ENLARGEMENT AND ITS CONSEQUENCES FOR EU ENVIRONMENTAL LAW

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In the past years I had the pleasure to participate first in the Hungarian approximation process, later for a short period also in the Czech Republic and now in the same process of the SEE countries, within which I had most of my experiences in Bosnia and Herzegovina. The question had always been the same: how to approximate environmental legislation to the already existing EU structures. Sometimes, of course, there are cases, where the domestic legislation is at the same level or even more advanced – such as the case with nature protection legislation in Hungary -, but usually the opposite issue, that is the consequence of enlargement for EU environmental law, has never been raised.

From the point of view of the state environmental legal development we may distinguish between at least three groups of countries:

- the first group, where environmental legislation has been relatively developed at the time of starting the process (Czech Republic, Hungary, Poland, probably Slovenia), but still we had a lot of missing elements and also outdated method and instruments;
- the second group, where environmental legislation has been less developed, but the need for approximation could result in a relatively quick progress (the Baltic countries, Bulgaria, Croatia, Romania);
- and finally, the third group, where due to several reasons – armed conflicts or weak economic development – the process started relatively late in time, and also the existing legislation in terms of environmental protection is less developed (Albania, SEE countries)

The possibility to have an effect on EU legislation is greater in the case of the first group and less viable in case of the third group, if we take existing and effective environmental regulations as the basis of our discussion. If we take the problem of weak environmental legislation, but even more weak enforcement as a possible source of such effects, then the order is different. EU requirements may mean great burden on some countries and may raise the problem of derogation. This possible problem will partly be solved as the time for entering EU in case of the second and third group of countries is not so close.

The lack or weakness of implementable legislation and also the lack or weakness of enforcement capacity may be examined separately. In case of legislation there shall not be any serious options for derogation, and it would mean that the possibility to have a lower level environmental legislation in the future is very small. The problem of implementation and enforcement may mean that the option of providing "grace time" for these countries allows some flexibility for both EU and would-be members.

So if we speak about new structures or methods, one could be to have a looser control over the situation of implementation in some of the countries. I do not believe that this may happen as the time for joining EU is relatively far. Anyhow, sometimes first group, but in most of the cases second and third group countries even today face the problem of having a relatively advanced legal system with a weak, inefficient enforcement capacity, which may lead to formal implementation.

Also, we should not forget that the requirements of EU environmental legislation may have a great advantage on the future state of environment in all of these countries. The reason is very simple: the political will together with the enforcement capacity is more and more limited if we go from group No.1 to No.3. Thus EU as a reference may help a lot in developing future system and also capacity, which could not be the case if these countries are not interested in membership.

All the above mentioned problems may lead to one major task, that is to develop the structure of permanent monitoring of implementation on behalf of the EU, even during the accession time, otherwise the legal regulations are not going to be effective.

EU environmental legislation shall be the strict minimum for all would-be members.

A next question is that is there a need to change existing guiding principles, regulatory methods, instruments within EU environmental law or is it necessary to add new ones to the already existing systems ?

The actual tendencies prove that all accession countries are willing to follow existing patterns of European environmental legislation. The already available principles and methodology are flexible enough to cover the different situations. The history of EU enlargement could prove that the need for possible changes is real in case of new members which have a more advanced environmental legal system, but even in that case the general EU structures could survive.

Some principles may have a different emphasis – for example, in case of mass privatisation in some of the relevant countries and also in case of decisions on

new investments there is a big threat to push environmental interest behind and neglect long-lasting environmental values. This would mean the need to revitalize existing principles, like first of all precautionary principle and provide extensive explanation.

Let's have a look at the method of self-regulation, voluntary agreements as upcoming methods in accession countries. Seemingly, it would be easier to use such methods in order to fill the gaps of inefficient enforcement capacities. The picture seems to be clear: self-regulation and self-implementation of potential polluters may replace a bit the administrative authorities – see the 'Working with the market' idea of the 6th EAP. The reality is far from this idea as voluntary measures, such as agreements may only be effective if an efficient environmental enforcement capacity is available, which is capable to manage the procedure of agreement, monitor the implementation and react on defects. Thus the possible relief, if any, is available only for countries with already existing and well-developed public administration.

Also the problem of using new regulatory methods and techniques may be postponed as the history of environmental legislation could prove that the process had to start with traditional measures – command-and-control measures – and based on experiences gained through implementing these measures the solid basis of using new instruments could be founded. The skills of cooperation or the practice of control have to be learned.

The same is true for such regulatory methods as the use of 'technology requirements' – most importantly: BAT – which actually mean the individualisation of environmental requirements, together with the need of being aware of technology development tendencies, being able to find the proper balance between the best and environmentally necessary techniques, the costs of investment and the possible environmental damage, the social and environmental impact, etc.

On the other hand, existing European principles and regulatory methods may help a lot in developing environmental legal system of accession countries. Even today most of these countries are willing to underline, that all the principles are listed in law, that the right to environment is a constitutional right (one country even declares itself being an 'ecological country' in its constitution) and together with the transposition of EU norms, the different methods are also going to be transposed.

What has been missing from EU law and was taken as important instrument for accession countries is close to adoption – that is the possibility to harmonise important liability measures in civil and criminal law. The challenge will again be the problem of implementation. There is one additional element to liability – that is the liability for damages caused by activities in the past, by operation being at the time of the unlawful act in state property. This would need – but

not in EU level – specific provisions in all the accession countries, as it happened e.g. in Hungary.

In terms of regulated areas there are more options to develop EU legal system. If we take as our basis that the reference to EU law is an easy way to push new legislation through, than the missing areas may easily mean that most of these countries neglect to regulate environmental media, such as soil or environmental impacts, such as noise immission limits. Again the 6th EAP provides good examples, like references to land-use or regional planning. These harmonisation provisions would be useful in order to assist in developing domestic laws.

Thus if enlargement goes on, the only threat is the possibility that some of the accession countries are not able to meet the requirements and wish to limit the scope of environmental requirements or receive derogation. None of such options should be supported, neither in principles nor in the way of defining different instruments.

The Treaty provisions – is there a need to change from the point of view of accession countries ?

Following the line of the above discussion, it is worth to look at the Treaty provisions and their relationship with the accession countries.

- Art 95(100a). par (4) it is necessary to keep the wording concerning the future of former national provisions – that is the reference that reasons have to be given. The same is true for Par (5)-(7), thus the present strict measures of possible derogation shall apply also in the future. This should not be weakened.

- the objectives of Community environment policy. The only one thing which may be raised is the reference to future generations, as it appears in a number of domestic constitutions or framework acts. The mere reference to human health is a restriction.

- Basic principles are all mentioned in different environmental laws of the given countries. It may be worth to think about further explanation on precautionary principle and integration. High level of protection shall be highlighted, but this does not mean a change.

- Regionalism and the problem of diversity of regions – here while preserving the essence, the term 'region' may be further elaborated, as it would not be wise to think of CEE or SEE countries as regions of their own.

- Decision-making procedure should stay as it is, the only concern might be the need for unanimous voting in issues like town and country planning and land use, also management of water resources. This way of decision-making at these problem areas, highly relevant to accession countries may not serve well the interest of environment as this may lead to the possibility of limiting the decision-making capacity, while these areas shall serve as fields of new trends in environmental policy. Thus qualified majority may better serve the interests of environment in accession countries.

- Polluter pays principle as opposed with the need to set up environmental funds in order to support environmental activities