaining increasing importance, with the aim of influencing their desirable behaviour through citizens' awareness. Such instruments are primarily used in law in the field of prevention (Kluth and Smeddinck 2013: 53) with the aim of preventing environmental damage. These indirect instruments are also numerous, such as adequate information, financial incentives (subsidies, tax exemptions and reliefs), incentives through approving the use of advantages in the pursuit of activities, etc. Indirect instruments, in fact, influence the motivation of the addressees of the norms to behave in an acceptable manner, without the use of coercive means. When using indirect means, the state makes a specific appeal to the addressees to behave appropriately (Schmidt and Kahl 2010: 33) without sanctioning the behaviour if that appeal is not accepted (Kloepfer 2016: 260). This paper analyses the nature of indirect instruments, as well as their role and importance in modern environmental systems.

GENERAL CHARACTERISTICS OF INDIRECT INSTRUMENTS

Although direct environmental instruments (legal prohibitions and orders, permits, approvals and exemptions, mandatory applications, control, and repression of management, etc.) are still key, indirect instruments of influencing environmental addressees are gaining importance every day. For increasing their importance, indirect instruments must be thankful to their specific characteristics.

First of all, citizens and other addressees of norms do not perceive indirect instruments as direct pressure from public authorities, which is always the case with direct instruments. Indirect instruments do not impose binding conduct threatened by sanctions but leave addressees free to decide. Instead of command, they are given the appearance of incentives that they can enjoy, if they behave in a desirable way. This means that the addressee of the norms remains free to choose between more different ways of *legal* behaviours, but the choice of the behavioural option also depends on the ability to use the intended incentives. He, therefore, chooses between socially desirable and undesirable behaviours. In other words, the norms determine a certain desirable behaviour, but it is up to the citizens and other addressees (companies, other legal entities, etc.) to decide whether and how they will be treated. When using indirect instruments, the state, therefore, does not want to address the norms for certain behaviours (acts or omissions) but wants to reward desirable behaviours.

The incentives themselves may be different. They are usually "positive", i.e. for desirable behaviour the addressee of the norms will be rewarded with some financial or other benefits. However, they are not rare, so-called "negative" incentives. They are characterized by the fact that, in the case of undesirable behaviour, the addressee is not only denied positive incentives, but also exposed to some additional material and other disadvantages (e.g. increased environmental contributions, etc.).

The main advantage of indirect instruments, therefore, is that it leaves citizens freedom to choose. This does not only develop their general awareness of the need for environmental protection,

but also raises awareness of their "cooperation" with the state in that protection. In addition, sometimes indirect instruments can be more effective than direct ones, if they are sufficiently interested in the benefits of desirable behaviour.

In addition, indirect instruments significantly relieve the governing bodies of certain tasks in the field of environmental protection and promotion (Kloepfer 2016: 363), which, on the other hand, leaves them more dedicated to the implementation of direct protection instruments.

Alongside the benefits, indirect instruments also have certain downsides. They include insufficient transparency in the behaviour of the addressees of the norms, as well as insufficient certainty in predicting desirable behaviours. When it is necessary to implement certain behaviours, especially in emergency situations requiring emergency measures, indirect instruments can certainly not be compared to direct environmental measures, although they can be used to supplement them. In providing a minimum of environmental protection, direct instruments are irreplaceable, but in providing them with optimal protection, indirect instruments are proving to be instruments with a complementary (Kloepfer: 2011: 106), but very important function.

Indirect instruments can be diverse, but ones that occur most often in modern environmental systems are:

- information from public authorities (states)
- classical economic instruments
- new economic instruments
- other indirect instruments

INFORMATION FROM PUBLIC AUTHORITIES

Information provided by public authorities is one of the most significant indirect environmental management instruments (Kloepfer, 2011: 106). The state collects all environmental information, so only it can fully inform the general public about the state of the environment, as well as the risks and dangers that threaten it. Public authorities should systematically collect environmental

information to meet their obligations to inform all members of society about the state of the environment (Lilić and Drenovak-Ivanović 2014: 42). Due to this position of the state in many countries, legal obligations of public authorities at all levels are prescribed to continuously, timely and fully inform the public about the state of the environment. In some countries this obligation of the state is raised to the level of constitutional norm. This norm is also stipulated in the Constitution of the Republic of Serbia.[1]

Public information on the state of the environment indirectly, but significantly, influences environmental protection. Their importance is growing day by day (Erbguth and Schlacke: 2016: 120). The forms of information can be different. It is important, however, that the information system as a whole is such that it continuously provides timely and complete information to the public on the state of the environment. Only such information system provides the right basis for the response of different members in society to diverse environmental threats.

In the information system, news, explanations, tips, and warnings are most commonly used as indirect instruments of environmental impact.

News is considered to be both individual notices, and general and comprehensive environmental reports for a particular area and for a specified period of time. The news may also have the character of a notice which is indicated by an appropriate sign (e.g. blue flags as a sign of a clean, unpolluted part of the sea or a sign on the health of a product, etc.). It is especially important for news to be timely, complete, and true, as otherwise adequate responses of citizens and other entities in society in the event of an environmental threat cannot be expected.

Often the news itself, even when complete, true, and timely, is not enough for citizens and other members in society to grasp the essence of particular forms of environmental threat. In such situations, the additional explanations provided by public authorities are used. These explanations are most often given when proper

1) According to Art. 74 para 1 of the Constitution of the Republic of Serbia of 2006 "everyone has the right to a healthy environment and to be notified on time and completely of its condition".

professional education (e.g. chemical breakdowns, etc.) is required to properly understand the resulting environmental threats.

In addition to informing, sometimes it is important to give citizens advice on how to behave in the current state of the environment. Citizens are being helped with advices on how to adequate behave to protect themselves and their property, but also to help general measures with such behaviour to eliminate the consequences of environmental damage.

When citizens and other entities are directly threatened by the risks of environmental damage, public authorities also use warnings. They point out the risk that has been incurred, as well as the possible adverse consequences, if realized. Alerts include notices about the amount of harmful ingredients that certain products contain, and which are declared according to regulations. Warnings are often combined with advices, which further informs citizens about appropriate behaviour, to prevent or minimize the occurrence of adverse consequences.

For the systematic monitoring of the state of the environment, in addition to the aforementioned instruments, comprehensive statistics on the state of the environment in a particular area and at a particular time are of particular importance. Based on them, not only can this state be identified at a certain cross-section, but corresponding trends can be observed.

Information provided by public authorities should be distinguished from information provided by other, primarily private entities. Such information may be mandatory but may be optional. Among the mandatory information that private entities are required to give to the general public, the most significant are those that are declared on products under the regulations.

Opposite to the obligation of public authorities to provide information on the state of the environment, there is a right of citizens and other entities (companies, other legal entities) to be informed about it. This is usually determined by law, but sometimes by the Constitution. Thus, from the aforementioned constitutional norm according to which "everyone has the right to a healthy environment and to timely and complete notification of its condition" (Article 74, paragraph 1 of the Constitution of the Republic of

Serbia), it can be unequivocally concluded that such right exists in the Republic of Serbia as a subjective right of every citizen. And not only that. The right to a healthy environment and to be informed about it has been established as a universal human right (Pajvančić 2009: 96). This stems both from the constitutional norm itself ("everyone has the right to a healthy environment and to be fully and timely informed about it" - paragraph 1 of this Article) and from the fact that this article is in the section that establishes human rights and freedoms (Šogorov Vučković 2018: 405, 406 Environmental Law and Constitutional Norms). As a universal human right, therefore, the right to be informed about the state of the environment belongs to everyone, without exception. Since it has the character of a universal human right, this right, as well as the right to a healthy environment, is directly applicable. This means that the law is not a necessary mediator (Pajvančić 209: 96) for the application of the constitutional norm in practice. Furthermore, the right to a healthy life, as a universal human right, also has the character of a constitutionally guaranteed right.

Public authorities are obliged to make publicly available information on the state of the environment to an adequate extent, without the special request of citizens and other entities. In comparative law, it is considered that access to this information does not need to prove the existence of a particular legal interest (Kloepfer, 2011: 113). In our opinion, this rule should apply in our law, as soon as possible, given the direct application of the aforementioned constitutional norms. This responsibility of public authorities is general (see Šogorov Vučković, Jelena 2019: 607: Constitutional Responsibility of Public Authorities for Environmental Protection in the Republic of Serbia) and applies to all its levels.

Due to the importance of environmental information in EU law, a separate directive was adopted, which was later incorporated into the legal systems of the Member States.[2]

2) V. Directive 2003/4/ec of the european parliament and of the council, of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

CLASSICAL ECONOMIC INSTRUMENTS

Indirect economic instruments are of particular importance in environmental management. Some have been in use since the beginning of environmental protection, while others are more recent. Among the classical indirect instruments of economic character, duties (so-called environmental taxes) and subsidies are of the greatest importance.

Subsidies are characterized by economic acts (benefits) granted by public authorities to private individuals for the achievement of a certain public interest in the field of environmental protection (Kotulla 2014: 42,43) without the obligation of those individuals to consideration. The point of the subsidy is to discourage private individuals from engaging in environmental damage, or at least reduce the damage caused by such activities. They can come in the form of direct and indirect subsidies.

Direct subsidies are financial assistance provided by public authorities to private individuals with the aim of encouraging them to act in an environmentally friendly manner. These are various forms of grants, financial aid, recourse, etc. Unlike direct subsidies, indirect subsidies are not financial benefits, but are economic benefits that the state grants due to the desirable environmental behaviour of citizens and companies. These are, first and foremost, tax exemptions, reliefs and privileges granted for such behaviour or for investments of an environmental nature.

Due to the incentives that are directly visible, subsidies are readily accepted by private individuals. However, in addition to the good side, the subsidies have some downsides. They are primarily expressed through distortions of competition, as they administratively strengthen the market position of the beneficiaries of the subsidy.

Subsidies are a kind of expression of the principle of jointly (socially) bearing the burden of environmental costs. This, not much favoured, principle in environmental protection means that the cost of environmental protection is financed through the budget, i.e. that they are borne by society as a whole, ultimately, by taxpayers. It is also the most significant departure from the key

principle of causality according to which the cost of protection should be borne by the one who caused the damage to the environment (see Frenz, 1997). Nevertheless, the application of the principle of shared costing is in some cases necessary, especially when it achieves the desired environmental effects in the fastest way (Storm 2015: 148).

The breach of the principle of causality in favour of the principle of shared cost protection does not occur, however, only with direct subsidies but also with indirect ones, i.e. other forms of state aid (gifts, tax exemptions and reliefs, other financial benefits, etc.) to encourage private environmental protection measures (Messerschmidt 2011: 310).

Unlike subsidies, duties (primarily taxes) of public authorities are public-law revenue, monetary obligations imposed by public authorities on those who use or damage the goods of the environment. There are numerous analyses on the impact of environmental taxes (see, e.g., Bakker, 2009; Gaines and Westin, 1991). Environmental duties, especially environmental taxes, are usually defined from a tax base point of view (Dimitrijevic 2012: 231), especially at the international level (OECD, Commission EU). Accordingly, environmental tax is understood as a tax whose tax base is expressed in physical units of substances, which have an established negative environmental impact. This means that, contrary to subsidies, public duties are precisely based on the principle of causality. They are, therefore, paid by those who use the environment and consume its resources. The addressee of the norm may reduce or avoid the public duty if it reduces or avoids the use or the consumption of protected environmental goods. Since this is the case, such duties have a steady, permanent effect.

Duties may have different goals (Kluth and Smeddinck, 2013: 54) depending on the predominant effects that they seek to achieve. Some serve as a regulatory measure, so they are influenced by the addressees of the norms to disrupt the environment to a lesser extent or in a less harmful way. Others are primarily used as a means of financing environmental protection, since successful environmental policy management must be based on stable sources of financing (Lilić and Drenovak-Ivanović 2014: 69). The third, again, is characterized by a kind of compensation.

In principle, duties are a useful indirect means of environmental protection. Still, they are not without weaknesses. The main weakness is that it is difficult to quantify the impact of specific activities and actions of individuals on the use or damage of the environment, and consequently it is difficult to quantify an adequate amount of public duty. This is especially pronounced when certain environmental damage occurs because of a number of different causes. However, the burden, at least on average, is one that damages the environment, thus incurring the costs of protecting and improving the environment that it would not otherwise or would not bear (Ramsauer 2010: 120).

In the field of environmental protection, the most important public duties are taxes, but besides them there are also taxes, contributions, etc. Taxes are typically characterized by public duties being levied without any counteraction by public authorities. In contrast, fees, contributions, etc. imply such counteraction (e.g. municipal taxes or municipal waste management contributions.).

NEW ECONOMIC INSTRUMENTS

In addition to the classical ones, more recently new indirect instruments of economic character are being used. Unlike the classical ones, new economic instruments have emerged and evolved according to specific environmental needs. It can generally be said that their aim is to rationalize the use of the environment as much as possible and to improve the efficiency of that use (Kloepfer, 2011: 114). There are more such instruments, with the most famous being:

- convenience of use,
- compensation,
- certificates,
- sharing.

For convenience of use is characteristic that they are being a kind of reward for products or processes that are highly environmentally friendly. Such products or practices shall be exempt from any existing prohibition or restriction and may be used. Thus, e.g. allows the use of certain light aircraft, electric motors, etc. in

areas where the use of aircraft and engines is otherwise prohibited or restricted. In this way, other entities are indirectly encouraged to use environmental protection products or processes.

Certificates or licenses are an interesting new indirect instrument. They are particularly used successfully in the field of emission. When regulations set the maximum value of harmful emissions for a particular area, that value is allocated to the appropriate number of certificates or licenses according to certain criteria. The holder of the certificate may carry out harmful immissions up to the value determined by the certificate (Schnedl 2014: 110). The certificate contains a right similar to property law (Kotulla 2014: 43). As a result, the certificate is transferable and can be traded on the regional ecological exchange as a property. Those in need of higher emission quotas buy additional certificates, at prices that are determined according to the principle of supply and demand, as on each stock market. In this way, the total value of the immissions is maintained at the established level, but the secondary redistribution of permitted immission quotas is done through the certificate trade, and according to the real needs of each participant in the immission.

Compensation (compensation model) is also a situation involving regulatory environmental burdens. These burdens (use, damage, damage) must not be exceeded in their total prescribed value. Each entity whose activity represents a particular environmental burden has its own approved contingent (e.g. the value of allowable emissions) that it must comply with. However, entities with such contingents may educate the business community in a particular area, so that all environmental burdens correspond to the sum of the approved contingent of those entities, but that some of them may exceed their contingents if the volume of use of contingents of other entities in that community is reduced by the same values, thereby compensating such exceedances. Regulations, however, generally stipulate that the total environmental burden in the final result (after compensation) must result in a lower burden (Storm 2015: 147). This instrument can be seen to have some similarities to the certificate model (Erbguth and Schlacke, 2016: 120), but contingents cannot be exchanged, but their use can only be given (in whole or in part) to only other entities in the business community.

A specific indirect type instrument is the sharing of certain resources to reduce environmental burden. Thus, it can oblige the owner of an existing facility to endure the use of that facility by competitors, so that the construction of additional facilities and networks does not put additional lade on the environment. A typical example of such sharing is the obligation of the pipeline, electricity, or communications network owner to suffer the use of those networks by competitors, under prescribed and agreed terms. Resource sharing has, as an indirect instrument, emerged from the strong influence of antitrust and antitrust policies, especially in the European Union.

OTHER INDIRECT INSTRUMENTS

In addition to the above, other indirect instruments are emerging in recent times, which, without the use of state power, seek to stimulate the desirable behaviour of certain entities.

Such instruments include, first of all, environmental agreements concluded by public authorities with interested entities. These agreements jointly determine the behaviour of private entities in the pursuit of an activity or other activity, which should provide environmental protection. Instead of forcing such behaviour to be compulsory, the state enables appropriate agreements to be concluded with interested parties. Such an approach is quite in line with the principle of cooperation (Sands, Peel, Fabra and MacKenzie 2018: 213), which is one of the most significant principles in environmental law. This principle, among other, means that it is essential that the full cooperation of state authorities and citizens, or different social groups and organizations, must be achieved in establishing environmental policies and norms (Meyerholt 2007: 66,67). In other words, environmental protection has ceased to be the exclusive obligation and responsibility of the state (which is characterized by the so-called directive principle) and has already become both the responsibility and the obligation of the so-called civil society (Messerschmidt 2011: 313), with all its members. Therefore, in the 1970s and 1980s, the attention of science and politics began to shift from a purely direct approach to the principle of agreement, communication, and cooperation between the

state and other interested parties of society. However, in modern environmental law, these two principles are most often combined.[3]

The cooperation of the state and the citizens in environmental protection has two ideas at its core. The first is that the interest of society in environmental protection is expressed not only indirectly, through the state as a general representative of society, but also directly, by the citizens themselves, social groups, and organizations. The second idea is to meet the general interest of the society, embodied in the state, in the process of negotiation, with the partial interests of individual citizens, social groups and organizations, and thus, with the respect and consideration of all legitimate interests, develop and implement socially best policies. In this way, with the previously applied directive principle, the consensual principle, i.e. the principle of cooperation (cooperative principle, principle of cooperation), has become increasingly affirmed.

These agreements, by their legal nature, may be administrative contracts but also private contracts (Erbguth and Schlacke 2016: 121) of two equal contractual parties. However, in practice, informal agreements between public authorities and certain private entities that do not have a legal character, but result in the desired effect to occur, because the participants behave responsibly to what they have agreed. Such arrangements, therefore, rely on the moral or political responsibility of the parties rather than on legal ones.

The good side of the environmental agreement is that the desirable behaviour of private entities is realized instantaneously, and not until after a relatively lengthy procedure provided for by law or regulation. In addition, they are provided with voluntary cooperation by certain environmental member, which stimulates their behaviour.

Indirect instruments also include various national proclamations on environmental goals. They are not legally binding, but they inform the public of the intentions of the state, so that, accordingly,

3) When combining a directive principle with a cooperative principle, various modalities are possible. The degree and manner of participation of citizens and their organizations in environmental protection can range from mere informing of citizens, through their participation in policymaking and drafting of legal regulations in this field, to participation in their implementation, including control and surveillance activities.

they may also be found in binding legislation at some future time. In this way, interested parties are given the opportunity to plan their activities better, as they are timely informed of the state's environmental goals and intentions in certain areas.

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