The Precautionary and 'Polluter Pays' Principles in Austria – More Than Just Lip Service?

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A reminder: According to Art. 191 (2) sentence 1 TFEU,

> '[t]he Union policy on the environment shall be based on the precautionary principle and on the principles … and that the polluter should pay.'

It is generally accepted that the precautionary and polluter pays principles are by far the *most important principles*[1] of the EU policy on the environment, and this also affects the environmental legal systems of the Member States, taking into account that the *acquis* is particularly broad on the field concerned. They are *binding normative guidelines*, especially in terms of a mandate for action at the EU level, but also for national institutions, and due to the *horizontal clause* codified in Art. 11 TFEU they must be taken into account in relation to all fields of EU policy, such as, e.g. the common traffic policy. While the EU and the Member States enjoy a broad scope of discretion concerning the implementation of these principles,[2] serious and repeated violations constitute an infringement of primary EU law. It is submitted that the two principles have not been properly observed in the field of the EU traffic policy, and that initiation of an action for failure to act by the European Commission is long overdue.[3]

'Based on', in terms of Art. 191 TFEU, means that the precautionary and polluter pays principles constitute the *foundations* of European environ-

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1 See also *Kahl* in Streinz (ed.), EUV/AEUV[2] (2012) Art 191 Rz 76; *Durner* in Landmann / Rohmer, Umweltrecht (2015) 76. ErgLieferung Umweltvölkerrecht Rz 65; *Piska* in Mayer / Stöger (ed.), EUV/AEUV (2012) Art 191 Rz 31; from the origin principle we are still far away both intellectually and in the real implementation. The precautionary principle is probably equitable with the hazard prevention principle.

2 See only *N. Raschauer* in N. Raschauer / Wessely (ed.), Handbuch Umweltrecht[2] (2010) 86 f; *Calliess* in Calliess / Ruffert (ed.), EUV/AEUV[4] (2011) Art 11 AEUV Rz 9 ff, Rz 23; *Epiney*, Umweltrecht in der europäischen Union[2] (2005) 108.

3 See *Kerschner / Wagner* in Kerschner (ed.), Österreichisches und Europäisches Verkehrsrecht – Auf dem Weg zur Nachhaltigkeit (2001) 17 ff; 45 ff.

mental law. In contrast to what has been held by other sources,[4] in my view there is no difference between the legally binding nature of the precautionary principle on the one hand and the polluter pays principle on the other. The fact that the precautionary principle is mentioned first may perhaps emphasize its outstanding importance but does not imply any kind of hierarchy between the principles. It is also not true that both principles are only relevant if they are referred to in individual cases, as they would essentially be meaningless otherwise.[5]

The key message of the polluter pays principle is: The *significant* polluter must pay. It is not always clear, though, who the significant polluter is, which is why there may exist a certain scope of discretion on the part of the States concerned.

The key message of the precautionary principle is: When scientific uncertainty exists concerning the potential negative impacts of a certain behaviour/project on the environment, an obligation exists *to avoid* the conduct concerned![6] This does not at all prevent research and science, but rather encourages them. The producer or actor who plans to undertake the activity concerned has to conduct research until the harmlessness (apart from non-detectable risks) is proven.

As far as the implementation of the two principles within European law is concerned, the following remarks can be made:

The polluter pays principle is the essential guideline for the environmental liability directive.[7] The water framework directive follows *both principles*: While Art. 9 (1) of the Directive requires a cost covering charging of the environmental damage according to the polluter pays principle, ("Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted according to Annex III, and in accordance in particular with the polluter pays principle") Art. 4 of the Directive imple-

4 See the discussion in *Proelß*, Wirtschaft und Recht im europäischen Kontext, in IUR (ed.), Jahrbuch des österreichischen und europäischen Umweltrechts 2016 (2016) 151 ff.

5 See *Raschauer* in N. Raschauer / Wessely (ed.), Handbuch Umweltrecht[2] 19.

6 See also in the matter for instance *Kloepfer*, Umweltrecht[3] (2004) 175 § 4 Rz 13; 179 § 4 Rz 22; further *Kahl / Gärditz*, Umweltrecht[9] (2014) 37 Rz 13: avoidance at concern potential; see also *Epiney* in Landmann / Rohmer (ed.), Umweltrecht (2015) 76. ErgLieferung Art 191 AEUV Rz 24; particularly clear *Kiss / Shelton*, European Environmental law (1993) 37 ff.

7 On the deficiencies in the implementation for instance, see *Hinteregger / Kerschner* in Hinteregger / Kerschner (ed.), B-UHG (2011) § 19 Rz 4 ff.

ments the precautionary principle by prescribing a binding and strict prohibition of deterioration, which the European Court of Justice (ECJ) now – to the frustration of some Member States – has confirmed as being obligatory concerning the planned deepening of the river *Weser*. That is a consistent implementation of the precautionary principle!

To avoid serious environmental risks also calls for accepting a *reversal of the burden of proof*: The potential polluter has to prove that because of his behaviour no serious environmental damage could occur. Exactly this has been confirmed by the ECJ in 2004 in its far too little observed decision concerning mechanical cockle fishing.[8] In its judgment, the Court stated:

> "57. So, *where doubt remains* as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, *the competent authority will have to refuse authorisation*."

This revolutionary judgment has not been properly implemented by the institutions of the EU in the context of the REACH (Registration/Education/Authorisation and Restriction of chemicals)-Regulation. It should not be forgotten that a quasi-authentic interpretation of the precautionary principle exists in the shape of a Communication from the EU-Commission[9] submitted in 2000, whose essence is that the *protection of health takes precedence over economic considerations*. Thus, there is no room for any kind of proportionality test.

Following this brief outline concerning the legal relevance of the precautionary and polluter pays principles, let me turn to the *situation in Austria*. To anticipate the result of the analysis: Both principles are mostly – with minor exceptions – only applied in terms of *alibi law*, or soft law respectively, *without specific effective implementation*. As far as the polluter pays principle is concerned, it is not properly implemented in the Austrian Environmental Liability Act (B-UHG). Rather, water damage is officially allowed, and the BUHG is not applicable to water law approved emissions. The B-UHG also does not cover previously contaminated sites.[10] In this respect, polluter liability has hardly ever been accepted. Rather, the competent administrative courts have rewarded polluters by referring to the burden-sharing principle.[11] Furthermore, the cost covering principle codified in Art. 9 of the water framework directive, which provides for a recovery

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8 Rs C – 127/02.

9 COM 2000 (1) 2.2.2000.

10 To all this *Hinteregger / Kerschner* (ed.), B-UHG – Bundes-Umwelthaftungsgesetz (2011) passim.

11 See *Kerschner*, RdU 1996, 77; VwGH 95/07/0112, RdU 1996/86.

of costs from the polluter, is not implemented in a sufficient manner. In Austria, a *very narrow definition of water services* is usually advocated (which covers only water supply and disposal, but not hydropower stations). The B-UHG must thus be regarded as dead law.

Also the precautionary principle largely ought to be considered as mere "paper law", frequently constituting no more than lip service. Generally, the administrative authority bears the burden of proof for environmentally dangerous behaviour, i.e., no reversal of the burden of proof has been implemented. In the context of environmental impact assessment procedures (which are by themselves precautionary in nature), authorizations can only be refused if there is 'heavy environmental damage' (zero alternative). Moreover, even though the precautionary concept of BAT (best available technology) has been incorporated in § 71a GewO (trade regulation), in Austria one simply equates BAT with the previous 'state of the art'.[12]

The essence of the whole matter is the following: Where their proper application starts to seriously hurt the economy, these environmental principles are often diluted or even rendered meaningless. The polluter pays principle is still largely overlapped by the burden-sharing principle, thus leading to a situation where profits are privatised but losses socialised. Therefore, a much more rigorous recovery of costs is needed. Furthermore, the precautionary principle must be implemented in conformity with the ECJ's Waddenzee decision on *cockle fishing*. The ECJ is called upon to further develop this jurisprudence in a consistent manner. In particular, the precautionary principle must not be weakened, or abused respectively, by subjecting it to a balancing of interests ('principle of proportionality'). *We do not only need a 'rigorous' prohibition of water deterioration but also a 'rigorous' understanding and implementation of the precautionary and polluter pays principles! Yes, we can! If we want it!*

12 See *Altenburger* in Ennöckl / N. Raschauer / Wessely (ed.), Kommentar zur Gewerbeordnung 1994 (2015) Band 1 Rz 3 zu § 71a.