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Scope and Substance of the Integration Principle in EC Law and Its Application in Estonia

1. Introduction

The integration principle has been recognised as one of the cornerstones of modern environmental policy and law.

Principle 4 of the Rio Declaration on Environment and Development[*2] as adopted by the United Nations Conference on Environment and Development in Rio de Janeiro in 1992 proclaims the following:

> In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

According to the Amsterdam Treaty, the integration principle is now stipulated in Article 6 of the EC Treaty, which goes further than the Rio Declaration and prescribes that:

> Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.

The integration of environmental concerns into other areas of policy has achieved the status of one of the basic principles of EU environmental policy and law. As stated above, the principle is reflected in Article 6 of the EC Treaty, the very frontispiece of the treaty. This indicates that the principle has a general character and affects all policy areas. The European Court of Justice has ruled, in the case *Greece v. Council*[*3], that it is a binding obligation and that environment-related requirements must be integrated into the other policies, but it is still far from clear what constitutes the exact substance of this principle.[*4]

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2 Available at http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=78&ArticleID=1163 (12.05.2008).

3 Case 62/88, paragraph 20. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61988J0062:EN:HTML (11.05.2008).

4 See also R. Wurzel. The EU Presidency and the Integration Principle: An Anglo German Comparison. – European Environmental Law Review, January 2001, pp. 13–14.

There are numerous uncertainties as to how to understand the integration principle. What is its object (as reflected in the language "policies and activities" and "definition and implementation"), who are the addressees (the Community or also Member States insofar as implementation of EU policies is concerned), and what are the criteria ("environmental protection requirements", "with a view to promoting sustainable development")? There are also doubts as far as character of guidance ("must be integrated") is concerned — is it enabling authorities to restrict economic activities, or is it directing authorities to introduce such restrictions? Does the integration principle constitute a procedural or substantive prescription?

The present article seeks answers to some of these questions and explores how the integration principle is transposed into Estonian legislation and legal practice.

2. The integration principle in EU law

2.1. The object and addressees of the integration principle

On the EU level, the integration principle plays a role in policy-making and adoption of legislation in all policy areas indeed. Before the Amsterdam Treaty, the integration principle was stipulated in Article 174 of the environmental chapter of the EC Treaty. The principle was formulated similarly to one used now in Article 6.[*5] L. Krämer notes that, before the Amsterdam language was formulated, there was active debate about the method for reflection of the integration principle in the EC Treaty. There were two basic concepts. The first was to incorporate a reference to environmental considerations into other chapters of the EC Treaty, such as chapters on agricultural, transport, competition, and other policies. The second was to reflect the principle in the general part of the treaty. In Amsterdam, the second option prevailed.[*6] The interpretation of the integration principle makes it quite clear that this principle covers both policies and activities as well, and also the definition and implementation of any policies that are within EC competence.

The principle should be interpreted in such a way that environmental policy cannot be viewed in isolation as a specific policy sector alone. Environmental policy should be horizontal and cover all areas with environmental impact.

Furthermore, the integration principle covers not only definition and implementation of all policies having even remote impact on the environment but also individual activities. The integration principle has achieved the status of a general principle of Community law.

The requirement for integration is not met with the same strength in any of the other areas of policy in the European Union. Also, in Article 37[*7] of the Charter of Fundamental Rights of the European Union it is prescribed that:

> A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

J. Jans, one of the most distinguished scholars of EU environmental law, believes the requirement for the integration of environmental considerations to be the most important provision concerning the environment in the EC Treaty.[*8] Indeed, Article 6 of the EC Treaty, along with Article 37 of the Charter of Fundamental Rights of the European Union, gives environmental protection a whole new meaning in the EU context. Now there is no longer any area of policy (including law) influencing the state of the environment where environmental concerns do not have to be taken into consideration. With the aid of the integration principle, entry of environmental considerations into nearly all fields of human activity is occurring. This tendency, sometimes called ecological modernisation, follows the idea that economic and social development are not allowed to be, and should not be, a cause of environmental damage. In certain cases, economic and social development may bring with them even an improvement in the quality of the environment.

As an example of integration, fisheries policy can be highlighted. A fishery falls within the exclusive competence of the EC. The basic legal source regulating fisheries policy is Regulation 2371/2002.[*9] The regulation defines sustainable use of fish resources in Article 3 (e):

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5 "Environmental protection requirements must be integrated into the definition and implementation of other Community policies."

6 See L. Krämer. EC Environmental Law. 6th edition. London: Sweet and Maxwell 2007, p. 21.

7 For more information about this article, see F. Ermacora. The Right to a Clean Environment in the Constitution of the European Union. – The European Convention and the Future of European Environmental Law. J. Jans (ed.). Groningen: Europa Law Publishing 2003, pp. 29–42.

8 See J. Jans. European Environmental Law. Kluwer Law International 1999, p. 25.

9 Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:358:0059:0080:EN:PDF (12.06.2008).

> 'Sustainable exploitation' means the exploitation of a stock in such a way that the future exploitation of the stock will not be prejudiced and that it does not have a negative impact on the marine ecosystems.

At least in theory, this is a rather strong version of integration, because strict substantive criteria are used; implementation of fisheries policy must not have a negative impact on marine ecosystems as a whole.

Where the addressees of the principle are concerned, the academic debate is focused on the question of whether the principle is binding only on the Community level and for Community institutions. Alternatively, is it binding also for Member States? For example, L. Krämer insists that Article 6 is addressed merely to Community institutions.*[10] The author of the present article cannot fully agree with this statement. The principle seems to be addressed not only to the EC; it appears to bind also, at least indirectly, Member States. The implementation of EC environmental policy is a responsibility of Member States; consequently, Member States should take care of integrating environmental concerns into policies and activities in order to achieve a high level of protection, taking into account the principle set forth in Article 10 of the EC Treaty. This article prescribes that:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

Article 2 of the EC Treaty reflects the main tasks of the Community:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development […] a high level of protection and improvement of the quality of the environment […].

Consequently, Article 10 in conjunction with Article 2 of the EC Treaty commands Member States to achieve a high level of environmental protection. This cannot be obviously achieved without integrating environmental concerns into policies and activities potentially affecting the environment.

2.2. What should be integrated?

Article 6 of the EC Treaty prescribes that environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities. "Environmental protection requirements" means measures needed to ensure a high level of environmental protection. Furthermore, the environmental protection requirements referred to in Article 6 may be considered to encompass the objectives, principles, and conditions for action mentioned in Article 174 of the EC Treaty, as well as all other environmental protection principles, guidelines, and criteria that may be derived from the EC secondary environmental legislation and the relevant EC case law as well. One of the prescriptions that should enter into policies in other fields should be the precautionary principle in the event of scientific uncertainty. The precautionary principle is among the primary legal means by which environmental protection and sustainable development are achieved at an advanced level. Putting precaution into practice is an administrative task allowing for setting of ambitious environmental goals in such a manner that substantiating their legitimacy does not require final proof of potential environmental damage.*[11]

The integration principle is ultimately related to the principle of sustainable development. There are different opinions as to what the legal content of sustainable development is. According to my understanding, instruction to integrate environmental consideration into other fields is one of the legal aspects of the principle of sustainable development. One of the most widely recognised German scholars of the precautionary principle, S. Boehmer-Christiansen has treated the precautionary principle as one of the most important methods used in achieving sustainable development, which places the responsibility for the protection of the natural foundation of life for current and future generations with the government and gives government the right to intervene in the structure of the liberal consumption society with its short-term perspective.*[12]

[10] L. Krämer. EC Environmental Law. London: Sweet and Maxwell 2003, p. 11.

[11] See E. Fisher. The Precautionary Principle As a Legal Standard for Public Decision-making: The Role of Judicial and Merits Review in Ensuring Reasoned Deliberation. – Perspectives on the Precautionary Principle. R. Harding, E. Fisher (eds.). Federation Press 1999, p. 90.

[12] See S. Boehmer-Christiansen. The Precautionary Principle in Germany: Enabling Government. — Interpreting the Precautionary Principle. T. O'Riordan, J. Cameron (eds.). London: Earthscan 1994, p. 55.

2.3. Character of guidance — "must be integrated"

Article 6 is not the only integration clause in the EC Treaty. But there is still a clear difference. The phrase "must be integrated" appears in Article 6 as a stronger expression than those used, for example, in Articles 127 and 153 of the EC Treaty. These articles concern employment and consumer protection policies, respectively, and state that the objective of a high level of employment "shall be taken into consideration" and consumer protection "shall be taken into account". Article 6 is obviously more demanding.

The integration principle does not merely enable*[13] relevant authorities to restrict economic activities if this is necessary for achieving a high level of protection. It also commands them to do so if it is necessary. At the same time, the integration principle leaves to the institution very broad room for discretion concerning what kind of environmental requirements are involved and to what extent to perform integration. Similarly to the achievement of a high level of environmental protection, integration does not necessarily mean precedence over other policies.*[14]

Because of the considerable room for discretion, court control is obviously limited. A court can probably intervene and correct only in cases in which there is a clear and manifest disregard for environmental concerns. In implementation of the integration principle, other general principles of law should be taken into account as well — first of all, the principle of proportionality. This means that environmental concern shall not have *prima facie* supremacy over other considerations. The integration principle commands that environmental concerns be taken into account and carefully and prudently considered.

2.4. Procedural or substantive character of the integration principle

The integration principle set forth in Article 6 of the EC Treaty clearly has not only procedural but also substantive content. It is not merely the requirement to take environmental considerations into account; it instructs to achieve a certain environment-related result — a high level of protection: a measure may not cause environmental damage that cannot be outweighed by other, prevailing reasons.

It is not easy to answer the question of what constitutes a high level of environmental protection. In the literature, it has been stated that this probably means the level achieved by 'environment-friendly' Member States such as Sweden, Denmark, Finland, Austria, and Germany.*[15] In general, the author agrees with that position and considers it necessary to add that, under Article 95 (7) of the EC Treaty, such Member States can also contribute to improving the 'level' of harmonisation measures. Namely, Article 95 of the EC Treaty provides for those derogations when a Member State may introduce and apply environmental requirements that are more stringent than the harmonisation measures. The above-mentioned Article 95 (7) provides that when "pursuant to paragraph 6, a member state is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure". In explanation, the European Commission must consider whether to raise the level of harmonisation measures and establish environment-related requirements that are stricter than the existing ones.

The author is of the opinion that there are still even more indicators of a high level of environmental protection. I consider these to be primarily the application of the precautionary principle and the principle of integration.

That a high level of protection requires the application of the precautionary principle has also been found by the court of first instance in *Artegodan v. Commission*.*[16] The company Artegodan had a licence to manufacture medicinal products containing amfepramone. On 9 March 2000, the European Commission adopted three decisions to prohibit that substance on the basis of the opinion of a number of scientists and doctors that, under certain circumstances, medicinal products containing that substance could pose a potential risk to health. The company contested those decisions, relying on the principle of proportionality. At this point, I would like to highlight the following section of the court's judgment. The court pointed out that the precautionary principle should be applied not only to achieve a high level of environmental protection but also to ensure a high level of health and consumer safety. Thus, the court pointed out that, in order to achieve a high level of protection, the precautionary principle must be applied and, also, uncertain risks must be prevented.*[17]

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[13] G. Winter distinguishes enabling and directing function of the principles. See G. Winter. Environmental Principles in Community Law. – The European Convention and the Future of European Environmental Law. J. Jans (ed.). Groningen: European Law Publishing 2003, pp. 4–7.

[14] See *Germany v. Parliament and Council*, Case C-233/94.

[15] L. Krämer (Note 10), p. 11.

[16] *Artegodan GmbH v. Commission*, Case T-74/00, paragraph 183. Available at http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&nomusuel=Artegodan&resmax=100 (11.05.2008).

[17] *Ibid*.

3. The integration principle in Estonian law and practice

3.1. The integration principle in the Constitution and framework environmental legislation

3.1.1. The Constitution

There are two provisions in the Estonian Constitution that could be, at least indirectly, related to the principle of integration. Section 5 of the Constitution stipulates that:

The natural wealth and resources of Estonia are national riches which shall be used sustainably.

In the case *Koidu Park*, the Tallinn district court[*18] directly referred to § 5 in the context of the integration principle. The case will be dealt with in more detail below.

Furthermore, § 5 of the Constitution can also be interpreted in such a way that integration of environmental protection requirements constitutes valid legal grounds to justify encroachment on basic entrepreneurial and property rights and freedoms and to limit the environmental impact of economic activities.

Section 53 of the Constitution stipulates that:

> Everyone has a duty to preserve the human and natural environment and to compensate for damage caused to the environment by him or her.

Unfortunately, there is still no court practice addressing § 53, but, in my opinion, this provision can be interpreted in such a way that a certain environment-related 'duty of care' must be integrated into all activities affecting the environment.

3.1.2. Framework legislation

Three sources can be brought forward in this case — the Act on Sustainable Development[*19], the Planning Act[*20], and the Nature Protection Act.[*21]

Subsection 3 (3) of the Sustainable Development Act stipulates the following:

> Minimisation of environmental pollution and use of natural resources should be considered to be basic requirements of all economic activities.

This subsection is very broad and general, but nevertheless it could be interpreted in such a mood that environmental concerns must be integrated not only into legislation but also in economic practices. At the same time, this provision creates several questions — of exactly what should be integrated and to what extent. Unfortunately, there are no clear answers to such questions, neither in Estonian legislation nor in court or even administrative practice. Estonian law obviously leaves a very broad margin for discretion here.

Section 12 of the Sustainable Development Act prescribes:

> Development of economic sectors and areas where environmental pollution or use of natural resources may have negative environmental impact should be governed by development plans. Such plans should be drawn up with respect to the sectors of energy, transport, agriculture, and forestry and to the chemical, building material, and food industries.

This is one of the few highly practical provisions of the otherwise very vague Sustainable Development Act. Just such development plans indeed have been drawn up. One of the primary functions of these plans is integration of consideration for the environment into other policies. The problem, however, is that these plans are only indirectly binding on the administration and in too many cases are not seriously considered and taken into account in the taking of individual decisions.

The purpose of the Planning Act is to "ensure conditions that take into account the needs and interests of the widest possible range of members of society for balanced and sustainable spatial development, spatial planning, land use, and building". According to § 2 (2) of the act:

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[18] Tallinn District Court, 18.04.2008, 3-06-1136. Available at http://www.kohus.ee/kohtulahendid/temp/3-06-1136.pdf (12.06.2008) (in Estonian).

[19] Säästva arengu seadus. Adopted on 22.02.1995. – RT I 1995, 31, 384 (in Estonian).

[20] Planeerimisseadus. Adopted on 13.11.2002. – RT I 2002, 99, 579 (in Estonian).

[21] Looduskaitse seadus. Adopted on 21.04.2004. – RT I 2004, 38, 258 (in Estonian).

> […] spatial planning is democratic and functional long-term planning for spatial development that co-ordinates and integrates the development plans of various fields and, in a balanced manner, takes into account the long-term directions in and needs for the development of the economic, social, cultural, and natural environment.

As one can see, the main purpose of the land use planning procedure is to ensure sustainable development — balancing of economic, social, cultural, and environmental considerations (values). Unfortunately, this idea is a bit idealistic in Estonian conditions. Estonia is famous for its ultraliberal economic policy, and in reality in most cases where there is certain conflict between different interests — economic and environmental, for instance — the economic considerations prevail. This is a general problem of the legal culture. Most Estonian environment-related laws are very progressive, but at the stage of implementation the 'power' of environmental law weakens considerably.

In the Nature Protection Act, one can find a framework provision that could somehow be linked with the integration principle. Subsection 2 (2) of the act prescribes that:

> Nature conservation shall be based on the principles of balanced and sustainable development and in each individual case, alternative solutions shall be considered which, from the position of nature conservation, are potentially more effective.

This provision indirectly refers to the integration principle and orders — when environment-related decisions are taken, that the alternative that is 'best for the environment' always be carefully considered. Unfortunately, there have been no court cases dealing with this matter in Estonia yet.

3.1.3. Draft legislation

The Coalition Agreement of the government (from May 2007) sets up a goal of codifying Estonian environmental law.[*22] The first step in this obviously lengthy process will be elaboration of the 'General Part Act' for the Estonian Environmental Code. At the moment, Estonian environmental law lacks such a general framework act; Estonian environmental law is fragmented and organised by sectors. This deficit obviously weakens the impact of environmental regulation and negatively affects also integration of environmental requirements into other policies.

One of the chapters of the draft deals with planning of environmental protection — in particular, strategies and action programmes in the field of the environment. There will be envisaged three types of strategies — national long-term environmental strategy, strategies of different areas of environment protection (e.g., nature conservation strategy, forest policy, etc.), and so-called strategies of integration (energy, transport, tourism, etc.). All of these strategies deal in some way with integration tasks, but the last will be specially designed to promote integration of environmental concerns.

3.2. The integration principle in policy papers

The Estonian National Strategy on Sustainable Development called Sustainable Estonia 21 was approved by the Estonian Parliament in September 2005.[*23] The strategy focuses on the concept of sustainability for the long-term development of the Estonian state and society until the year 2030. The general development principle for the country is "to integrate the requirement to be successful in global competition with a sustainable development model and preservation of the traditional values of Estonia".

The strategy defines Estonian long-term development goals of taking into consideration interaction between environmental and development factors:

- Viability of the Estonian cultural space: According to the Constitution of the Republic of Estonia, the state of Estonia shall "ensure the preservation of Estonian nature and culture through the ages".[*24] The sustainability of the Estonian nation and culture constitutes the cornerstone for the sustainable development of Estonia.
- Enhancement of welfare: Welfare is defined as the satisfaction of the material, social, and cultural needs of individuals, accompanied by opportunities for individual self-actualisation and for realising one's aspirations and goals.
- Coherent society: Achievement of the first two goals will be possible only if the benefits proceeding from their realisation can be enjoyed by the majority of the population and the price for achieving the goals is not destructive for the society as an integral organism. Realisation of the goals is possible

[22] Available at http://www.valitsus.ee/failid/2007_12_20_VV_tegevusprogramm_LOPLIK.pdf (12.06.2008) (in Estonian).

[23] Available at http://www.riigikantselei.ee/failid/Saastev_Eesti_21.pdf (12.06.2008) (in Estonian).

[24] Eesti Vabariigi Põhiseadus. Adopted on 28.06.1992. – RT 1992, 26, 349; RT I 2007, 33, 210 (in Estonian).

only in a situation where an absolute majority of the members of society believe in and contribute to their achievement — i.e., in a coherent and harmoniously functioning society.

– Ecological balance: Maintenance of ecological balance in the natural environment of Estonia is a central precondition for our sustainability. It is also a contribution to global development, following the principle that requires a balance both in cycles of materials and in flows of energy at all levels of the living environment.*[25]

The strategy emphasises that the overall aim is to integrate considerations related to the regenerative capacity of nature into the use of nature. The main function of environmental protection is not to protect resources and the natural environment but to achieve their harmonious and balanced management in the interests of Estonian society and local communities. The aim is to reach a situation where humans regard the environment not as a pool of objects requiring protection but as an integral whole of which the human is one part. The aim is combined conception of nature as a value and as a central development resource of the society in the context of the overall development of Estonia.

In my opinion, the strategy clearly uses the language of 'integration', but from the other side it concentrates too much on economic and social issues, with environmental concerns still somehow subordinated to these. The other problem with regard to the strategy is another connected with Estonian legal culture. Such policy documents do not play a significant part 'in real life' and are very frequently disobeyed when legislative or executive decisions are taken.

3.3. Interpretation of the integration principle by the judiciary

There are two indeed significant cases of the Estonian courts that are related to the integration principle — the so-called *Jämejala Park* case*[26] of the Estonian Supreme Court and, already mentioned, the *Koidu Park* case.

A historic and well-preserved park can be found in a small village — Jämejala — in central Estonia. In Soviet times, a hospital for mentally disabled people was erected in the park. In the late 1990s, the Ministry of Justice launched a project to construct on the basis of the existing building a new central hospital for prisons. The planned new facility would have needed more space, and, as a consequence, a significant part of the park would have had to be destroyed. Under Estonian planning law, all such projects should be based on a land use plan. The plan was initiated and subsequently adopted by the local government. Adoption of a land use plan is under Estonian law a discretionary decision that should entail weighing of different interests and values. The decision of the local government was based on two arguments. The first argument was brought out by the Ministry of Justice — building of a new facility in the park on the basis of existing buildings would have resulted in fewer costs. The local government emphasised the opportunity for new jobs for local people, who suffered from a high rate of unemployment. When deciding on the plan, the local government totally ignored the environmental value of the park, which was brought up in discussion by local people, who decided to protect the park. A group of local residents filed a complaint with the administrative court and contested the adoption of the planning, applying for annulment of the administrative act. The court of first instance and the district court dismissed the complaint, but the Supreme Court took a different position. The Supreme Court annulled the plan. The court's reasoning here was based on the concept of discretion. Under Estonian administrative law, the right of discretion is an authorisation granted to an administrative authority by law to consider making a resolution or choose between different resolutions. The right of discretion shall be exercised in accordance with the limits of the authorisation, the purpose of discretion, and the general principles of justice, taking into account all relevant facts and considering all legitimate interests. The Supreme Court pointed out that the planning act adopted by the local government was not based on all relevant facts and consideration of all legitimate interests. In the Supreme Court's estimation, the local government totally 'forgot about' environmental considerations and this should be considered a manifest error of discretion that should lead to a declaration of illegality of the planning decision.

As a conclusion, it could be said that in the latter case the Estonian Supreme Court used the integration principle in the context of the right of discretion of administrative bodies. The court emphasised that environmental consideration should always be taken into account in decisions on development plans or projects that can have a negative environmental impact. This decision seems to be a quite effective interpretation of the integration principle. The Estonian Supreme Court pointed out that environmental concerns should have significant legal weight and that they can and must successfully compete with economic and social concerns. Furthermore, the court added that weighty arguments are not only those concerning environment-related

[25] See Web site of Estonian Ministry of Justice at http://www.envir.ee/58738 (11.05.2008).

[26] Estonian Supreme Court, 14.10.2003, 3-3-1-54-03. Available at http://www.nc.ee/?id=11&indeks=0,3,159,1213&tekst=RK/3-3-1-54-03 (12.06.2008) (in Estonian).

human health and well-being but also those related to the objective value of the environment as such (here the "park as such").

In the *Koidu Park* case[*27], the Tallinn district court dealt with a situation similar to that addressed in *Jämejala Park*. The case concerned an old and well-preserved park in Tallinn. Koidu Park was regularly used by local residents for recreational purposes. Local inhabitants filed a claim with the administrative court, seeking annulment of the proposal to change the local land use plan in a manner allowing erection of residential buildings in the park and, thereby, destruction of the park. The court here directly referred to principle 4 of the Rio Declaration and, erroneously, to Article 6 of the EC Treaty and ruled that the contested plan infringed on the integration principle and that this principle must be implemented not only when new legislation is prepared and adopted but also in administrative practice.

3.4. Governmental institutions taking care of integration

One cannot find special procedures of environmental integration in the Estonian legislative process. However, the Estonian Ministry of the Environment can and should take care of integration of environmental concerns in the framework of general procedures of legal drafting in Estonia. The legislation is usually drafted in ministries or other governmental bodies, before adoption drafts are sent to all ministries for comments. Unfortunately, the Estonian Ministry of the Environment in practice has not used this tool actively enough to promote environmental aspects of different policies.

There are no general requirements as to inviting environmental agencies to comment on or co-operate in the rule-making and individual administrative actions by agencies more remotely concerned with the environment.[*28] Such general procedures are not present in Estonia. Intervention of environmental agencies can occur merely in the framework of environmental impact assessment for projects or strategic environmental assessment of plans and programmes.

3.5. Implementation of Directive 2001/42/EC[*29] — on strategic environmental impact assessment

One of the major instruments of environmental integration in EC law is Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment. Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes that are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption.

Strategic environmental assessment (SEA) is the assessment of environmental effects of policies, plans, and programmes. The practice of SEA is closely related to environmental impact assessment (EIA), which is the evaluation of environmental effects of development projects. Strategic environmental assessment should strengthen EIA because it addresses potential environmental problems at a higher and earlier level in the development process and because it aims at integrating environmental requirements into decision-making.[*30]

The key measure for transposition of the directive is the Environmental Impact Assessment and Environmental Management Act[*31], approved by Parliament on 22 February 2005. The first section of the act deals with assessment of the effects of certain public and private projects on the environment. The second major section of the act regulates the procedure of strategic environmental assessment and transposes Directive 2001/42/EC.

Section 22 of the previous EIA act (from 2000) stated that the potential environmental impact resulting from activities proposed by development plans or programmes had to be assessed in the course of drafting of the plan or programme.[*32] The Planning Act contained similar provision concerning land use plans (in § 30). This meant that there was no specific procedure for environmental impact assessment for a plan and, accordingly, no procedural guarantees. In most cases, assessment of the environmental impact of plans was not carried out

[27] Tallinn District Court, 18.04.2008, 3-06-1136.

[28] By this we mean administrative agencies in charge of policies which *prima facie* do not impact on the environment but do so indirectly or upon deeper consideration.

[29] Council Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment. – OJ L 197, 21.07.2001, pp. 30 – 37.

[30] S. Marsden, J. de Muller. Strategic Environmental Assessment and Sustainability in Europe — How Bright is the Future. – Review of European Community and International Environmental Law 2005 (14) 1, p. 50.

[31] Keskkonnamõju hindamise ja keskkonnajuhtimissüsteemi seadus. Adopted on 22.02.2005. – RT I 2005, 15, 87 (in Estonian).

[32] Keskkonnamõju hindamise ja keskkonnaauditeerimise seadus. Adopted on 14.06.2000. – RT I 2000, 54, 348 (in Estonian).

at all or at least was not conducted carefully enough. Impact assessment was 'hidden' in the general planning procedure.

Estonia has, in general, transposed Directive 2001/42/EC (including the annexes to it) properly; however, there are a number of deficiencies as well. The most important deficiencies are related to specification of the plans and programmes and detailed arrangements for consultations and dissemination of information.

The main conformity problems are as follows.

- Subsection 2 (2), litra a, first indent of the directive specifies which plans and programmes are subject to preparation **and/or** adoption by an authority at national, regional, or local level or are prepared by an authority for adoption, through a legislative procedure by Parliament or the government. According to Estonian law (§ 31 of the Environmental Impact Assessment and Environmental Management Act), a strategic environmental impact assessment is carried out only if the strategic planning document is established by a legal act of a parliament, government, national-level governmental body, or body of local government. Accordingly, the Estonian national law does not cover plans and programmes having potential environmental impact that are prepared but not established by a legal act. This should be considered a major mistake in transposition of the directive.
- Subsection 3 (6) requires that in the case-by-case examination and in specifying types of plans and programmes those authorities shall be consulted that, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing said plans and programmes. Estonian law (§ 34 (4) of the Environmental Impact Assessment and Environmental Management Act) stipulates that opinion shall be sought at least from the Ministry of Social Affairs, the Ministry of Culture, and the Ministry of the Environment, as well as from the county environmental department or a local government body. It is obvious that the list of authorities cited as those that should be consulted is not exhaustive. Other authorities might be likely to be concerned by the environmental effects of a plan or programme — such as the environmental inspectorate (responsible for enforcement), the border guard department (responsible for marine pollution), and those responsible for administration of protected areas. If necessary, these authorities should be consulted as well. By contrast, Estonian law is ambiguous and stipulates that other authorities **may be** consulted. It is obvious that in this respect the discretion is too broad and Estonian law should be made more concrete.
- As far as specification of relevant plans and programmes is concerned, Estonian transposition is controversial. As was mentioned above, Estonian national law does not cover plans and programmes that could have an environmental impact and are prepared but not established by legal act. From this standpoint, the Estonian definition is narrower than the directive's definition. From another angle, the Estonian definition is broader. The scope of the directive covers only plans and programmes that are required by legislative, regulatory, or administrative provisions. This requirement is missing from Estonian law. Estonian law is stricter than the directive, as plans and programmes that are not directly required by legislative, regulatory, or administrative provisions are covered as well. The last argument, of course, has more theoretical relevance. I do not believe that the Estonian authorities are keen to adopt plans or programmes on a voluntary basis.

3.5.1. Assessment of SEA practice

Strategic environmental assessment is a relatively new instrument in Estonia, and specialist studies of its effectiveness are not available. However, two problems, which currently are under active discussion in Estonia, can be pointed out. Both of these issues are related to the interrelations of SEA and EIA.

Firstly, in many cases, plans or programmes subject to SEA are so general and include so many uncertainties that SEA seems to be quite pointless. In reality, this procedure is not capable of creating new knowledge about environment-related aspects of the plan, which have to be taken into account in decision-making.

Secondly, in many cases, the plan or programme subject to SEA is already detailed, enabling performance of full-scale environmental impact studies. In such cases, EIA for the planned project seems to be pointless.

In summary, the main problem is that impact assessment should be done at those stages of the procedure where there is enough information for prudent assessment, and unnecessary, lengthy, and costly parallel procedures should be avoided.

4. Conclusions

Integration has achieved the status of a general principle of EU law. Its main addressees at this level are Community institutions, but it is indirectly binding for Member States as well, insofar as they are implementing EU policies.

The integration principle covers not only definition and implementation of all policies having even remote impact on the environment but also individual activities. The principle is closely related to that of sustainability but is more demanding still, as it instructs those it addresses to achieve a certain environment-related material result — a high level of environmental protection. This means that the principle has not only a procedural dimension (e.g., with SEA) but a substantive element as well.

The integration principle does not merely enable relevant authorities to restrict economic activities if this is necessary for achieving a high level of protection; it also commands them to do so if this is necessary. At the same time, the integration principle leaves to the institution very broad room for discretion with respect to the kind of environmental requirements to integrate, and to what extent to do so. Similarly to the achievement of a high level of environmental protection, integration does not necessarily mean precedence over other policies.

The Estonian Constitution (in its §§ 5 and 53) and environmental framework legislation (the nation's Sustainable Development Act, Planning Act, and Nature Protection Act) contain indirect reference to the integration principle and can effectively facilitate internalisation of environmental concerns in other policy areas and relevant administrative practice.

The Estonian judiciary has interpreted the integration principle in the context of exercise of administrative discretion. Estonian courts have pointed out that environmental concerns should have significant legal weight and that they can and must compete on equal footing with economic and social concerns.

One of the most significant instruments of integration — the SEA directive — has been transposed into Estonian law correctly in general, but there are still important conformity problems as far as definition of plans and programmes and consultational requirements are concerned.