

BASICS OF EU ENVIRONMENTAL LAW

Harmonization of environmental requirements. EU law transposition and implementation. The role of national courts and the role of CJEU.



7. March 2022

JUDr. Vojtěch Vomáčka, Ph.D., LL.M

Last lecture summary

- Protection of the environment *is "one of the Community's essential objectives"* which may as such justify certain limitations of the principle of the free movement of goods.
- Sources: **Primary legislation** – Treaties (TEU, TFEU, Charter) = base for legislation, principles, **Secondary legislation** – regulations, directives, decisions, opinions and recommendations, Conventions and Agreements, Supplementary law

Article 191

1. 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.

2. 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. It shall be based on the **precautionary principle** and on the **principles that preventive action** should be taken, that environmental damage should as a priority be **rectified at source** and that **the polluter should pay**.

Competence + Subsidiarity + proportionality



Last lecture summary

Aims of EU environmental policy:

- **High level of protection**
- **Integration**
- **Sustainable development**
- **(Public participation)**

Environmental principles (in narrow sense):

- **Prevention**
- **Precautionary principle**
- **Polluter pays**
- **Rectification at source**

Specific principles





Principles – Precautionary principle

Where action is deemed necessary, measures based on the precautionary principle should be, *inter alia*:

- **proportional** to the chosen level of protection,
- **non-discriminatory** in their application,
- **consistent** with similar measures already taken,
- based on an examination of **the potential benefits and costs of action or lack of action** (including, where appropriate and feasible, an economic cost/benefit analysis),
- **subject to review**, in the light of new scientific data, and
- capable of assigning responsibility for producing the scientific evidence necessary for a **more comprehensive risk assessment**.



Principles



C-2/90: The principle that environmental damage should as a matter of priority be remedied at source, laid down by Article 130r (2) of the Treaty as a basis for action by the Community relating to the environment, entails that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as dose as possible to the place where it is produced, in order to limit as far as possible the transport of waste.

(Moreover, that principle is consistent with the principles of self-sufficiency and proximity set out in the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal, to which the Community is a signatory.)



Principles - Rectification at source

Rectification at source – emphasises proximity,
opposite to end-of-pipe approach, BAT

C-364/03: *„Accordingly, inasmuch as it is undisputed that emissions of sulphur dioxide and nitrogen oxide have harmful effects on human health and on biological resources and ecosystems, the obligation on Member States to adopt the measures necessary to reduce the emissions of those two substances is not dependent, contrary to the assertion of the Hellenic Government, on the general environmental situation of the region in which the industrial plant in question is located.“*



Principles – Polluter pays

Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy:

„Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted according to Annex III, and in accordance in particular with the polluter pays principle.“



Principles – Polluter pays

C-254/08 (wide margin of appreciation):

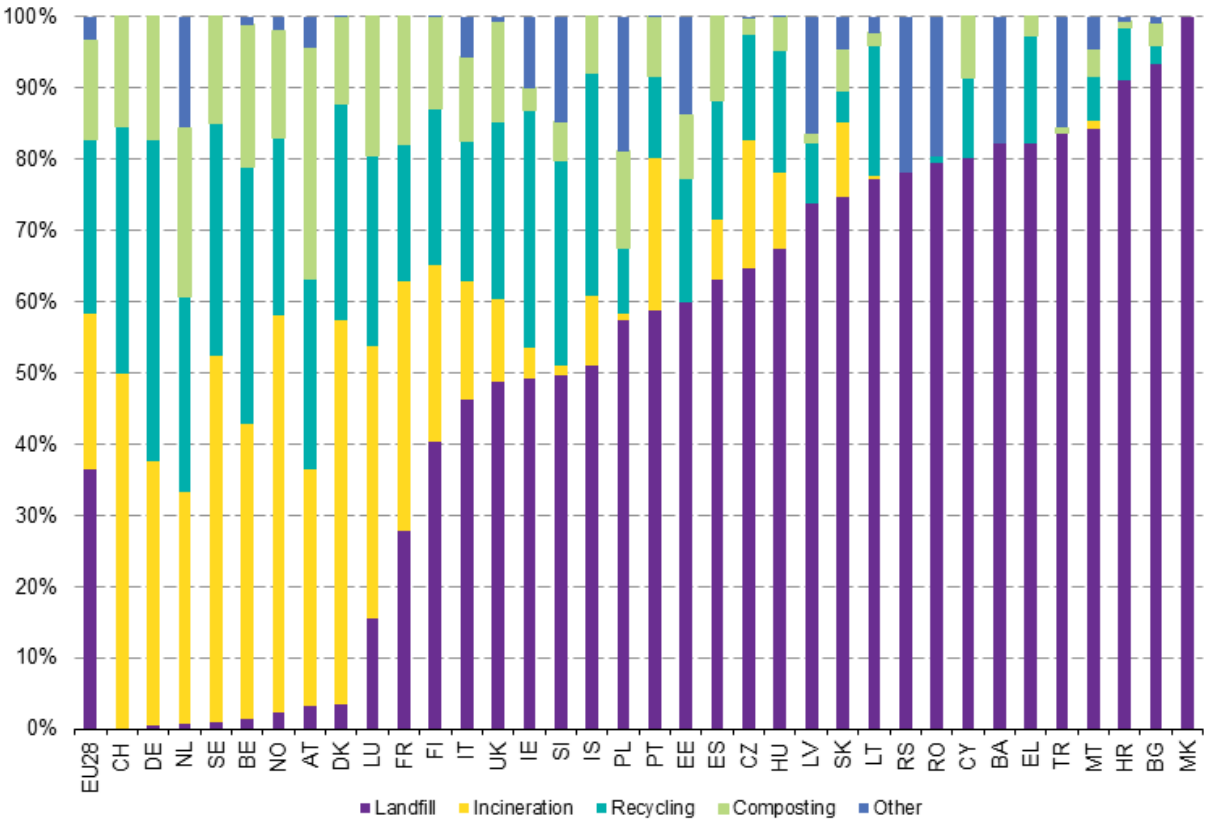
- *While the Member States as the addressees of Directive 2006/12 are bound as to this result to be achieved in terms of financial liability for the cost of disposing of waste, in accordance with Article 249 EC they may, however, choose the form and the methods to be applied in order to attain that result.*
- ...as Community law currently stands, there is no legislation adopted on the basis of Article 175 EC imposing a specific method upon the Member States for financing the cost of the disposal of urban waste, so that the cost may, in accordance with the choice of the Member State concerned, equally well be financed by means of a tax or of a charge or in any other manner.

Today: Harmonization of environmental requirements

Reasons:

- Environmental and safety reasons: facing transboundary or global problems (ozone depletion, climate change, biodiversity, air and water pollution, etc.).
- Market and economy reasons.
- Avoiding freeruners: same rules, principles and sanctions (existing discrepancies).
- Lobby and policy, international obligations.

Harmonization of environmental requirements





<https://www.youtube.com/watch?v=ypMvDKW5qm0>

Today: Harmonization of environmental requirements and their implementation

What are the obligations of the Member States towards the EU environmental law?

- **to refrain from any measures which would jeopardise its effects**
- **to implement (transpose) it correctly**
- **to apply it correctly (interpretation, effectiveness)**
- **to inform the Commission**

What if not?

There are three main procedures at the Court of Justice:

- **Direct actions against EU acts initiated by MS, institutions or individuals (Article 19 (3) (a) TEU, Article 263 TFEU)**
- **Preliminary reference procedures, initiated by Member State Courts (Article 19 (3) (b) TEU, Article 267 TFEU)**
- **Infringement proceedings against MS initiated by the Commission or other MS (Article 19 (3) (a) TEU, Article 258 to 260 TFEU)**

Today: Harmonization of environmental requirements and their implementation

What are the obligations of the Member States towards the EU environmental law?

- **to refrain from any measures which would jeopardise its effects**
(even before the time limit for the implementation?)
- **to implement (transpose) it correctly**
(not just copy paste)
- **to apply it correctly (interpretation, effectiveness)**
(inspections, sanctions, public participation)
- **to inform the Commission**

Infringement proceedings against MS initiated by the Commission or other MS (Article 19 (3) (a) TEU, Article 258 to 260 TFEU)

(lengthy proceedings, burden of proof, systematic failures, high sanctions)

EXAMPLE 1: Transposition within a time limit

C-126/96 (*Inter-Environnement Wallonie*)

- The Belgian Conseil d'État referred to the Court for a preliminary ruling
- Proceedings brought by an NGO for annulment of the Order of the Walloon Regional Executive on toxic or hazardous waste
- Part of the Order infringes (?) the EU directives as it **excludes from the permit system the operations of setting up and running an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste**, where that installation forms an integral part of an industrial production process.

EXAMPLE 1: Transposition within a time limit

During the period laid for implementation? C-129/96

- *Since the purpose of such a period is, in particular, to give Member States the necessary time to adopt transposition measures, **they cannot be faulted for not having transposed the directive** into their internal legal order before expiry of that period.*
- *Nevertheless, it is during the transposition period that the Member States **must take the measures necessary to ensure** that the result prescribed by the directive is achieved at the end of that period.*
- *Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that **during that period they must refrain from taking any measures liable seriously to compromise the result prescribed.***

EXAMPLE 2: SANCTIONS

1) Particular requirements

Numerous directives require MS to establish 1) effective system of sanctions, 2) effective system of sanctions with particular sanctions and measures (withdrawal of permit, measures to ensure that compliance is restored within the shortest possible time)

2) Duty of cooperation of the member states

Geelhoed in C-304/02:

Member States are under a general obligation under Article 10 EC to take all measures necessary to ensure that Community law is applied and enforced effectively and that its 'effet utile' is achieved.(...) to ensure 'that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

- Taken as a whole, the system of remedies must be dissuasive (see C-565/12)

Transposition and implementation

- The adequacy of enforcement still remains a major issue
- **The European Commission only exercises a relatively marginal control over the proper implementation of EU secondary law**
- additional control over financing from EU funds
- **Important role of national courts and the role of CJEU.**

National judge and EU environmental law

- **Does the national law respect (transpose correctly) the EU Directive?**
- **Not perfectly = but is it possible to interpret it in compliance with the directive? (understand the directive)**
- **It is not possible = the conflicting national law must be dissapplied.**
- **Now there is a gap in law = is it possible to apply the EU Directive directly?**

- **The national law was not in compliance with EU law = liability?**
- **The EU law does not seem correct? What to do?**

CORRECT APPLICATION = CORRECT INTERPRETATION

A sow is a female that has reproduced. A gilt is a female that has not reproduced.



Livestock Terminology:
SWINE

BOAR: Uncastrated male hog or pig.	BARROW: Male pig castrated before reaching sexual maturity.
SOW: Female swine which has farrowed at least once.	GILT: Young female swine that has not yet produced a litter.



Kansas

TERMINOLOGY

A sow is a female that has reproduced. A gilt is a female that has not reproduced.

STARTING POINT: *It is therefore necessary also to examine the general scheme **and** purposes of Directive 96/61 (C-585/10 Møller, para. 28)*

*The Kommune submits, before the Vestre Landsret, that it was justified in including the places for gilts in the number of places for sows. It maintains that **the objective of Directive 96/61 is to protect the environment and that there is no reason to take the view that a gilt pollutes less than, or in a different manner to, a sow.** It concludes that places for gilts are covered by the expression 'places for sows'. According to the Kommune, the legislation on animal welfare is not relevant in that regard.*

CONSEQUENCE:

31 As the purpose of Directive 96/61 has therefore been broadly defined, subheading 6.6(c) of Annex I to that directive cannot, as Mr Møller and Ireland suggest, **be interpreted restrictively in such a way as to exclude places intended for gilts** (see, by analogy, *Association nationale pour la protection des eaux et rivières* and *OABA*, paragraph 27).

CONTROL EXERCISED BY THE COMMISSION

- **Non-communication**
- **Non-conformity** (non-transposition: delayed, incorrect)
- **Bad application** (non-enforcement: no monitoring, no sanctions, non-application)

- Commission gets information from reports, petitions, complaints, press, previous proceedings
- **EU Pilot**: scheme designed to resolve compliance problems without having to resort to infringement proceedings
- **Only a few cases end up before the CJEU.**

Correct application

Burden of proof - science comes to play

C-335/07, C-438/07: Treatment of urban waste water - Failure to require more stringent treatment of nitrogen in all treatment plants of urban waste water.



Correct application

Burden of proof - science comes to play

37 The submissions made by the parties indicate that, in general, one of the nutrients, whether it be phosphorus or nitrogen, is present (...).

38 In such circumstances, it is necessary to adopt different measures to reduce eutrophication in one part of the Baltic Sea as compared with another part. Directive 91/271 provides in this respect that the **Member States are to assess, on the basis of the local situation, the substances** – phosphorus and/or nitrogen – **which contribute to eutrophication** and, in accordance with that assessment, **adopt appropriate treatment measures.**

Correct application

Systematic failure of a Member State to fulfil obligations
C-494/01: waste operation at Fermoy, County Cork



Correct application

C-494/01:

*“...in principle nothing prevents the Commission from seeking in parallel a finding that provisions of a directive have not been complied with by reason of the conduct of a Member State’s authorities with regard to particular specifically identified situations and a finding that those provisions have not been complied with because **its authorities have adopted a general practice** contrary thereto, which the particular situations illustrate where appropriate.”*

Correct application

Consistent and general nature:

C-342/05:

- *Commission has never pleaded a lack of sincere cooperation by the Finnish authorities as regards the communication of decisions relating to the issuing of hunting permits*
- *in spite of the wolf hunting authorised by way of derogation in Finland, the conservation status of the species concerned substantially and consistently improved*



Correct application

Systematic failure of a Member State to fulfil obligations – how long, how many times

C-420/02 – ‘Pera Galini’ site of waste: **4 years:**

The direct inference may not in principle be drawn that the Member State concerned has necessarily failed to fulfil its obligations under that provision to take the requisite measures to ensure that waste is disposed (...). However, if that situation persists and leads in particular to a significant deterioration in the environment over a protracted period without any action being taken by the competent authorities, it may be an indication that the Member States have exceeded the discretion conferred on them by that provision.

C- 248/05 - While the extracts from the reports quoted by the Commission emphasise the contamination of water supplies, they do not establish to the requisite legal standard a causal link between that contamination and the presence of substances in list II.

Court of Justice (CJEU)

Moving the environmental protection further:

Interpretation of EU Law

Procedure: Art. 258 – 260 TFEU

Maastricht Treaty: Financial sanctions

(C-304/02: both lump sum and a penalty payment)

- the seriousness of the infringement,
- its duration,
- the need to ensure that the penalty itself is a deterrent to further infringements.

Court of Justice (CJEU)

Article 260

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned **has not taken the necessary measures to comply with the judgment** of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall **specify the amount of the lump sum or penalty payment** to be paid by the Member State concerned which it considers appropriate in the circumstances. **If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.**

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned **has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned** which it considers appropriate in the circumstances. If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Court of Justice (CJEU)

Seriousness of the infringement:

- the loss of Community own resources,
- the impact of the infringement on the way the Community functions,
- **serious or irreparable damage to human health or the environment,**
 - economic or other harm suffered by individuals and economic operators, including intangible consequences, such as personal development,
 - the financial sums involved in the infringement,
 - any possible financial advantage that the Member State gains from not complying with the judgment of the Court,
 - the relative importance of the infringement taking into account the turnover or added value of the economic sector concerned in the Member State in question,
 - the size of the population affected by the infringement (the degree of seriousness could be considered less if the infringement does not concern the whole of the Member State in question),
 - the Community's responsibility with respect to non-member countries,
 - whether the infringement is a one-off or a repeat of an earlier infringement (for example, repeated delay in transposing directives in a certain sector).

Court of Justice (CJEU)

C-387/97 – first fine

- Waste management in Chania (Crete), problems known from 1987, first judgment C-45/91
- 24.600 EUR/day requested



Note of criteria selected:

Subject-matter = "Environment"

Documents = Documents published in the ECR : Judgments

Documents not published in the ECR : Judgments

Case status = "Cases closed"

Name of the parties = Commission

References to case-law or legislation = [Search in = "Grounds of judgment"; Category = "Treaty";

Treaty = "TFEU (Lisbon)"; Article = "260";]

17 document(s)

Case	Document	Date	Name of the parties	Subject-matter	
C-298/19	Judgment ECLI:EU:C:2020:133	27/02/2020	Commission v Greece (Pollution caused by nitrates)	Environment - Pollution	 
C-261/18	Judgment ECLI:EU:C:2019:955	12/11/2019	Commission v Ireland (Derrybrien Wind Farm)	Approximation of laws Environment	 
C-498/17	Judgment ECLI:EU:C:2019:243	21/03/2019	Commission v Italy	Environment	 
C-251/17	Judgment ECLI:EU:C:2018:358	31/05/2018	Commission v Italy	Environment	 
C-205/17	Judgment ECLI:EU:C:2018:606	25/07/2018	Commission v Spain	Environment	 
C-626/16	Judgment ECLI:EU:C:2018:525	04/07/2018	Commission v Slovakia	Provisions governing the institutions Environment - Waste	 
C-328/16	Judgment ECLI:EU:C:2018:98	22/02/2018	Commission v Greece	Environment	 
C-584/14	Judgment ECLI:EU:C:2016:636	07/09/2016	Commission v Greece	Environment	 
C-167/14	Judgment ECLI:EU:C:2015:684	15/10/2015	Commission v Greece	Environment - Pollution	 
C-653/13	Judgment ECLI:EU:C:2015:478	16/07/2015	Commission v Italy	Environment - Waste	 
C-243/13	Judgment ECLI:EU:C:2014:2413	04/12/2014	Commission v Sweden	Environment - Pollution	 
C-196/13	Judgment ECLI:EU:C:2014:2407	02/12/2014	Commission v Italy	Approximation of laws Environment - Waste	 
C-576/11	Judgment ECLI:EU:C:2013:773	28/11/2013	Commission v Luxembourg	Environment - Waste - Pollution	 
C-533/11	Judgment ECLI:EU:C:2013:659	17/10/2013	Commission v Belgium	Environment - Pollution	 
C-374/11	Judgment ECLI:EU:C:2012:827	19/12/2012	Commission v Ireland	Provisions governing the institutions Environment - Waste	 
C-279/11	Judgment ECLI:EU:C:2012:834	19/12/2012	Commission v Ireland	Provisions governing the institutions Approximation of laws Environment	 
T-33/16	Judgment ECLI:EU:T:2018:135	14/03/2018	TestBioTech v Commission	Environment	 

Thank you for your attention