Regional exchange webinar

The importance of the rule of law in beating pollution: the establishment and reinforcement of the Polluter Pays Principle (PPP) and the environmental responsibility in the Western Balkans

5 October 2021 - 10.00—12.15
THE IMPORTANCE OF THE RULE OF LAW
AT NATIONAL AND INTERNATIONAL LEVELS IN
ADDRESSING TRANSBOUNDARY POLLUTION

TRANSBOUNDARY WATERS IN THE WESTERN BALKANS

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Int’l Watercourses Convention
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WBs "SMALL ESPOO"
TRANSBOUNDARY WATERS IN WBs

THREE WATERSHEDS

Black Sea
Adriatic Sea
Egeian Sea/Mediterranean

AT LEAST 13 TRANSBOUNDARY RIVER BASINS & SUB-BASINS

Danube, Neretva, Drim, Vardar, Vjosa, Drina, Maritza...

MULTILAYER LEGAL REGIME IN PLACE (applicable)

Multilateral - UN; UNECE
EU environmental – water acquis
Regional (or sub/regional) – DRPC; FASRB; Prespa Lakes Agreement
Bilateral (mostly aimed at administrative co-operation; at the lowest binding level - MoUs)
RULE OF LAW

INTERNATIONAL ASPECT

Venice Commission (European Commission for Democracy through Law)
- Advisory body for constitutional matters of the Council of Europe
- 62 member states (47 European)
- The role: providing legal advice to its members; helping states in bringing their legal and institutional structures into line with EU standards and int’l experience in the fields of:
  democracy
  human rights
  rule of law [one particularly important aspect - constitutional division of power between three branches of power: parliamentary, executive, judiciary]

NATIONAL ASPECT (in the principle)

Constitutional division of power between the three branches
Importance of the legal instruments [parliament enacts the laws; executive branch (gov’t) may set out only the legal instruments (decrees, regulations, orders, decision) in the framework set out by the law]

Constitutional courts are responsible for checking the constiuutiality of legal instruments adopted by the parliamentary and executive power branches against constitution
1. Binding international duty of approximation of environmental legislation (includes water acquis) to EU acquis, meaning inter alia:

- Transposition of the water and realting environmental directives into national legal systems;
- Implementation of the national legal instruments containing provisions transposing EU requirements;
- Enforcement of such legal instruments,

2. These activities are subject to permanent monitoring of a joint body of the SAA parties, and negotiations between the parties on approximation of the chapter relating to environmental protection.

Negotiations to the chapter can be completed and closed only if the EU Commission is satisfied with the (level and quality) of transposition (and implementation and enforcement). All three aspects of approximation must be in place before signing the Agreement on Association between same parties.
LEGAL INSTRUMENTS OF TRANSPOSITION

Laws – Competence of the parliamentary branch of wower. Regulate certain issue and set out the the limits and content of the executive branch in implementation of the laws

Govermental decrees, ministerial regulations, decisions, orders etc. - are legal instruments for implementation / execution of a law, and their scope must fully be inside the limits established by the law (which set out the legal basis for their adoption).

Regulating issues beyond (outside) of such limits, means breaching of the (constitutional) rule of law principle.

Speaking in the principle, in such cases constitutional court is competent to interveny and derogate privisions not in line with constitution.

LEGAL/ADMINISTRATIVE INSTRUMENTS FOR CONTROLLING POLLUTION

Main ones: environmental permits, authorisations, consents, concessions etc.

Must be based on a previously performed an Environmental Impact Assessment Study (in accordance with EU EIA requirements).
UNECE CONVENTIONS

UNECE MEAs are relevant

- Int’l Watercourses Convention (1992)
- Espoo Convention (1991)
- Aarhus Convention (1998)

EU acquis is in line with MEAS
EIA STUDY

IN NATIONAL CONTEXT

National legislation in line with EU requirements (which should be transposed and implemented)

Diversins from the EU EIA system, (due to improper transposition; due to breaching the rule of law in terms of respecting constitutional division of power), make higher certainty that the Polluter Pays Principle (the implementation of which is also an EU requirement) will not have expected effect in practice.

IN TRANSBOUNDARY CONTEXT

Espoo Convention is a safe international law ambient for performing an EIA in transboundary context, which, if properly performed, would provide enough reliable elements for subsequent environmental permits, authorisations, consents or concessions.

PUBLIC

Performing an EIA, both in national or international contexts, assumes the requirements of Aarhus Convention (i.e. regarding right of public ona environmental information, as well as public participation i decision-making and access to justice) should be sustained.
BUCHAREST AGREEMENT - “SMALL ESPOO”

The Multilateral Agreement among the countries of South-Eastern Europe for implementation of the Convention on Environmental Impact Assessment in a Transboundary Context was signed in Bucharest 2007. Signatories are: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Greece, Montenegro, Romania, Serbia and N. Macedonia. According to available data (from 2018) four countries still did not ratify the Agreement.

The aim of the Agreement is to provide a common EIA procedure concerning major projects between SSE countries that may have an adverse transboundary environmental impact, as well as to provide smooth implementation of the Espoo Convention, especially by conducting joint EIA.

Instead, the “Small Espoo” contains a serious potential for suspending in certain cases both national and international legal regimes established for ensuring an EIA procedure.

Words of Mihaela Măcelaru, Ministry of Environment, Romania (depositary of the Agreement):
“Small ESpoo” of WB Countries II

“For a ‘joint proposed activity’, the Bucharest Agreement gives the right to all concerned Parties to skip relevant procedures and practical arrangements for disclosure of information, public consultation and communication set under this Agreement and conduct EIA public consultation and communication according to special arrangements”.

“These arrangements are to be the product of one or more Joint Working Groups. If case by case consultation would be provided for joint project activities that will take place under the jurisdiction of more than one Party (e.g. nuclear power plants, hydropower plants, cross border pipelines etc.), this would actually reduce standards for public participation making it more difficult, inaccessible and non transparent.”

[TReCa REGIONALNA KONFERENCIJA O PROCJENI UTJECAJA NA OKOLIŠ / THIRD REGIONAL CONFERENCE ON ENVIRONMENTAL IMPACT ASSESSMENT; Vodice, Hrvatska / Croatia, 13. - 16. rujna 2017. / September 13th - 16th, 2017]
TENTATIVE CONCLUSIONS

THE POTENTIALLY MAIN REASONS FOR NON-EFFECTIVENESS OF THE POLLUTER PAYS PRINCIPLE IN WBAs

1. Inadequate environmental permitting system in place:
   - not established fully in accordance with the rule of law, i.e. disrespecting division of powers set out in the constitution; due to intrusion of the executive branch of power, e.g. Gov’t, into the competence of the parliamentary branch of power (taking over responsibility from the parliaments for regulating EIA and permit systems the laws, and regulating such issues by the executive administrative acts, which purpose is implementation of the laws, inside the limits laid down by the laws);
   - this may indicate not safe (inadequate; improper) transposition of the EU acquis requirements;
   - permits do not reflect accurately findings of the respective EIA studies;

2. Inadequate, or lack, of implementation and enforcement of (potentially) good environmental permitting system;

3. Introduction a legal possibility for suspension of any EIA procedure (both at national or transboundary levels) now existing as binding, if “Small Espoo” enters into powerer;

4. FURTHER COMPARATIVE RESEARCH IS NEEDED.