Integration principle in Estonia

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I. How to understand the integration principle of Art. 6 EC (to be introduced by invited speaker; however all of the participants should prepare and submit their own views)

Integration principle set up in Article 6 of the EC Treaty clearly has not only procedural (e.g. SEA) but also substantive content. It not only enables but also demands from institution to limit economic activities from the environmental protection point of view. Integration principle covers not only definition and implementation off all policies having even remote impact on the environment, but also individual activities. Integration principle has achieved the status of general principle of Community law

At the same time integration principle leaves to institution a very broad room for discretion, what kind of environmental requirements and to what extent to integrate. But what seems to be obvious – environmental objectives and basic principle (especially precautionary principle) are those which should be inserted into other policies and activities.

Due to considerable room for discretion court control is obviously limited. Court can probably intervene and correct only in cases when there is a clear and manifest disregard of environmental concerns.

The principle seems to be addressed not only to EC, but bind also, at least indirectly, member states. The implementation of EC environmental policy is responsibility of member states, consequently member states should take care of integrating environmental concerns into policies and activities to achieve high level of protection, taking into account principle set up in article 10 of the EC Treaty. Implementation of integration principle and precautionary principle seems to be primary indicators of high level of protection.

When implementing integration principle other general principles of law should be taken into account as well, fist of all principle of proportionality. It means that environmental concern can't have *prima facie* supremacy over other considerations. Integration principle commands that environmental concerns should be taken into account and carefully and prudently considered.

Integration principle is ultimately related to principle of sustainable development. There are different opinions what is the legal content of sustainable development. According to my understanding instruction to integrate environment into other fields is one of the legal aspect of principle of sustainable development.

II. Integration principle in Estonian law and practice

1. Policy framework

1.1. Integration principle in Constitution and framework environmental legislation

Constitution.

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

Art. 5 of the Constitution stipulates that

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

What could be the legal meaning of this provision? In two cases Estonian Supreme court commented on the issue.

Firstly, according to the estimation of Estonian Supreme Court the addressee of this article is Estonian state. The provision orders the state to create legislation that takes into account (integrates) environmental concerns when regulating different types of use of environment and to take due care of implementation and enforcement of these regulations via legislative, executive and judicial powers. The Supreme Court took this position in the case that concerned quotas to mine oil shale. Supreme Court pointed out that when establishing these quotas the Government should take into account not only economic and social considerations but also environmental protection requirement.

Secondly, Supreme Court in case concerning restriction of logging in privately owned forest stated that environmental concerns set up in art. 5 of the Constitution can be used as constitutional justification for restriction of property rights. According to Estonian Property law ownership is full legal control by a person over a thing, the rights of an owner may only be restricted by law and that the restrictions of property rights should be proportional. In mentioned case court said that principle stipulated in article 5 of the Constitution, enables to implement even total prohibition of logging in private forest and that this prohibition should be considered as proportional.

Accordingly, Estonian Supreme Court has highlighted that integration of environmental protection requirements is valid legal ground to justify encroachment of basic entrepreneurial and property rights and freedoms and to limit environmental impact of economic activities

Art 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 no Court practice relating to article 53 up till now, but in my opinion this provision can be interpreted in a way that certain environmental related "duty of care" must be integrated into all activities affecting environment.

Framework legislation

Three sources can be brought forward in this case – Act on Sustainable Development, planning Act and Nature Protection Act

Sustainable Development Act[1]

Article 3 (3) Sustainable development act stipulates that:

> "Minimization of environmental pollution and use of natural resources should be considered as basic requirements of all economic activities"

This article is very broad and general, but nevertheless it could be interpreted in such a mood that environmental concerns shall be integrated not only into legislation but also in economic practices. At the same time this provision creates several questions – 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 very broad margin of discretion here.

Article 12 of sustainable development Act prescribes that

> ""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 sectors of energy, transport, agriculture, forestry and chemical-, building material- and foodstuff industries.

This is one of the few really operational provisions of otherwise very vague Sustainable development Act (*I call it in my lectures "a piece of poetry on sustainable development"*). Such development plans have been drawn up indeed. One of the primary functions of these plans is integration of environment into other policies. But the problem is that these plans are only indirectly binding to the administration and in too many cases not seriously considered and taken into account while taking individual decisions.

Planning Act.[2]

The purpose of this Planning Act is to "ensure conditions which 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 article 2(2) of the act

> "…spatial planning is democratic and functional long-term planning for spatial development which co-ordinates and integrates the development plans of various fields and which, 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"

[1] Säästva arengu seadus. 22. 02. 1995 - RT I 1995, 31, 384
[2] Planeerimisseadus. 13. 11. 2002. - RT I 2002, 99, 579

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 when there is certain conflict between different interests – economic and environmental for instance – the economic consideration prevail. This is a general problem of legal culture. Most of Estonian environmental related laws are very progressive, but in the stage of implementation the "power" of environmental law weakens considerably.

Nature Protection Act[3]

In Nature protection Act one can find a framework provision that could somehow be linked with integration principle. Article 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 integration principle and orders - when environment related decisions are take "best for environmental" alternative should always be carefully considered. Unfortunately there are no court cases on this matter in Estonia yet. But there is one pending case where court may decide to comment on the issue.

Draft legislation

Coalition Agreement of the government (2007 May) sets up a goal to codify Estonian environmental law. The first step in this obviously lengthy process will be elaboration of General Part Act of Estonian Environmental Code. At the moment Estonian environmental law lacks such general framework act, Estonian environmental law is fragmented and sectorial based. 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 environment. There will be envisaged three types of strategies – national long-term environmental strategy, strategies of different sectors of environment protection (e.g.. nature conservation strategy, forest policy etc.) and so-called strategies of integration (energy, transport, tourism etc). All these strategies deal somehow with integration task but the last one will be specially deigned to promote integration of environmental concerns

1. 2. Integration principle in policy papers

Estonian National Strategy on Sustainable Development „*Sustainable Estonia 21"* was approved by Estonian Parliament in September 2005. The strategy focuse on concept of sustainability for the long-term development of the Estonian state and society until the year 2030. General development principle of 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:

[3] Looduskaitse seadus. 21. 04. 2004. - RT I 2004, 38, 258.

Viability of the Estonian cultural space - According to the Constitution of the Republic of Estonia, the state of Estonia shall "ensure the preservation of the Estonian nature and culture through the ages". Sustainability of the Estonian nation and culture constitutes the cornerstone of sustainable development of Estonia.

Growth of welfare - Welfare is defined as the satisfaction of the material, social and cultural needs of individuals, accompanied by opportunities for individual self-realisation and for realising one's aspirations and goals.

Coherent society - Achievement of the first two goals will be possible only if the benefits from these goals 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 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 nature of Estonia is a central precondition for our sustainability. It is also contribution to global development, following the principle that requires a balance both in matter cycles and in flows of energy at all levels of the living environment.[4]

The strategy emphasizes that the overall aim is to integrate the considerations of self- generation 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 the Estonian society and local communities. The aim is to reach a situation where human does not regard the environment as a pool of objects requiring protection but as an integral whole which human itself is part of. The aim is combined conception of nature as a value and as a central development resource of the society in the co context of overall development of Estonia.

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

1. 3. Interpretation of integration principle by judiciary

There is one indeed significant case of Estonian Supreme Court that is related to the integration principle - so called "Jämejala Park case"[5].

A historic and well preserved park is situated in a small village – Jämejala – in central Estonia. In soviet time a home for aged people was erected in the park. In the end of 90-s the Ministry of Justice launched a project to erect on the basis of existing building a new central hospital of 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 land use plan. The plan was initiated and subsequently adopted by local government. Adoption of the land use plan is under Estonian law a discretionary decision that should entail weighting of different interest 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

[4] See homepage of Estonian Ministry of Justice
-http://www.envir.ee/58738.
[5] Case – 3-3-1-54-03.

in the park on the basis of existing buildings would have ended up in fewer costs. Local government emphasised the opportunity for new jobs for local people who suffered from high rate of unemployment. Local government totally ignored environmental values of the park when deciding on the plan, which were brought out by local people, who decided to protect the park. A group of local inhabitants filed a complaint in administrative court and contested the adoption of the planning, applied for annulment of the administrative act. The court of first instance and district court dismissed the complaint, but the Supreme Court took a different position. The Supreme Court annulled the planning act, the reasoning of the court was based on 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 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. According to Supreme Court's estimation local government totally forgot about environmental considerations and this should be considered as manifest error of discretion that ends up in illegality of planning decision.

As a conclusion it could be said that in the mentioned case Estonian Supreme Court used the integration principle in the context of right of discretion of administrative bodied. Court emphasized that environmental consideration should always be taken into account while deciding apon development plans or projects which can have negative environmental impact. This decision seems to be quite effective interpretation of integration principle. Estonian Supreme Court pointed out that environmental concern should have significant legal weight, can and must successfully compete with economic and social concerns. Furthermore, the Court added that weighty arguments are not only those concerning environmental related human health and wellbeing, but also those related to objective value of the environment as such ("park as such")

1. 4. Governmental institutions taking care of integration in the legislatory process

One can't find special procedures of environmental integration in Estonian legislatory process. However, Estonian Ministry of Environment can and should take care of integration of environmental concerns in the framework of general procedure 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 Estonian Ministry of Environment in practice has not used this tool actively enough to promote environmental aspects of different policies.

1.5. General requirements as to inviting environmental agencies to comment on or cooperate in the rule-making and individual administrative action by environmentally remote agencies[6]?

Such general procedures are not present in Estonia. Intervention of environmental agencies can happen only in the framework of environmental impact assessment of projects or strategic environmental assessment of plans and programs.

1.6. General official advisory boards or scientific groups which reflect, discuss and recommend policies, measures or actions on environmentally remote legislatory or administrative action?

[6] 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.

Such official advisory bodies are not present in Estonia.

2. Implementation of SEA Directive 2001/42/EC?

2.1. Transposition of SEA directive

The key measure of transposition of the directive is Environmental Impact Assessment and Environmental Management Act approved by the Parliament on 22nd of February 2005. The first division of the Act deals with the assessment of the effects of certain public and private projects on the environment. The second division of the Act regulates the procedure of strategic environmental assessment and transposes the directive 2001/42/EC.

Estonia has in general transposed the directive (including Annexes to it) properly; however there are a number of deficiencies as well. The most important deficiencies are related to definition of the plans and programmes and detailed arrangements of consultations and dissemination of information

Main conformity problems are as follows:

Article 2 – Definitions
Article 2 (2), litra a, 1. indent of the directive defines plans and programmes which are subject to preparation **and/or** adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government. According to Estonian law the strategic environmental impact assessment is carried out only in the case if the strategic planning document is established by the legal act of a Parliament, Government, governmental body or body of local government. Accordingly the Estonian national law does not cover plans and programmes (having potential environmental impact) which are prepared but not established by the legal act. This should be considered as major mistake in transposition of the directive.

Article 3 – Scope
Article 3 (6) requires that in the case-by-case examination and in specifying types of plans and programmes the authorities shall be consulted, which by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes. Estonian law stipulates that opinion be asked at least from the Ministry of Social Affairs, the Ministry of Culture, and the Ministry of the Environment, the county environmental department or a local government body. It is obvious that the list of authorities which should be consulted is not exhaustive. There could be other authorities who are likely to be concerned by the environmental effects of plan and programme – such as environmental inspectorate (responsible for enforcement), border guard department (responsible for marine pollution), administration of protected areas etc. If necessary these authorities should be consulted as well. Estonian law is ambiguous and stipulates that other authorities MAY BE consulted. It is obvious that to this point the discretion is too broad and Estonian law should be made more concrete

Article 5 – Environmental report
Article 5 (4) requires that the authorities, which by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report. According to Estonian Law, depending on the characteristics of the strategic planning document, opinion be asked at least from the Ministry of Social Affairs, the Ministry of Culture, the Ministry of the Environment, the county environmental department or a local government body. Estonian law should expand the list of potentially affected

authorities and contain the strict requirement that if necessary the other affected authorities SHOULD be consulted as well. This is especially relevant and very important in cases when strategic planning document and strategic assessment is initiated by governmental bodies or local government - whose awareness of environmental related issues is often limited in Estonian circumstances

Article 6 – Consultations

Article 6 (1). Prescribes that the draft plan or programme and the environmental report shall be made available to the designated authorities and the public.

Article 41 of Estonian Environmental Impact Assessment and Environmental Management Act stipulates that a public notice regarding a strategic environmental assessment programme and report shall set out the time and manner of accessing the terms of references or draft strategic planning document. The fact that instead of draft plan or programme only the terms of reference should be made publicly available is assessed as not being in conformity with the directive. It is also not clear how could be assessed environmental impact of a plan or programme merely on the basis of terms of reference. It is obvious that in most cases terms of reference are too general and do not allow identification and assessment of whole scale of impacts to the environment and human health. The last statement is especially relevant in these cases were precautionary principle should be applied and hazards covered by scientific uncertainty assessed.

Article 6 (2). According to the directive the designated authorities and the public shall be given an early and effective opportunity to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure. Estonian law requires that draft report and terms of reference or draft plan or programme as well as time and place of public display and public consultations are made publicly available. Relevant authorities are consulted on the stage of initiating an assessment, preparing the programme and report of strategic environmental assessment. But at the same time Estonian law is ambiguous and does not define any concrete methods and timeframes for consultations with the authorities. This is obviously not appropriate transposition of the directive. Furthermore, Estonian law does not regulate what particular techniques should used to make terms of reference or draft plan or programme publicly available.

Article 9 – Information on the decision
According to article 9 (2) the detailed arrangements concerning the information referred to in Article 9 (1) shall be determined by the Member States. The relevant detailed arrangement are not defined by Estonian law. Estonian law stipulates only in general terms that a description of the measures proposed for the monitoring of potential significant environmental impact resulting from implementation of the strategic planning document should be made publicly available
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2. 2. Definition for 'plans and programmes'.

As far as definition for "plans and programmes" is concerned Estonian transposition is controversial. As it was mentioned above, Estonian national law does not cover plans and programmes (having potential environmental impact) which are prepared but not established by the legal act. From this point of view Estonian definition is narrower than the directives definition. But from the other side Estonian definition is broader. The scope of the directive covers only plans and programmes which 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 which are not directly required by legislative, regulatory or administrative provisions are covered as well. The last argument has of coursed more theoretical relevance, I do not believe that Estonian authorities are keen to adopt plans or programmes on voluntary basis

2.3. The concept of the 'authority' in Estonian law.

Article 31 of Estonian SEA Act defines the concept of authority as follows.

> "For the purposes of this Act, a strategic planning document is a national plan, county and comprehensive or detailed plan … a strategic development plan … or another plan, programme or strategy established by the legal act of the Riigikogu, the Government of the Republic, a governmental authority, a county governor or local government body."

Accordingly competent authorities are governmental bodies and public or private legal persons (including those who perform specific tasks in the field of environment) are not covered by Estonian law.

2. 4. Application of article 3(2) of the directive

In Estonia Art. 3 (2) of the directive is transposed in a way which clearly limits the concept of plans and programmes under article 2. Article 2 of the directive is almost literally transposed

According to Estonian SEA Act strategic environmental assessment shall be carried out during the preparation of a strategic planning document before its adoption, if the document:

1) is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications or tourism and on the basis thereof activities specified in subsection 6 (1) of SEA Act (*This subsection corresponds to Annex I of the EIA directive*) are proposed or proposed activities are likely to have a significant environmental impact, on the basis of the provisions of subsections 6 (2)-(4) of SEA Act (*these subsections correspond to Annex II of the EIA directive*);
2) is a national, county or comprehensive plan;
3) is a detailed plan on the basis of which activities specified in subsection 6 (1) of SEA Act are proposed or the proposed activities are likely to have a significant environmental impact, on the basis of the provisions of subsections 6 (2)-(4) of SEA Act;

Accordingly only those plans and programmes which presumably can have significant environmental impact are subject to SEA. But in many cases administration enjoys wide discretion when deciding on initiation or not of SEA. detailed land use plans are responsibility of local governments, they should decide also about SEA, but the reality is that local governments clearly tend to overestimate economic considerations and in too many cases obviously underestimate environmental consideration. Unfortunately this is quite common practice that occasionally SEAs are not initiated despite there are serious grounds to predict negative environmental impact of a plan.

The only exception from the general rule is related to national, county or comprehensive land use plans which are subject to SEA in all cases, even irrespective of presumed environmental impact. There is no room for discretion in these cases and initiation of SEA is obligatory.

2. 5. How does the outcome of the SEA procedure affect the final decision-making?

Estonian law considers SEA in the framework of right of discretion of the administration. The results of SEA like all other important factors and legitimate interest should be taken into account when deciding on adoption of the plan or programme.

This means that Sea in not binding and plan or programme having certain (but not illegal) negative environmental impact could be approved. The only additional requirement is - if, upon making a

decision to adopt a plan, the decision-maker fails to take account of the results of environmental impact assessment, the decision-maker shall set out a reasoned justification of such behaviour.

6. Assessment of SEA practice

SEA is a relative new instrument in Estonia and special studies on its effectiveness are not available. However two problems, which are actively discussed in Estonia presently, can be pointed out. Both of these issues are related to 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 to create new knowledge about environmental 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 so detailed, and enables to perform full scale environmental impact. In such cases EIA of the planned project seems to be pointless.

Summarising – the main problem is that impact assessment should be done in these stages of the procedure when there is enough information for prudent assessment and unnecessary, lengthy and costly parallel procedures should be avoided.

2.7. The situation before transposition of the SEA directive.

The previous EIA act (From 2000) stated that the potential environmental impact resulting from activities proposed by a development plans or programmes had to be assessed in the course of drafting the plan or programme. The Planning act contained similar provision regarding land use plans. It meant that there was no specific procedure for environmental assessment of the plan and accordingly any procedural guarantees. In most cases environmental impact of plans was not carried out at all or at least not carefully enough. Impact assessment was "hidden" in the general planning procedure.

8. Do you have any information on any ongoing cases or judicial decisions in connection with the implementation of SEA requirements? Please, provide a summary, if there is any example!

There are only a couple of pending case which concern procedural aspect (public right to intervene) of SEA

3. Integration of environment into tax policy - proposed Ecological Tax Reform in Estonia

One of the examples of integration principle may be connected to inserting environmental aspects into the tax policy.

According to the Governing Coalition Agreement (which was signed approximately a year ago) Coalition partner decided to move towards so-called „Green tax reform" in Estonia and to initiate respective public debate on the issue. The general idea of the reform is to shift the tax load from labor to consumption. The reform idea corresponds very well with the tendency to use more market

mechanisms to protect environment. According to the experience of different countries environmental taxes can have positive macroeconomic effect. Environmental taxes boost economy, improve efficiency of enterprises thus improving competitiveness of the economy.

According to estimation of Stockholm Environmental Institute in Tallinn (SEIT)[7] in the 1990-ties labour taxes formed 50% of all tax income in Europe, whereas the taxes from the use of natural resources generated only 10% of all tax revenues. At the same time the average unemployment level was 10% and industry, transport, energy and agriculture were the biggest producers of environmental problems. „Getting prices right" is the main idea of „green tax reform" and this idea is based on full implementation of polluter pays principle and internalization of externalities. According to SEIT report also European Commission has several times declared that currently prevailing taxation systems send wrong market signals.

One of the leading ideas of tax reform corresponds to the need to effectively integrate environmental policies with other sector policies (such as energy, transport or agriculture). According to SEIT´s estimation „ If properly conceived and implemented, green tax reforms can contribute to a real structural readjustment of economies. Most countries including Estonia need to introduce more flexibility and efficiency in their economic structures. Increase of environmental taxes is complemented with reduction of the income taxes and/or social taxes directly or through compensation mechanisms"

There is a belief that „Green" tax reform - by changing several existing environmental taxes - enables to strengthen their positive impact to the environment. Consumption and product related taxes would increase prices of products and services, which have the biggest negative environmental impact. In addition differentiation of tax levels (like sales and registration fees to vehicles according to their age or engine size, related to the fuel consumption of engines and emissions of exhaust gases that is applied in most countries) helps to direct the effect of fiscal measures to the most acute environmental problems, which need to be reduced and mitigated.

These basic ideas were quite actively discussed in Estonia. But from the fall 2007 when there happened quite serious decline in economic growth the debate almost immediately stopped. This story is a very good proof that economic instruments are effective tools in times of economic prosperity and become unreliable in times of economic hardship.

[7] The following section of the report is based on SEIT report - http://www.seit.ee/failid/45.pdf.