

*mgr Ilona Przybojewska*

Uniwersytet Jagielloński

Katedra Prawa Europejskiego

## **Cohesion Policy of the European Union and Sustainable Development in the Context of Environmental Protection**

### INTRODUCTION

The article presents an endeavour to analyze the interrelationship between the cohesion policy of the European Union and requirements of environmental protection which, by virtue of article 11 of the Treaty on the Functioning of the European Union, have to be taken into account in all spheres of activity of the Union, thus also in the cohesion policy. The main problem lies in the fact that the aims of these two branches are often – in an actual or at least perceived way – contradictory. Within the regional policy, introduced to diminish disproportions in regional development, the means are allocated for projects destined to contribute to rise of the level of environmental protection as well as for initiatives such as trans-European networks which can rather contribute to the decrease of the aforementioned level. The question how this problem is rectified embodies the issue with which present paper intends to grapple.

The topic of this article is not accidental as it stems from the complex correlations between globalization and regionalism. As the creation of definition of globalization has been up to now elaborated in many works and it is definitely not the proper subject of this paper, it will suffice to say that globalization processes have resulted in creation and development of worldwide interdependencies which contribute to its increasing homogeneity. While perceived mainly as advantageous, the globalization also raises concern as to the dangers appearing as its consequence. One of them is the deepening of development differences between states, regions and sectors. The idea of regionalism seems to have appeared as an answer to that threat. It acts in two dimensions; the first one features the creation and development (which means the deepening of integration) of regional integration organizations, such as the European Union, while the second consists in fostering development and diminishing the development differences among particular regions [Milczarek, 2005, p. 15]. The fruit of that second dimension is cohesion policy of the European Union. The shape of cohe-

sion policy to a certain extent determines the influence of the globalization processes and above all largely contributes to well-functioning of the internal market which constitutes major instrument introduced by the European Union.

Therefore, the foundation of European regional policy is situated in the supposition that the lack of cohesion between European regions hinders the full and proper operation of the common market. Nevertheless, the effectiveness of the cohesion policy of the European Union faces certain obstacles, among which there can sometimes appear the requirements of environmental protection enshrined by a variety of instruments, even such as environmental impact assessment, applied obligatorily in case of most infrastructure investments, not to mention more restrictive regime concerning investment in areas within the framework of a program Nature 2000. Examples can be multiplied. The mean that is intended to reconcile the demands of civilization development and the protection of environment is the principle of sustainable development, invoked in the above mentioned article 11 TFEU. Thus, it seems necessary to analyze the legal frameworks of the cohesion policy of the European Union and the actual meaning of the sustainable development together with its scope of influence, which will allow to draw conclusions connected with the subject of this article.

#### LEGAL FRAMEWORKS OF THE COHESION POLICY OF THE EUROPEAN UNION

Cohesion policy is the set of actions destined to level disproportions in social, economic and territorial development and to achieve convergence between states and regions by way of allocation of financial means [*vide* Głąbicka, Grewiński, 2005, p. 20]. The means are redistributed [*vide* Murzyn, 2009, *passim*], although now the emphasis is put on alleviating the competitiveness of regions, as according to the First Cohesion Report [CEC, 1996a, p. 14–15] the equalization of differences does not imply deterioration in the tempo of development for better developed regions.

Apart from the treaties, the legal framework is based on secondary sources of law, among which the most significant is Council Regulation 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation No 1260/1999 [OJ L 210, 31.7.2006, p. 25–78]. Currently there are two structural funds (mentioned in the title of Regulation) and Cohesion Fund.

According to article 176 TFEU, the European Regional Development Fund serves to redressment of main regional disproportions in the European Union by contributing to development and structural adjustment of regions which are underdeveloped as well as to conversion of industrial regions which fall into

decline, whereas the European Social Fund concerns job market, struggling with unemployment and human resources development. The Cohesion Fund, by virtue of article 177 TFEU, gathers resources for supporting projects *in the fields of environment and trans-European networks in the area of transport infrastructure*.

The allocation of aid is founded on several rules, such as the complementarity rule, placed in article 8 of the regulation, according to which the funds provide aid which complements actions undertaken on a state level, the programming rule, by virtue of which the aid is allocated on the basis of long-term planning, the partnership rule (article 8), imposing a duty of strict cooperation between European Commission and the Member States, as well as the additionality rule (article 11), stressing that financial means from structural funds do not replace expenses encumbering the state. Particularly significant, in the light of interrelationship between the cohesion and the environmental policy is the rule of cohesion (article 12) which states that the cohesion policy has to be coherent with other activities and financial instruments of the European Union.

There are also other forms of aid, such as long-term advantageous loans from European Investment Bank and initiatives such as JEREMIE, JASPERS and JESSICA [*vide* Kokocińska, 2009, *passim*].

## THE PRINCIPLE OF SUSTAINABLE DEVELOPMENT AND ITS SCOPE OF INFLUENCE

The sustainable development is relatively new conception, although it is already deeply rooted in international law, European Union law as well as in internal legal orders of Member States. The notion of sustainable development has appeared in a variety of international treaties and other legally binding acts. Also the European legislator repeatedly raises the question of sustainable development; it is said, for instance, about actions which should be undertaken to ensure the sustainable development of Europe (article 3.3 of the Treaty on the European Union [OJ C 83 of 30.3.2010]). Yet, which should be emphasized, the principle of sustainable development was not explicitly included in the catalogue on which the European Union environmental policy rests, enshrined in article 191.2 of the Treaty on the Functioning of the European Union [OJ C 83 of 30.3.2010] and constituting the following rules: precautionary principle, prevention principle, rectification at source principle as well as “polluter pays” principle. However, the aforementioned catalogue is not an exhaustive list as article 11 TFEU proclaims the integration principle imposing an obligation to take into consideration the requirements of environmental protection in all actions undertaken by the European Union both while it defines and pursues its

policies, *in particular with a view to promoting sustainable development*. Article 11 sets forth *sui generis* horizontal clause, which is a corrective element in all spheres of activity of the European Union [*vide* Lisowska, 2005, p. 180, 182]. This principle covers, as far as its meaning is concerned, one of the rules from the Declaration from Rio which were created to determine the notion of sustainable development, namely the postulate that the environmental protection ought to be inherent part of development processes. Therefore, integration principle should be regarded as one of possible form of sustainable development or rather it is an extract of this idea [Pallemmaerts, Herodes, Adelle, [http://ecologic.eu/projekte/epigov/documents/EPIGOV\\_paper\\_9\\_pallemmaerts\\_herodes\\_adelle.pdf](http://ecologic.eu/projekte/epigov/documents/EPIGOV_paper_9_pallemmaerts_herodes_adelle.pdf)].

The construction of horizontal clause turned out to be effective as the Treaty of Lisbon introduced other norms of such type, referring, for instance, to struggling with any kind of discrimination (article 10 TFEU) as well as consumer protection (article 12 TFEU). Their prototype is the aforementioned integration clause which *per se* is substantially void, but in the same time being the norm of widest scope, invoking provisions of title XX of TFEU, devoted to environmental policy of the European Union. Thus, it extends the obligation of conduct compliant to the rules of this policy on all spheres of activity of the European Union. The great significance of such clause is visible when the four principles included in article 191 TFEU are properly interpreted. Especially the principle ‘polluter pays’ and the precautionary principle may have far reaching consequences; the first one allows to determine the casual link between certain action and the environmental damage resulting from that action to execute strict liability, while the second one actually seems to contribute to loosening of the conditions of proof and in consequence the requirements of attributing responsibility to a certain entity. If the precautionary means have to be introduced, if the negative impact is not proven or if the lack of negative impact is not proven (as it is sometimes formulated), then how does the liability of the presumed polluter look like? As the European Court of Justice ruled, *in accordance with the ‘polluter pays’ principle, in order for (...) a causal link thus to be presumed, that authority must have plausible evidence capable of justifying its presumption, such as the fact that the operator’s installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities* [Case C-378/08].

The notion of sustainable development is invoked also by article 37 of the Charter of Fundamental Rights of the European Union [OJ C 83 of 30.3.2010]. A significant *novum* consists in classification of the sustainable development idea as a ‘principle’, which has not been so obvious.

The problem with the principle of sustainable development is that it derives from a highly general notion; currently there is still controversy in literature if it merits the denomination of a principle and not rather of some kind of strategy,

as the notion of sustainable development seems to be perceived by the European Union. As V. Lowe claims, sustainable development is a convenient ‘umbrella’ term to signify a group of congruous rules [Lowe, 1999, after: Przyborowska-Klimczak, 2004, p. 175]. Such an understanding does not dilute the significance of sustainable development; to the contrary, it can lead directly to introducing respective measures destined to fulfill its demands, which can be more advantageous than the formulation of the general rule, particularly if the relevant bodies would confine themselves to such formulation. This question will be elaborated in the course of further considerations.

Also Polish law comprises the principle of sustainable development. The Constitution in article 5 says that the Republic of Poland shall ensure the protection of environment, following the principle of sustainable development. This norm is further elaborated in article 3.50 of Environmental Protection Law, defining the sustainable development as the social and economical development within the framework of which there is an integration of political, economic and social actions, with preservation of environmental balance and stability of basic environmental processes to guarantee the possibility of satisfying fundamental needs of particular communities or citizens of both present and future generations. The conception of sustainable development is mentioned also, *inter alia*, in article 8 of the act, providing for the necessity of taking it into account in programs and other planned documents pertaining to the development of branches of economy, such as energy sector or industry. Here it should be mentioned also the principle of complexity from article 5, which states that protection of one or a few elements of nature should allow for protection of other components. As it was noticed by doctrine, this principle is not often found as independent, but constitutes a component of other rules, as for instance exactly of the principle of sustainable development [Górski (ed.), 2009, p. 59]. In the context of ambiguities that seem to be inseparable with the notion in question, it should be noted that in Polish doctrine appeared several translations of word *sustainable*, such as *samopodtrzymujący* until finally the denomination *zrównoważony rozwój* prevailed. According to doctrine, analyzed alone, the principle of complexity signifies, *primo*, the necessity of pursuing environmental protection goals taking into account all elements of environment in their mutual relations; *secundo*, the impacts on environment should be recognized in constructions of a variety of legal instruments, such as environmental impact assessments, access to information or integrated permits [Korzeniowski, 2010, p. 333–334]. All the aforementioned rules seem to be inherently intertwined. It is well displayed in conception of two aspects of integrated protection principle: the external one and the internal one [Wasilewski, 2000, *passim*]. While the first reflects the substance of integrity principle from article 11 TFEU, the second one can be associated with the principle of complexity.

A particularity is that although law often refers to the idea of sustainable development, it rarely gives – or does not give at all – satisfactory explanation of this notion, as if that was obvious. Certain aid may be comprised in report *Our Common Future* by G.H. Brundtland, determining four contents of sustainable development conception, namely justice inter- and intra- generations, moderate exploitation of natural resources as well as integration of development and environmental protection [Brundtland, 1987, after: Korzeniowski, 2010, p. 284–285].

Within the framework of the notion of integrated protection principle, another theory sheds light on the question of interests at variance that the European cohesion policy attempts to reconcile. According to its authors, the factual states covered by the principle fall within to distinct categories: a model of divergent principle of integrated protection and a model of convergent principle of integrated protection. While the latter consists of situations where the goals pursued are of such character that can easily be achieved simultaneously, the first one includes cases where the aims are conflicting [Breuer, 1995, after: Korzeniowski, 2010, p. 340]. Here appears another question: does the horizontal clause from article 11 TFEU implies that in case of contradiction existing between aims or projects directed towards environmental protection and other projects, for example connected with infrastructure, the priority should be deemed to characterize the first category? The doctrine put an emphasis on the necessity of balancing the aims to find equilibrium that would allow to achieve all the aims to the right extent [Wasilewski, 2000, p. 513]. In my opinion, the question that should be raised is if the inconsistency of respective goals is a perceived one or a real one, which can be determined merely using *ad casum* analysis. The solution of this preliminary issue may pose practical problems, as well as the balancing itself. Definitely, it is indispensable to ignore the clause referring to the requirements of environmental protection completely, but we can face an abundance of borderline cases where the choice of appropriate solution would not be so simple. In certain cases the dilemma between pursuing development of regions aims by means at disposal of European cohesion policy and the requirements of environmental protection may still remain unresolved.

## CONCLUSIONS

Definitely, the cohesion policy of the European Union is very complex and it enshrines values that not always are viable or easy to be reconciled with the needs of environmental protection. The counterbalancing of these two spheres of activity of the European Union is to a high extent a matter of interpretation

by policymakers. No legal formulations can ensure striking the right balance in each case as the interpretation should be made on a case by case basis. Therefore, the special emphasis should be put on the obligation to maintain due diligence, encumbering the entities involved in applying relevant law.

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### *Summary*

Considerations of environmental protection have to be taken into account when the cohesion policy is determined and realized just by virtue of a horizontal clause from article 11 of the Treaty on the Functioning of the European Union. Nevertheless, these considerations are also reflected directly within the framework of the cohesion policy of the European Union by use of financial instruments such as the European Regional Development Fund or the Cohesion Fund. Within the regional policy, introduced to diminish disproportions in regional development, the means are allocated for projects destined to contribute to raise the level of environmental protection as well as for initiatives such as trans-European networks which can rather contribute to the decrease of the aforementioned level. It is hard to overlook that globalization processes imply the emergence of new threats to natural environment. In this context there appears the question of mutual compatibility of the actions indicated. The answer can be given only after performing an analysis of relevant regulations and their real influence on the regional development as well as on the environment. The crucial conception here is the principle of sustainable development which should be examined to discover its actual meaning.

## **Polityka spójności Unii Europejskiej i zrównoważony rozwój w kontekście ochrony środowiska**

### *Streszczenie*

Względy ochrony środowiska muszą być brane pod uwagę przy ustalaniu i realizacji polityki spójności choćby na podstawie swoistej klauzuli przekrojowej z art. 11 Traktatu o funkcjonowaniu Unii Europejskiej. Jednakże względy te znajdują swoje odzwierciedlenie również bezpośrednio w ramach unijnej polityki spójności poprzez wykorzystanie instrumentów finansowych takich jak Europejski Fundusz Rozwoju Regionalnego czy też Fundusz Spójności. W ramach polityki regionalnej Unii Europejskiej, wdrażanej dla zmniejszenia dysproporcji w rozwoju regionalnym, przeznaczane są zatem środki zarówno na projekty mające na celu przyczynianie się do podniesienia poziomu ochrony środowiska, jak i na inicjatywy takie jak transeuropejskie sieci transportowe i energetyczne, które w naturalny sposób mogą raczej przyczyniać się do obniżenia tego poziomu. Nie da się bowiem ukryć, że zachodzące procesy globalizacyjne niejako implikują powstawanie coraz to nowych zagrożeń dla środowiska naturalnego. W tym kontekście pojawia się pytanie o wzajemną kompatybilność wskazanych wyżej działań. Odpowiedzi na nie można udzielić dopiero po przeprowadzeniu analizy regulacji prawnych i ich rzeczywistego oddziaływania tak na rozwój regionalny, jak i na środowisko. Kluczową koncepcją jest tutaj zasada zrównoważonego rozwoju, która powinna zostać zbadana w celu odkrycia jej aktualnego znaczenia.