Avosetta Questionnaire on the Principle of Integration

Norwegian report

Hans Chr. Bugge

I. How to understand Art. 6 EC?[1]

The normal interpretation of the wording of article 6 is, in my view, that it lays down *mandatory substantial requirements* or limitations as regards the content of the policy in all the fields of activity listed in article 3. It clearly addresses the Community, not the individual member states. However, MS of course have to implement environmental protection requirements within the sector policies in accordance with the Community policies and legislation, in order to make it effective.

The reference to "environmental protection requirements" may be "what is needed to protect the environment". A more narrow and precise meaning is that the definition and implementation of sector policies must be in accordance with and support the key environmental objectives and measures of the EC, as laid down in EC environmental policy documents and legislation. Such an understanding seems well in line with the wording, but may be said to go further than intended.

The reference to "promoting sustainable development" may be interpreted at least in three ways: It may just mean to explain and place this obligation within the broad objective of sustainable development in EC art. 2, without any independent meaning It can also be seen as a support of the environmental protection aspect – needed to achieve sustainable development. Or it may mean to underline the "integration and balancing" of economic and environmental objectives and needs that is inherent in the broader understanding of the concept of sustainable development.

"Must be integrated": This must mean that the Community has an obligation - as a minimum - to balance economic activities and environmental protection in the definition and implementation of sector policies. In my view it not only *enables* the EC bodies to restrict

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[1] I hesitate to present views on this as Art. 6 EC does not apply directly to Norway (Norway is not party to the EC treaty). However, Article 73 Environment of the EEA Agreement of 1992 reflects the integration principle as it was expressed in the former EC Art. 130 R: "Environmental requirements shall be part of the policies of the Parties in other areas."

Formally, the main part of the EEA Agreement is equal to Norwegian Law.[1] Article 73 is seen mainly as the formal basis and framework for the implementation by Norway of EC environmental legislation, and not as a rule that lays down substantial obligations for the state of Norway outside and independently of EC legislation.

Art. 6 EC will, however, indirectly influence Norwegian law in several ways. First, through the legislation adopted by EC, in so far as it is influenced by art. 6 and "EEA relevant". Second, to the extent art. 6 is given weight by the ECJ. The EFTA Court, when ruling in cases of national implementation of the EEA agreement, must take decisions by the ECJ into account, and generally apply the same principles as the ECJ in order to harmonize EEA and EC law as much as possible. So far, however, there has not been any cases before the EFTA court where art. 6 EC has been invoked.

economic activities if this is necessary to protect the environment, it *obliges* them to do so. It is not only a procedural requirement either, a matter of assessing environmental effects and "taking environmental considerations into account". Environmental needs must influence the *substance*. However, it is of course naïve to mean that environmental requirements always should be given priority – a trade-off is necessary when several legitimate social objectives conflict. The idea of certain minimum environmental standards as absolute limitations may however be fruitful.

"Must be integrated" appears as a stronger expression than those used in art. 127, 2 (the objective of high level of employment "shall be taken into consideration"….) and art 153 2 (consumer protection "shall be taken into account"….)

The principle of integration is generally seen as positive from an environmental point of view. It reflects one of the major messages of the Brundtland report: that environmental problems must be *"attacked at the sources"* in order to achieve sustainable development. All sector authorities should be responsible for assessing and mitigating the negative environmental effects of their activities. It is good and necessary that environmental considerations have to be taken into account by sector authorities. However, this presumes that environmental concerns are treated in a consistent way across economic sectors and administrative units. This is not necessarily so, when it leaves to the sector authorities to *assess the environmental impacts* of their activities and decide *what weight* the environmental concerns should be given. For example, in Norway, the principle is used as an argument for giving sector ministries the authority to approve EIA's for projects within the sector. The result is not particularly good from an environmental point of view.

The principle of integration thus presents us with a dilemma, and it has to be supplemented by other principles and mechanisms to ensure proper environmental protection.

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

Question 1.
There is *no direct or explicit reference to the integration principle in Norway's Constitution*. However, the *article 110b on environmental protection* in the Constitution lays down a general right for the citizens to a healthy environment, and to biodiversity protection. It further states that "natural resources should be managed in such a way that this right is ensured for future generations as well".

The full meaning and role of this article is not quite clear. It is certainly more limited than the wording indicates. However, it is meant as a guideline for lawmaking and the implementation of legislation across economic and social sectors. It has been used by the Supreme Court as an element of legal interpretation in support of environmental considerations. Supported also by other general elements in Norwegian law, the prevailing view is that environmental effects always have to be assessed and environmental considerations have to be taken into account when laying down legislation or regulation, and deciding individual cases, within all areas of legislation. Hence, environmental considerations are *always both relevant and mandatory*. However, the *weight* that is given to environmental considerations in the final trade off against economic and sector interests is to a very large extent left to the discretion of the

authority in question - although the formulation of the acts may provide some obligations, guidelines or limitations. Only in extreme cases can the courts overrule this discretion.

There is in Norway *no framework environmental act* laying down the principle. However, our *Planning and Building Act*[2] which is a general act on societal, spatial and land use planning, provides an important framework for the coordination and trade off of conflicting economic interests and environmental considerations, across sectors. The problem with this act, from an environmental point of view, is that it leaves much authority to the municipalities. Too often, they are neither interested in environmental protection nor adequately equipped to assess and take properly into account environmental effects.

A general *Environmental Information Act*, adopted in 2003,[3] is also relevant. Its main objective is to implement the Århus Convention into Norwegian Law, but it goes somewhat further. Its section 20 states that all public agencies, when preparing legislation, plans and programmes relating to the environment shall make provision for participation by the public in these processes. This shall be done at stages and within time frames that provide real opportunities to influence the decisions that are made. To this end, the public shall be provided with the necessary information. During the preparation of legislation, plans or programmes that may have a significant impact on the environment, a public hearing shall be held well before a final decision is taken. An account of the environmental impact of the proposal shall be available at the hearing. Decisions taken in such matters shall be made public. It shall be made clear how comments and other input from the public have been evaluated. - In principle, this forces sector authorities to consider the environmental impact of new legislation, policies, etc. This article supplements the more specific rules on environmental impact assessment that follow in particular from the implementation of the EC SEA and EIA directives.

Quesion 2.
Explicit references to "the integration principle" are not found in Norwegian law, and are few and far between in policy documents. But the need to integrate environmental concerns into various sector policies is stated in several governmental documents. It is *implicit* in main policy documents on environmental and land use policy. Such documents as the biannual White paper on the State of the Environment and the Government's Environmental Policy are to some extent cross-sectoral. In 2002 a major White paper on Biodiversity described necessary measures to be taken by 12 different ministries to protect biodiversity. Similar broad whitepapers have covered such issues as the protection of the marine environment, and the control of emission of chemicals into the environment.

In the late 1990s the government decided that *each ministry* – in order to implement the principle of integration - *should develop and adopt an environmental strategy*. Several important ministries did. However, it is the general opinion that these strategies themselves in fact did little to strengthen environmental protection. They mainly listed already existing policy and legislation, and some good intentions which did not necessarily become reality.

Quesion 3.
The principle of integration as such *has not yet been interpreted by the judiciary*. There has been some cases before the Supreme Court where the Court has used the environmental

[2] Act of 14 June 1985 no. 77.
[3] Act of 9 May 2003 no. 31.

Article 110b in the Constitution to interpret an act in such a way that it better ensures environmental protection. (The issue in these cases are too particular to be of general interest.)

Questions 4-5.
The general rule in Norway' system of legislation is that a public hearing of the proposal has to take place before final decision by the government, and before it is presented to Parliament. (In fact, there are often several rounds of hearing.) In this hearing, *the Ministry of the Environment and its subordinate agencies*[4] will take on the "watchdog-role" on behalf of environmental interests. In principle, this also applies to "environmentally remote agencies", but the practical implementation may vary.

Question 6.
No, apart from the Ministry of the Environment and it agencies there is *no general official advisory boards* or scientific groups which reflect, discuss and recommend on policies, measures or actions on environmentally remote legislatory or administrative action.

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

1. Was the SEA directive properly been transposed into national law?

Both the SEA directive and the project EIA directive apply to Norway through the EEA Agreement. Although somewhat late they have been implemented jointly through a recent reform (in force from 2005) of the Planning and Building Act.[5] This *links the procedure of environmental impact assessment to the land use planning system* of the Planning and Building Act. This is possible because most of the projects covered by the project directive must be in accordance with a municipal master plan and also usually require a local development plan (in addition to a permit/concession pursuant to the relevant sector legislation). The rules on the planning procedure as regards public hearings, public participation, etc. clearly fulfills the procedural requirements in the directive. For the projects that are exempted form the requirement of a local development plan, the EIA procedure is linked to the permit procedure (although the rules are still pursuant to the Planning and Building Act).

The SEA directive also applies to petroleum exploration and exploitation on the Norwegian continental shelf. This is not covered by the Planning and Building Act, but by special provisions in the Petroleum Act[6] and regulations pursuant to that act.

2. In Art. 2 (a) there is a broad definition for 'plans and programmes'. How has this definition been adopted ?

In the Norwegian system an SEA has to be carried out for *all county plans and municipal master plans* which include provisions for land development. These plans are most often mandatory, but some are voluntary. The Norwegian rules do not distinguish between these situations; a SEA is required anyway. This goes somewhat further than the SEA directive, as

[4] The Pollution Control Authority, the Directorate for Natural Management, and the Directorate for Cultural Heritage.
[5] The provisions in the Act itself are short and quite general. The detailed rules are laid down in a regulation of 1. April 2005.
[6] Act of 29 November 1996 no. 72.

it includes land use plans for activities not covered by the project directive (such as new housing areas). The same goes for *local development plans that may have significant environmental effects*. Broadly speaking, this applies to projects covered by the project directive. *The two directives are thus implemented in parallel, through one system*.

On the other hand, there is in Norway no relevant *national* plan that fulfils the criteria for a SEA and is "required by legislative, regulatory or administrative provisions". This expression has been interpreted strictly by the Norwegian government. National long term plans have been developed and adopted by the Parliament for certain sectors or geographical areas (transport, hydro-energy developments, the Barents Sea), but these have been decided on a case by case basis. There has nevertheless been some discussion of whether a formal SEA should be carried out in connection with such plans. The importance of this should, however, not be overestimated, since environmental effects are assessed to a certain extent anyway.

3. What is the general understanding of the concept of the 'authority' ? What kind of organisations are included ?

The general application of the concept of 'the authority' in Norwegian law is the authority that makes the final decision/approves the relevant plan or permit. This can be seen as an expression of the integration principle. In most cases, the *municipality* is the "authority" since most land use plans in Norway are approved by the municipality (although on the basis of a hearing, and in case of conflict state authorities have the final word). In some sectors, and in particular the energy sector, the *sector authority* is 'the authority'. Hence, there is no independent review institution for SEAs and EIAs in Norway. This makes it rather weak from a strictly environmental point of view.

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?

There is no longer much debate related to the list of issues which provide the automatic application of the SEA. In general, the system has been accepted, as it is – to a large extent – perceived as a continuation of the project EIA directive.

5. In what way does the outcome of the SEA procedure affect the final decision-making?

There is still not enough empirical evidence to answer this question properly. It also depends on what you compare. To some extent, environmental assessments were carried out before the SEA directive was implemented by Norway. However, the SEA has made the procedure more consistent and the assessment more thorough in substance. It can be assumed that at least important environmental values, on average, are better protected.

7. Were there/or are there any similar requirements in force in your county before/since the entering into force of the Directive ?

Not as a system, although environmental impact assessments may have been carried out in practice as part of planning procedures, but on an ad hoc basis.

8. Do you have any information on any ongoing cases or judicial decisions in connection with the implementation of SEA requirements ?

No ongoing cases or judicial decisions yet.

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?

The main weakness in Norwegian legislation is the lack of *a general* Act for environmental protection and sustainable management of natural resources which could give the environmental authorities a strong instrument vis a vis sector authorities. At present, the Pollution Control Act is effective in this regard, but it is limited in its field of application.

The principle of integration is applied to the effect that each sector authority is responsible for taking into account environmental considerations in their decision-making. This is in itself a good thing. Through the general hearing system the environmental authorities will always have a say. But most of the legislation *gives the sector authorities much discretion in the final weighing*. As long as it is not countered by a clear and law-based "watchdog-function" for environmental authorities the result may easily be a weak protection of the environment. The coordinating legislation on spatial planning in the Planning and Building Act is also good in principle, but it leaves much authority to the municipalities, which does not either ensure a proper environmental protection. The current and often short term political priorities will prevail.

A problem in Norwegian environmental law is that environmental law principles such as the precautionary principle is defined and seen mainly as principles of *environmental* policy and law only. They do not appear in the policies and law of other sectors, and do not, as a consequence influence the application of their legislation. This is a serious weakness.

Fish farming as illustration.
One of many possible illustrations of these problems in the legal and administrative system of Norway, is the case of *fish farming*. This has become a major industry along the coast, of equal economic importance as the ordinary fisheries. It has major harmful environmental effects, such as a dramatic reduction of the stocks of wild salmon through "genetic pollution", due to massive escapes from the fish farms during storms and accidents. Indirectly it also seems to cause a serious decrease in sea birds along the coast. The industry is regulated by the Aquaculture Act[7], administered by the Ministry of Fisheries. New fish farms must have a permit by the fisheries authorities, and it is said explicitly in the act that fish farming must be carried out with due consideration of the environment. In addition, a pollution permit pursuant to the Pollution Control Act is required. As the direct pollution may be limited, in particular in open fjord areas, this rarely stops a new fish farm. Apart from pollution control, the final assessment of "environmental considerations" lies with the fisheries authorities. In policy documents on fish farming there is no reference to the precautionary principle, in spite of the fact that this principle is defined as a governing principle of the government's "environmental policy". Lately, the problem has been partly addressed through the establishment of particularly protected fjord areas,[8] but this measure comes far too late and is too weak.

[7] Act of 17 June 2005 no. 79.
[8] The Parliament has decided that fish farming shall be strictly limited in a number of "salmon rivers" and "salmon fjords".