

# Development, Objectives and Principles of the EU Environmental Policy and Law

Zsuzsanna Horváth

Pécs, 9-14 July 2012



**Hungary-Croatia**

IPA Cross-border Co-operation Programme



# **Development of the European Union Environmental Policy and Law**

(Content)

- 1. Establishment of the EU Environmental Policy, reasons for its establishment**
- 2. Environmental Action Programmes**
- 3. Objectives of the EU Environmental Policy**
- 4. Principles of the EU Environmental Policy**
- 5. Principles of Subsidiarity and environmental integration**
- 6. Specific environmental principles**
- 7. Policy aspects (parameters)**
- 8. Treaty Articles on the EU Environmental Policy**

# Establishment of the EU Environmental Policy

- 1957 Rome Treaty – no reference to the environment
- 1970 memorandum, 1971 Communication of the Commission, initiating an EC environmental policy
- 1972 Paris Summit of Heads of States and Governments, Paris Declaration
- 1973 First Action programme of the Community
- „economic expansion is not an end itself”, its aim is to reduce disparities in living conditions and to improve not only the standard of living but the quality of life, therefore, „particular attention is given to intangible values and to protecting the environment so that progress may really be put at the service of mankind” (Paris Declaration, I. EAP)

## I-II. Environmental Action Programmes

- Forms: „soft law”, Declaration, Resolutions. From Maastricht onward: „Decision” – legally binding act
- **First EAP** (1973): for the first time it defined objectives, principles, areas of action. Justification: Art. 2 of the Rome Treaty – objectives of the Community: *inter alia* to promote harmonious development of economic activities and an accelerated raising of the standard of living
- **Second EAP** (1977): particular attention is given to rational management of natural resources, protection of wild fauna and flora. It reinforces the objectives and principles and the preventive nature of the EC environmental policy

### III. Environmental Action Programme

- **Third EAP (1982):** of a rather political character.
- It further strengthens the preventive side of the policy; introduces the integration of environmental concerns into the planning and development of certain economic activities listing five policy areas: agriculture, energy, industry, transport and tourism
- More attention is paid to regional aspects
- Contribution to solution of economic problems: unemployment, inflation through creation of new jobs, encouragement of industrial innovation, improving competitiveness of the EC's economy
- Requires the introduction of environmental impact assessment
- Introduction of multi-media approach to prevent the transfer of pollution from one part of the environment to another

## IV. Environmental Action Programme

- **Fourth EAP** (1987): new stage, SEA (1987) introduced the Environmental Title into the EC Treaty; the legal basis for the EC environmental legislation; ‘constitutional’ EC competence, legitimacy; no further need to justify environmental decisions solely by economic reasons, the environment can be protected on its own right
- Contribution to the achievement of the internal market
- High level of environmental (health and consumer) protection
- More effective implementation of EC environmental law
- Reinforces former goals, principles, actions, eg. integration, the use of economic instruments; and introduces new ones, eg. risk assessment of and stricter control on the use of chemicals, biotechnology, nuclear safety, pollution control

## V. Environmental Action Programme

- **Fifth EAP (1993): ‘Towards Sustainability’** new phase: Maastricht Treaty on the European Union (1992), economic and monetary union, Northern and Eastern EU enlargement, strengthening the political integration; extending to new fields
- UN Conference on Environment and Development (Rio de Janeiro 1992), ‘Agenda 21’, new principles (e.g. sustainability, precaution), new Conventions on climate change, biodiversity
- New sustainable patterns of production and consumption
- Integration requirement: five selected target sectors
- Global problems: climate change, biodiversity
- Broader mix of instruments: legislation and market based ones (economic incentives, taxes, state aids, EMAS, envtl. liability)
- Institutional changes: Environmental Agency, IMPEL network
- Revision of the 6th EAP 1998 (decision)

## VI. Environmental Action Programme

- **Sixth EAP** (2002-2012) ‘Environment 2010: Our Future, Our Choice’: a basis for the EU Sustainable Development Strategy
- Contribution to the EU Integration Strategy, use of instruments beyond legislation, economic incentives
- **Priority areas:** climate change, nature and biodiversity, health and quality of life, natural resources, wastes
- Development of Thematic Strategies (e.g. protection of air, soil, natural resources, urban environment, etc.)
- More sustainable production and consumption patterns (IPP), *de-coupling* economic growth from use of natural resources
- Health protection: management and authorisation of chemicals and pesticides, principles of ‘substitution’ and ‘minimisation’
- Revision of the 6th EAP (2007), Final assessment (2011)

# Evaluation of the VI. Environmental Action Programme

- Final assessment (2011): large majority of actions have been or are in the process of being completed, however there are shortfalls, e.g.:
- biodiversity decline was not halted, general trend is negative (e.g. over-exploitation of the marine environment, fisheries)
- no progress in sustainable use of soils
- health protection: the negative impact of chemicals still continues; particulate matters (PM) and ozone depletion remains major problem in urban areas, access to water is insufficient
- resource use and waste generation is still increasing
- pressures from unsustainable production and consumption is growing
- climate change: share of renewable energy target 12% by 2010 was not achieved, greenhouse gas emissions (e.g. in transport)
- poor implementation of environmental legislation; there are shortcomings in information, in monitoring and in inspections

## Preparation of the VII. Environmental Action Programme

- Public Consultation (12 March – 1 June 2012): Commission Document on the EU environment policy priorities for the 7th EAP: „**A better environment for a better life**”
- EU Environment Council Conclusions of 11 June 2012 on the framework:
- It should be a strategic document, a framework for achieving a 2050 vision for a green Europe (EU strategies for resource efficiency, for biodiversity, low carbon economy, e.g. staying below 2°C increase in temperature, reducing greenhouse gas emissions by 80-95% by 2050, etc.)
- Better implementation, enforcement, monitoring and strengthening of environmental policy and legislation
- Continuation of policies and activities started under the 6th EAP
- Development and implementation of a comprehensive EU Adaptation Strategy (to climate change)
- Transition to a **green economy**: better integration of the environment into relevant policies
- Strengthening more sustainable production and consumption
- Using measures to create a **circular and green economy** (life-cycle concept, waste reduction, reusing, recycling - waste-hierarchy)

# Objectives of the EU Environmental Policy (First EAP)

**General aim:** is to improve the setting and quality of life and living conditions of peoples in the EC; economic expansion must be reconciled with the imperative need to preserve the natural environment (precursor of sustainable development)

**Special aims:**

- to prevent, reduce and eliminate pollution
- to maintain ecological balance, protection of biosphere
- sound management of natural resources (to avoid overexploitation)
- quality requirements in development (improving working conditions and settings of life)
- environmental aspects in town planning and land use
- common solutions to environmental problems outside the Community at international level

# **Objectives of the EU Environmental Policy (Article 191 (1) TFEU)**

Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment
- protecting human health
- prudent and rational utilisation of natural resources
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change

# **Principles of the EU Environmental Policy**

## **General principles of EU law**

- Principle of conferred powers/limited powers
- Competence sharing
- Loyalty – principle of sincere cooperation
- Subsidiarity – choice of the level of action
- Principle of proportionality
- Supremacy
- Direct effect
- Right to a healthy and clean environment
- Principle of environmental integration

# **Principles of the EU Environmental Policy**

## **(First EAP - 11 principles)**

- Prevention of pollution at source
- Effects on the environment should be taken into account
- To avoid exploitation of natural resources which causes significant damage to the ecological balance
- To improve scientific and technological knowledge, research
- Costs of prevention of pollution must be born by the polluter
- Activities in one state must not cause degradation of the environment of another state (Stockholm Declaration 1972)
- Interests of developing countries must be taken into account
- Participation in international environmental organisations
- Protection of the environment is a matter for all – education
- To establish the level of action – most effective at EC level
- National programmes should be coordinated, harmonized

# **Principles of the EU Environmental Policy**

## **(new principles)**

Principles listed in the First EAP are still valid. They were reinforced and extended by new ones by further programmes:

- integration of environmental requirements into other policies of the EU
- the high level of environmental protection
- principle of precaution
- principle of shared responsibility
- the subsidiarity principle

# Principles of the EU Environmental Policy (Treaty Articles)

- Preamble and Art. 3 TEU: sustainable development
- Art. 11 TFEU integration of environmental requirements into other policies of the EU
- Art. 191 (2) TFEU – specific environmental principles:
  - a high level of protection taking into account the diversity of situations in the various regions of the EU
  - precautionary principle
  - principle of preventive action
  - environmental damage should be rectified at source
  - the polluter should pay.”

## Principle of subsidiarity (Art. 5 (3) TEU)

- Art. 5 (1)-(2): principles of conferral and limited powers
- „(3) Under the *principle of subsidiarity*, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level [...]” ( + reference to the Protocol No. 2 and to role of national parliaments)
- Art. 5 (4) principle of proportionality
- It is a rule of the exercise of shared competences at EU level
- It should be read together with Art 4 TEU – „loyalty” principle (sincere cooperation)

# Principle of subsidiarity in environmental matters

- Art. 4 (e) TFEU: environment - shared EU competence
- First EAP: principle of the „level of action”
- Maastricht Treaty introduced the subsidiarity as a general principle for all non-exclusive competences
- Amsterdam Treaty: Protocol No. 7 (guidelines for the application of the principle)
- Key word: effectiveness. Type of pollution (transnational aspects) and geographical zone (more than one MS) should be considered to decide which decision-making level ensures better achievement of environmental objectives (e.g. need to correct distortion of competition, trade restriction, transboundary air or water pollution, climate change, biodiversity habitats protection, regional or global environmental matters, harmonization of product standards, etc.
- High level of protection (and other environmental objectives of the Treaty) could be achieved more effectively at EU level than by national measures, which are often not much more than transposition of EU legislation

## **Principle of environmental integration (Art.11 TEU)**

- “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”
- Continuous greening of other (economic) policies to reduce their harmful effects on the environment
- Environmental protection requirements: objectives, principles and conditions (Art. 191 TFEU) are to be set by other policies as their own ones, together with other sector specific objectives; it links together EU environment and other policies
- Continuous task: „definition and implementation” of policies
- Not a mere political guideline but a legal rule, it must be met by EU legislation, however, there is no priority over other policy objectives, a balance should be found

## High level of protection

- Art. 3 TEU: aims for the EU, *inter alia*, a high level of protection and improvement of the quality of the environment
- One of the general objectives of the EU, requiring the same respect as the achievement of its other economic and social objectives
- Art. 114 (3) TFEU (harmonisation) requires the Commission (Council and EP) to take as a base the high level of protection (health, safety, environmental and consumer protection issues)
- **Art. 191 (2) TFEU:** “Union policy on the environment *shall aim at a high level of protection* taking into account the diversity of situations in the various regions of the Union.”
- Not the highest possible level based on actual scientific knowledge or reached by the most advanced nations (interests of less advanced regions)
- Art. 193 allows derogations – for more stringent national measures
- Art. 114 (4) – (5): MSs can maintain existing or introduce new national measures after the adoption of harmonisation measures

## **Principle of prevention (Art. 191 (2) TFEU)**

- First, Third EAP: „prevention is better than cure” – damages to the environment often cannot be fully repaired, or irreversible
- Cost of clean up is often much higher than that of prevention
- Integration principle strengthens the preventive side of policy
- Environmental Impact Assessment – information provided by the developer before consent is given to avoid, reduce and remedy adverse effects of projects on the environment
- Strategic Environmental Assessment of public plans and programmes (SEA) – to take into account their adverse effects on the environment during their preparation (agriculture, land use, transport, energy, waste, etc.)

## Rectification of damage at source (Art. 191 (2) TFEU)

- Strongly connected to principle of prevention
- It requires the use of technologies other than „end-of pipe” – to rectify environmental damages already occurred (e.g. use of less polluting cars with lower consumption instead of catalytic converters)
- Preference for emission standards rather than environmental quality standards (in water and air protection) – in the EU the latter is often used
- Difficult to fully implement: Court of Justice: waste must be disposed as close as possible to the place where it is produced (Walloon waste case C-2/90 *Commission v Belgium*)
- Basel Convention (1989) on transboundary movement of hazardous waste: self sufficiency and proximity principles

## **Principle of precaution (Art. 191 (2) TFEU)**

- 1992 Rio Declaration, Maastricht Treaty, Fifth, Sixth EAP
- „Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” (Rio Declaration)
- New types of risks to human health and the environment due to scientific, technological development, e.g. chemicals, GMOs: their effects are not predictable to 100% certainty
- Potential, uncertain threats; no definitive scientific proof exists for their nature, seriousness, durability, cumulative effects, etc.
- Reversal of burden of proof: not the one who opposes but the actor has to prove that it won't cause harm to the environment
- Commission Guidelines (2000): considers it as a general principle, it applies to health protection as well
- Reflected in EU legislation, e.g. on GMOs, REACH (plus in case law of the Court of Justice of the EU and General Court)

# Polluter Pays Principle (PPP) (Art. 191 (2) TFEU)

- Who should pay for what? The meaning is broader than a simple restoration, a liability for environmental damage, however, it forms a part of the PPP. **Extended responsibility of polluters** to bear the costs not only for damage but of measures necessary for its prevention
- First EAP (1973): „the costs of *preventing* and eliminating nuisances must be born by the polluter”. 1974 Commission’s Communication; 75/436 Council’s Recommendation on cost allocation on environmental matters to avoid distortion in trade and competition: costs include all expenditure: costs of compliance with environmental standards, anti pollution measures + compensation for damages
- Aim: to **internalize external costs**: polluters must take their part and share the costs in combating pollution they cause; it encourages them to find less polluting technologies and products
- Community guidelines on state aid for environmental protection; to avoid pollution costs to be born by the society as a whole, in the granting of aids *distortion of competition must be avoided*, strict conditions should be met

# Directive 2004/35 on environmental liability

- The polluter pays principle constitutes the fundamental principle for the Directive 2004/35 on environmental liability
- Its aim is to establish a common framework for the *prevention* and remedying of environmental damage.
- Preamble: “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.”
- Article 8 paragraph (1) provides for that “The operator shall bear the *costs for the preventive and remedial actions* taken pursuant to this Directive.”

## Policy aspects – parameters Art. 191 (3) TFEU

“In preparing its policy on the environment, the Union shall take account of:

- available scientific and technical data,
- environmental conditions in the various regions of the Union,
- the potential benefits and costs of action or lack of action,
- the economic and social development of the Union as a whole and the balanced development of its regions.”

Not only the EU policymaker but the legislator shall take these aspects into consideration

(these „aspects” belong to „environmental requirements” to be taken into consideration together with objectives and principles of the EU environmental policy by other policies under the environmental integration principle)

## Environmental Policy Aspects

- *available scientific and technical data* in setting environmental standards, emission limit values, in application of prevention and precautionary principles
- *environmental conditions in the various EU regions*: different geographical, climatic, soil, water, etc. characteristics, it is difficult to adopt uniform measures, differentiation is needed
- *potential benefits and costs of action or lack of action* requires cost-effective measures; „costs” cannot be limited to economic aspects, ecological, social, human aspects should be considered; *costs of inaction*: remedying damage costs more
- *economic and social development of the EU as a whole and the balanced development of its regions* requires to take interests of less developed Member States into consideration: temporary derogations, financial support from the Cohesion Fund (Art. 192 (5) TFEU)

# Treaty Articles on the Environment

## Title XX, Arts. 191-193 TFEU

- Art. 191 (1) - (2) – (3): objectives, principles, aspects
- Art 191 (4): Competences of the EU and MSs to cooperate with third countries and international organisations; conclusion of international agreements – „mixed agreements”
- Art. 192: legal basis for adoption of environmental legislation  
Para. (1): *ordinary legislative procedure*: co-decision of the Council (*qualified majority voting*) and the European Parliament; consultation with ECOSOC and with the Committee of the Regions
- Art. 192 (2): *special legislative procedure*: Council adopts legislation by *unanimity* after consulting the EP, ECOSOC and Committee of the Regions

## Areas for unanimity decisions (Art 192 (2) TFEU)

- (a) provisions primarily of a fiscal nature;
- (b) measures affecting:
  - town and country planning,
  - quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,
  - land use, with the exception of waste management;
- (c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.
- The Council may decide (under the same decision-making procedure) to use the ordinary legislative procedure in these matters (i.e. by qualified majority voting)
- Art. 192 (3): General Action programmes – adopted by ordinary legislative procedure – (form: compulsory Decision)

## Financing and implementing: Art 192 (4) – (5) TFEU

- (4) „Without prejudice to certain measures adopted by the Union, the *Member States shall finance and implement the environment policy*” (role of MSs in implementing the EU Environmental policy; there is no explicit environmental fund, LIFE financial measure)
- (5) „Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph (1) involves costs deemed disproportionate for the public authorities of a Member State, such measure shall lay down appropriate provisions in the form of:
  - temporary derogations, and/or
  - financial support from the Cohesion Fund set up pursuant to Article 177” (environmental and infrastructural projects)

## Derogation from EU legislation: Art. 193 TFEU

- Art. 193 (TFEU) allows Member States to *maintain* or *introduce more stringent* protective measures. These national measures, however, must be compatible with the Treaties (e.g. provisions on free movements of goods, undistorted competition, prohibition of discrimination, etc.), and be notified to the Commission
- Art. 114(4) after the adoption of a harmonisation measure MSs may *maintain* national provisions to protect the environment
- Art. 114 (5) MSs may *introduce new* national provisions based on new scientific evidence
- MSs shall notify the Commission on these provisions and their grounds, which may approve or reject (they must not be means of arbitrary discrimination or disguised restriction on trade)

**Thank you for your attention!**