Report on Germany (Gerd Winter)

Questionnaire on the Principle of Integration

Motto

Art. 6 EC
"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 policy areas is one of the basic principles of environmental policy. It is enshrined in Article 6 of the EU Treaty – but progress has been mixed. … The Cardiff process – which was set up in 1998 in order to institutionalise this type of integration – has not lived up to expectations.
Impact assessments are now a standard feature of the policy making process and there is scope for greatly improving the assessment of the environmental impact that other policies will have. The Impact Assessment Board will be an important tool …
… The Commission will explore all possibilities to further integrate environmental concerns into other policies, for example agriculture, research and development policy. … The Commission will produce a strategic framework in order to address the issue of policy integration. ... At the Member State level, different Council formations should produce annual reports on how they have dealt with the obligation to integrate environmental issues into their work."[1]

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)

- object ('policies and activities', 'definition and implementation')
- addressees (Community, MS insofar as implemeting EU policies?)
- criteria ('environmental protection requirements', 'with a view to promoting sustainable development')
- character of guidance ('must be integrated')
    - enabling authorities to restrict economic activities?
    - directing authorities?
        - Procedural => assessment and justification of impact? Mere consideration?
        - Substantive => Minimal standards?
- counterprinciples and the inflation of principling (Art. 127 II, 153 II EC)
- density of court review, ECJ case law (policy guidance or hard law?)
- corollary institutions and procedures (DG Environment, EP Environment Committee, Council of Environmental Ministers)
- Amendments by Lissabon Treaty (e.g. Art. 6a, 176a, 176b EC, Art. 8b EU)
- Suggestions for making the integration principle more effective (applicability of SEA to EU activities? Environmental Assessment Board?)

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-term review of the Sixth Community Environment Action Programme {SEC(2007) 546} {SEC(2007) 547}

My suggestions for an ambitious but I believe also practicable interpretation of Art. 6 EC:

Premise:
Requirements of EC primary ("constitutional") law should not be interpreted in a way that strangulates the political process. However, as den constitutional principles pushing the European tanker in the direction of economic growth are forceful it is necessary to build countervailing principles in order to keep the tanker on course.

Art. 6 EC repeated:
"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."

Suggested definitions:
'Environmental protection requirements' – means measures needed to ensure a high level of environmental protection

'must be' – expresses an obligation, not only a programmatic guidance; by argument a maiore ad minus the formula has also an enabling character. 'must be' means that integration is a rule, i.e. a conclusive requirement which must be applied without exception. Integration is thus not a mere principle which could be relativised by other principles (see further below on competing principles)

"integrated into" – has a procedural and material component:

- procedural: in the decision-making process reasons must be given on environmental effects and compatibility of measures
- material: a measure may not cause environmental damage which cannot be outweighed by other prevalent reasons

"definition and implementation" – covers both the design and enforcement of measures. In relation to enforcement the obligation is especially relevant if the law opens up discretionary margins

'policies and activities referred to in Article 3' – 'policy'if read in the context of Art. 3 EC means a comprehensive set of measures (e.g. commercial policy, policy in the spheres of agriculture and fisheries, policy in the social sphere, policy in the sphere of development cooperation). 'Activities' means single measures including law-making, subsidizing, services etc. Art. 3 delineates the fields of competence for policies and activities

'Community' – all Community institutions including the legislative, executive and judicial branch; in addition, Member States are subject to the integration principle if implementing EC policies and activities

'in particular with a view to promoting sustainable development' – gives "integration" a momentum which is both dynamic ("promoting", "development") and long-term ("sustainable")

competing principles

- Art. 3 II EC: 'In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.'
- Art. 137 II EC: 'The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities.'
- Art. 153 II EC: 'Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities."

In cases of conflict Art. 6 EC prevails because 'must be integrated' is stronger than 'shall aim at' and 'shall be taken into consideration (account)'.

Legal consequences: Policies and activities breaching the integration rule are null and void. However, given the discretionary margin of institutions courts will come to this conclusion only in cases of clear and serious disregard.

II. To what extent has the integration principle become part of the constitution or general principles and practises of law-making in your MS?

Consider for this purpose that the integration principle could have

- a narrower or broader scope of objects
- more or less precise and extensive criteria
- a more or less far-reaching character of guidance
    - enabling/ directing
    - procedural
    - substantive

Consider further that the integration principle overlaps with the principle of sustainable development. Therefore, if sustainability appears in your legal system do include its analysis into your report to the extent it can be understood as meaning integration in the sense of Art. 6 EC.

Questions that may guide your research

1. Are there any direct provisions or references to the principle of integration in the Constitution, a framework environmental act or other act of general application, and if the answer is positive, how is it formulated?

No, integration does not appear anywhere in the meaning assumed in this questionnaire, i.e. in the sense that environmental concerns shall be respected in all non-environmental laws. Integration does appear in the sense of the IPPC-Directive, i.e. postulating that in environmental law all aspects of the environment shall be taken into consideration. The substance of the broader integration principle does however materialise in Art. 20a of the German Grundgesetz which says: "The state protects, also in responsibility for future generations, the natural fundaments of life and animals in the framework of the constitutional order, through legislation and – in accordance with existing and customary laws – the executive power and the judiciary." This means that the fundaments of life have gained constitutional status. They can be invoked to counterbalance other constitutional concerns (such as e.g. fundamental rights in property and economic enterprise). They not only empower the state to protect the environment but command it to do so. However, government has broad discretion whether and how to act.

2. Are there any references to making integration a legal principle on the level of federal/national/regional, etc. environmental policy papers (e.g. National Environmental Action Plan) or sectoral environmental policies (climate change, waste, etc.) and if the answer is positive, how is it formulated ?

No. There is however plenty of mentioning of the principle of sustainable development in many policy papers both general and sectoral. In general sustainability is understood as the rule that economic, social and environmental concerns shall be balanced. Normally it is not in any way specified if this means that a law shall be invalid if found one-sided (the substantive dimension) or if no reasons were given on the kind of balancing (the procedural dimension).

3. The principle of integration or some part of it has it ever been interpreted by the judiciary? If the answer is positive, please provide a short summary!

The integration principle has never been interpreted by the judiciary. However, the above mentioned principle of environmental protection (Art. 20a Grundgesetz) was in fact once addressed in a judgement of the Federal Constitutional Court (1 BvF 1/05; www.bverfg.de/entscheidungen/fs20070313_1bvf000105.html). The plaintiff, the Land Sachsen-Anhalt, argued that the law allocating CO_2-Emission-Cerificates disadvantage operators that had recently

modernised their plants (so-called early action). The Land alleged that the duty to protect the fundaments of life (Art. 20a GG) was breached because late-comers were too generously given emission allowances. The Court held that the law already provided for different treatment of early and late action, and that the precise shape of this was well within the broad discretionary margin Art. 20a GG that was granted to the legislator.

4. Are there governmental institutions playing an environmental watchdog-role in the legislatory process?

There are three independent scientific commissions mandated to commenting on environmental policy and proposing new solutions: the Council of Experts for Environmental Matters (Rat von Sachverständigen für Umweltfragen - SRU), the Scientific Council on Global Environmental Change (Wissenschaftlicher Beirat Globale Umweltveränderungen - WBGU), and the Council on Sustainability (Rat für Nachhaltigkeit). While the SRU focuses on providing a basis foron concrete reform steps of German environmental policy and law the WBGU develops broader visions on how to cope with global change, The Rat für Nachhaltigkeit does not play a noticeable role. In addition to these independent commissions a number of federal environmental agencies (Federal Environmental Agency, Federal Agency for Nature Protection, Federal Agency for Consumer Protection and Food Safety) play a certain watch-dog role. They are subject to the supervision of their pertinent Ministry but are granted a margin of independent assessment.

5. Are there general requirements as to inviting environmental agencies to comment on or cooperate in the rule-making and individual administrative action by environmentally remote agencies[2]?

No. Environmental agencies are often invited to comment or even give consent in procedures on decisions on the use of environmental resources, not however in relation to procedures concerning environmentally remote realms. For instance, the Federal Environmental Agency has no right to be heard on learning materials and curricula at schools. Of course, the agency is free to take initiatives and make proposals on environmental education.

6. Are there general official advisory boards or scientific groups which reflect, discuss and recommend policies, measures or actions on environmentally remote legislatory or administrative action?

Yes, see question no. 4.

[2] 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.

III. How has the SEA Directive 2001/42/EC been implemented in your country?

The SEA Directive comes closest to an instrument of alerting sectoral policies to environmental implications. We will not look at all details of understanding and implementation but will focus on the question whether experiences made with this instrument allow to conclude that it should be extended to further policy areas and even further forms of governmental action including legislation and rule-making. Questions of interest are the following:

1. Was the SEA directive properly been transposed into national law? (see e.g. C-108-06)

Yes

2. In Art. 2 (a) there is a broad definition for 'plans and programmes'. How has this definition been adopted ? Copied and pasted, or with some more words attached to them and even extending the scope?

The term "plans and programmes" is not defined by German law. Neither is it defined by Directive 2001/42. However, the kinds of plans and programmes requiring a SEA is indeed defined. One element of definition is the mode of production of plans and programmes: they must be mandated by law to be produced and promulgated by public authorities at the federal, Land and local community levels.

3. What is the general understanding of the concept of the 'authority' ? What kind of organisations are included ? (See on public services, eg. C-188/89 *Foster and others v British Gas*)

According to general administrative law (which also applies in the SEA realm "authority" (Behörde) means any entity (Stelle) that carries out a task of public administration. This definition includes detached public corporations, agencies and foundations. It also includes private persons with delegated powers of administration ("Beliehene"). However, as far as I can see all of the plans and programmes subject to SEA are in the powers of administrative bodies in the narrow sense. Therefore there is no problem with extending the SEA obligations to decentralised and privatised actors.

4. In Art. 3 (2) there is a special list of issues, which provide the automatic application of SEA. Is there any debate related to the content of this list ? Is it understood as a limitation of the definition of Art. 2 (see the different wording in Art. 3 (2): "and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC") ?

There was a debate on whether or not to go beyond the minimum required by the Directive. For instance, it was discussed whether subsidy

programmes for various economic activities should also be subjected to SEA. However, the political majority decided against any gold plating.

In formal terms the approach taken was to enumerate as precisely as possible the scope of plans and programmes. Thus, the general Law on EIA in Annex I sets up a list of plans and programmes subject to an SEA and regulates the content and procedure of SEAs. Sectoral laws corresponding to the sectoral plans and programmes requiring SEA complement the general law by adding specify requirements. The list covers both plans and programmes setting a framework for projects requiring EIA based consent as well as plans and programmes beyond the EIA realm.

For the latter there is discretion not to require an SEA in cases of no significant environmental effect (see Art. 3 (4) of the Directive). The same applies if a plan or programme within the EIA realm is insignificantly modified or concerns small areas at local level (see Art. 3 (3) of the Directive).

A self-contained regime on SEA has been established for land-use related plans. It was laid down in the Building Code (Baugesetzbuch – BauGB) (covering zoning plans) and the Law on Spacial Planning (Raumordnungsgesetz – ROG) (covering higher level spatial planning).

In certain areas the Länder have jurisdiction to transpose the Directive 2001/42.

5. In what way does the outcome of the SEA procedure affect the final decision-making? (see Art. 4 (2))

Art. 14k of the Law on EIA says that the result of the SEA must be taken into consideration in the procedure of elaboration and amendment of plans and programmes. This is interpreted by courts to mean that the facts collected by SEA and EIA must be respected when the law is applied. By contrast, the subsumtion of facts under laws which may also to be found in the SEA/EIA documents are not regarded to be binding on the decision-maker.

6. If you have had personal experience with SEAs or if there are reports on how SEA was used in practise: what are the conclusions, and do they encourage to extend the instrument to further sectors and even to law-making and sublegal rule-making in general ?

I believe that SEAs should be extended to (a) subsidy programmes (such as e.g. a programme of subsidising economic investments) and (b) any

sublegal rules (such as e.g. a regulation on fees for public services) if after preliminary assessment they are likely to have significant environmental effects. Furthermore, one might also require an SEA for laws.

7. Were there/or are there any similar requirements in force in your county before/since the entering into force of the Directive ? In case of a positive answer, please provide a short introduction, mainly in connection with the relationship of the two types of requirements!

No, at least not with the precision of SEA content and procedure. There was some kind of rough environmental impact assessment, though, with regard to zoning plans.

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!

Until now the federal Administrative Court has rendered 3 decisions concerning SEA. All of the cases were concerned with the question of applicability of the SEA requirements to procedures begun before the entering into force of the Directive.

IV. Where do you see deficiencies of environmentally remote legislation and implementation with regard to environmental concerns, and what legal rules and institutions could improve the situation?

Dear Colleagues and Friends,

Please select one or max. two items of the list below, which is most interesting to you of which may provide good experiences for us. You may select from this pool, but you may add other areas, which may serve a better example.

Possible areas of policies:

Sectoral policies:
agriculture, fisheries, transport, energy, climate, energy, tourism, etc.

Horizontal policies:
contract law, company law, consumer protection, intellectual property, insurance, finance, public procurement, privatisation, subsidies, research funding, etc.

1. On fisheries

Fisheries is an exclusive legislatory competence of the EC. Therefore, the question of integration is mainly to be addressed to EC legislation.

The basic legal document guiding EC fisheries is Regulation No 2371/2002. The regulation raises doubts on whether it has drawn the best balance of concerns. Depending on the interpretation of the integration principle it is imaginable that the regulation is in breach of that principle.

With its definition of sustainable use of fish resources the regulation does take environmental concerns seriously. See Art. 3 (e) :

> "'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 eco-systems" .

In terms of the integration principle (and indeed the sustainability principle) this is a strong version of definition because a strict upper limit is set. However, the definition does not help much because the material criteria guiding rule-making on the basis of the regulation are formulated in much weaker terms thus allowing economic and social concerns to override the limit of sustainability. See Art. 2 (1):

> "The Common Fisheries Policy shall ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions."

For instance, the Council when fixing total allowable catch quota (so-called TACs) arguably would act within the limits of the provision if it decided to deplete a stock of fish in order to ensure a high employment rate in the fisheries sector. The legal question is: Is this provision compatible with Art. 6 ECT? It seems that it is indeed if by integration we only understand a procedural command to give reasons. The answer may be no if Art. 6 ECT can be interpreted to have also a material significance.

Besides in relation TACs EC fisheries law defects on integration also by its subsidies policy. For a long time EC fisheries policy has aimed at the building up of an efficient European fishing fleet. This has caused massive fishing overcapacity that has put permanent pressure on management efforts. Later on the Common Fisheries Policy has reacted by reorientating subsidies against a further increase of vessels. The new policy conditioned MS subsidies for new vessels on the decommissioning of the same or greater capacity. In addition EC subsidies were paid to those who decommissioned their vessel. The guiding provisions are laid down in Art. 12 Regulation No 2371/2002:

> "1. Member States shall manage entries into the fleet and exits from the fleet in such a way that, from 1 January 2003:
> (a) the entry of new capacity into the fleet without public aid is compensated by the previous withdrawal without public aid of at least the same amount of capacity,

(b) the entry of new capacity into the fleet with public aid granted after 1 January 2003 is compensated by the previous withdrawal without public aid of:
(i) at least the same amount of capacity, for the entry of new vessels equal or less than 100 GT, or
(ii) at least 1,35 times that amount of capacity, for the entry of new vessels of more than 100 GT."

This means: The logic of the subsidy scheme is that there is no legal obligation to decommission old vessels and through that reduce the fleet. In fact, the effect is counterproductive because the scheme incites shipowners to replace old by more efficient new vessels. Question: Would the integration principle require that the fleet is effectively reduced in a situation of permanent overfishing?

A third defect of EC fisheries Policy is related to the shifting of fishing efforts from EC waters to the waters of third countries. Subsidies for the cessation of fishing vessels were given not only for the scrapping of a vessel but also for the transfer of the vessel to third countries, often to joint enterprises dominated by the same company who owned the vessel while still operating in the EC waters. This has led to massive and often uncontrolled fishing activities in the coastal seas and EEZ of third countries. The relevant provision is contained in Regulation No 2792/1999 (as amended), Art. 7:

"3. The permanent cessation of fishing vessels' fishing activities may be achieved by:
(a) the scrapping of the vessel;
(b) until 31 December 2004, permanent transfer of the vessel to a third country, including in the framework of a joint enterprise within the meaning of Article 8, after agreement by the competent authorities of the country concerned, provided all the following criteria are met:
(i) there exists a fisheries agreement between the European Community and the third country of transfer as well as appropriate guarantees that international law is not likely to be infringed, in particular with respect to the conservation and management of marine resources or other objectives of the Common Fisheries Policy and with respect to working conditions of fishermen.
5. Public aid for final cessation paid to beneficiaries may not exceed the following amounts:
(a) scrapping premiums:
(i) vessels of 10 to 15 years old: see Tables 1 and 2 in Annex IV;

(ii) vessels from 16 to 29 years old: the scales in Tables l and 2 decreased by 1,5 % per year over 15;
(iii) vessels of 30 years old or more: the scales in Tables 1 and 2, less 22,5 %;"

Question: Does the shifting of fishing activities from EC to foreign seas breach the principle of integration because it does not sufficiently take into account that fishing in the EEZ and coastal seas of developing countries is not adequately controlled?

2. On the organisation of industrial enterprises

Industrial enterprises cause environmental effects through the intake of materials and energy and the residues from production processes and products. Environmental law captures such effects through "peripheral" requirements, i.e. by setting standards for inputs and outputs of the enterprise. In order to meet such standards the enterprise must develop an appropriate inner organisation. How this is done is largely left untouched by environmental law. Disregarding the voluntary EMAS regime the law structures the inner organisation only through company and institutional labour law. These bodies of law aim at the minimising of costs and the maximising and sharing of revenues. In environmental terms this causes reluctance to go further than the standards require and incites strategies of evading legal commands. The question therefore is if in view of the integration principle environmental law should also set standards with regard to the inner organisation of the enteprise, such as the institutionalisation of an environmental officer or member of the board of directors who are given genuine rights of surveillance, reporting, and initiative. In German law, for instance, an environmental officer of this kind is required for air pollution, water pollution and technical safety. The obligatory naming of an environmental director as a member of the board of directors was proposed in the draft Environmental Law Code of 1997.

3. On patenting biotechnology

Technical inventions if commercially applied can cause environmental damage. Patent law grants exclusive use of the invention thus providing a stimulus to innovation. The patent is granted without regard to environmental effects. Would the integration principle suggest that patenting should be conditioned by an assessment of environmental effects of the application of the invention? One may object by pointing to the principle that patent law must be separated from the regulation of effects of the use of the invention. However, patent law does

already now look at some side effects of usages. See, for instance, Art. of the Directive 98/44 on the legal protection of biotechnological inventions:

> "1. Inventions shall be considered unpatentable where their commercial exploitation would be contrary to ordre public or morality; however, exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation.
> 2. On the basis of paragraph 1, the following, in particular, shall be considered unpatentable:
> (a) processes for cloning human beings;
> (b) processes for modifying the germ line genetic identity of human beings;
> (c) uses of human embryos for industrial or commercial purposes;
> (d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes."

These exceptions protect ordre public and morality, including also animal suffering. Should patent law in view of the integration principle be readjusted to exclude patenting of inventions in relation to environmental effects?

4. On contract law

Contract law is aimed at a fair exchange of goods and services between the partners of the contract. Defects of a product or a service trigger mutual rights and duties of repair, replacement and compensation. Defects of this kind are however defined in terms of the individual interest and expectations of the partners. Third party interests such as environmental interests are not regarded as relevant. If, for instance, the wood for the construction of a house stems from tropical forests and the seller has falsely claimed that it was sustainably harvested the building owner is not heard if arguing that the wood is environmentally damageable, as long as the wood serves its purposes as construction material well (provided he or she did not make the origin an express condition of the contract). Should, in view of the integration principle, contract law be readjusted towards internalising environmental side effects of goods and services? This would imply, in doctrinal terms, to add a constructive or subjective element to the traditional conception of defects.