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## **LEGISLATIVE CHANGES FOR IMPROVED COMPLIANCE AND ENFORCEMENT: THE CASE OF BULGARIA**

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### **SUMMARY**

A general review of Bulgarian environmental legislation from the initial instruments to the present is given. An attempt is made to explain the low or non-existent enforcement. A brief evaluation of adopted legislation is given with the main reasons—of a political, economic, and legal nature—behind the low or non-existent compliance and enforcement.

With the political developments during the last four years, there has been a radical revision of Bulgaria's environmental policy and the necessary legislative changes to achieve it. A short review is provided of the basic new principles and requirements in the adopted legislation in conformity with modern environmental protection. The two years of practical implementation of the new legislation have shown that, despite the desire, little progress has been achieved towards better compliance and enforcement. An attempt is made to explain the reasons behind this result and the difficulties in overcoming them.

Improved compliance and enforcement will continue to be a serious problem if the necessary prerequisites of a political, economic, and legal nature continue to be lacking, thus making effective enforcement an extremely difficult, painful, and slow process.

### **1 THE NATURE OF BULGARIAN ENVIRONMENTAL LEGISLATION IN THE PAST**

The existing body of environmental legislation in Bulgaria dates back to the sixties. Two basic laws, the Law for the Protection of the Air, Water and Soil from Pollution (1963) and the Law for the Protection of Nature (1967), together with numerous regulations for their implementation, formed the core around which environmental protection was carried out. The most characteristic feature of the whole body of environmental legislation in the past was its declaratory nature and the almost total lack of effective enforcement tools both in the legislative provisions themselves and in special enforcement programmes which did not exist. Both ideological and purely legal reasons lay behind this reality.

Communist doctrine considered man the "master of nature"; being the most evolved and only creature endowed with intellect he held a position of "supremacy" over all other creatures; he could tamper with natural processes if he thought necessary and change natural phenomena to his own liking. Environmental protection gained little from the ideological postulate that polluters exist only in the framework of a capitalist economy while in socialist conditions all was done "in the name of man and for his benefit" without any negative environmental impact whatsoever. These ideological presumptions led to the conviction that environmental protection was "self-executing" in socialist conditions; that the socialist economy did not pollute; that any environmental pollution of the different media in fact was only of transboundary character due to capitalist industry. Therefore, all the adopted legislation at the time aimed simply to stress these dogmas and obviously any effective enforcement tools would have seemed superfluous.

In no way was the situation improved by the fact that for almost half a century law did not execute its inherent regulative functions since the real regulation of social relations lay beyond law. Nor did any real or well-defined division of powers exist between the legislature, the executive, and the judiciary. Over all the existing powers in the State stood the Communist party, which determined and controlled everything in society, including the formulation of policy, the running of the economy,

culture, and education, and the personal everyday life of every citizen. Nor could any significant enforcement be contemplated within the conditions of a centrally planned economy where there was no private property and the State was both the owner of all industrial facilities as well as the regulating and enforcing agency. In the rare cases when some enforcement of environmental requirements did take place, since there was provision for both administrative, civil, and criminal liability, it was simply a case of taking an insignificant sum from one State "pocket" and placing it in another. Civil suits were practically non-existent both because of the lack of strict liability (ie, the precondition of intentional or negligent conduct) as well as because of the fact that any individual who contemplated a suit against the State or concrete state enterprises had little real chance of success.

Very much the same reasons lay behind the almost total lack of criminal enforcement. Managers of industrial facilities were in their majority "nomenclature" personnel. If any environmental criminal offence was committed while running economic activities, the liability was seldom criminal—the person who committed it simply was moved to another post. This to a very great extent explains why despite the existence of environmental crimes in the penal code, hardly any case has been filed and prosecuted.

To make the picture of past environmental enforcement complete: There was a total lack of accurate or credible public information on the state of the environment as well as of any relevant public participation in environmental decision-making and control, although different tools ensuring participation in "socialist democracy" did exist—at least in legislation—but hardly anyone took them seriously or expected such participation to give any significant practical results.

## **2 THE RECENT LEGISLATIVE CHANGES**

With the political changes of the past several years and the transition to democracy and a market economy, things are beginning to change very slowly. For the first time in decades it was publically admitted that the environment is in a state of catastrophe. The revealed information on the state of the environment showed that all environmental media are heavily polluted, creating serious health hazards and natural degradation.

A radically new environmental policy was formulated with three main tasks for the transitional period reflected in the adopted Environmental Strategy: preservation of the part of the environment which has not been severely damaged; decrease of pollution of all media; clean-up and elimination of the caused environmental damages. For the practical achievement of the new policy, environmental legislation is to play a priority role.

## **3 THE BASIC REQUIREMENTS IN THE NEW LEGISLATION**

In 1991 the new Constitution and the general Environmental Protection Law (EPL, amended 1992) were promulgated. Two provisions in the new Constitution are expressly dedicated to environmental protection—the obligation of the State to ensure protection of the environment, natural diversity, and reasonable use of natural resources and the right of each citizen to a healthy and favourable environment in accordance with established standards, as well as a personal obligation to protect the environment.

The EPL was one of the first basic laws to be adopted in the new political situation. The legislators' intention was to incorporate in the new law all the recognized basic principles of contemporary environmental protection, which should lead to better compliance and enforcement. The new law is supposed to provide for a balance of command-and-control and market incentive tools. It introduces stringent requirements for new facilities and the gradual achieving of compliance by existing industries, thus combining the precautionary and "polluter-pays" principle by means of environmental charges (still non-existent) and penalties, as well as increased responsibility and liability for environmental damages. The sums thus collected are deposited in the newly created National

and Municipal Environmental Funds, creating greater financial capacity for environmental protective measures.

The law provides for a balanced distribution of environmental management and control between central and local government, counting on increased public participation in environmental decision-making and wide public access to environmental information. Active participation in existing environmental conventions, treaties, and programmes of international organizations as well as harmonization with the directives of the European Community in accordance with the obligations stemming from the Association Agreement and the Council of Europe membership are also expected to play a significant role for better environmental protection.

#### **4 THE PRESENT ENFORCEMENT DEFICIENCIES**

The two years of practical implementation of the new Law have shown that although it provides for almost everything, its enforcement aspect once again is far from what is desired, due both to flaws in the provisions of the Law itself, as well as for reasons outside the Law. Once again the law does not provide for any special enforcement programmes, nor have any been adopted in order to achieve practical enforcement. But even without such programmes, if suitable tools were expressly provided for, and the necessary conditions existed, then compliance and enforcement would be effective.

The intended balance of command-and-control and market incentive tools has not been achieved in practice. The enforcement of environmental protection requirements continues to rely almost exclusively on command-and-control tools (such as ambient quality and emission standards), charges for the use of natural resources (still not introduced), and for pollution within the permissible limits (also still only on paper), and penalties—above these limits, instructions for the transportation, storage, handling and disposal of hazardous substances, designation of protected areas and species, prohibition of industries without treatment facilities, temporary or permanent closing-down of polluting industries, and halting the execution of acts of the central government and municipal bodies in contradiction with the requirements of the EPL.

All the more, the control functions carried out both by the Ministry of the Environment as well as by its 16 Regional Inspectorates are very much hindered by severe understaffing and financial difficulties. Another issue is the underestimation and lack of self-monitoring and self-control requirements regarding the industries themselves, rendering enforcement inconsistent and selective, and transforming command-and-control instruments into “command-without(or with little)-control”, which brings down the control mainly to monitoring only.

Other possible powerful tools as the right to close down polluting industries, for example, are hardly ever seriously contemplated due to the severe social consequences they would cause, making the difficult present economic situation unbearable. The very limited market incentives (exemption for import tariffs, emission charges, and penalties as a stimulus for environmentally sound industrial behavior) have given little practical results since privatization is still only on paper. There is no real market as yet, since it is predominantly monopolistic and deficit in character. Thus any market incentives cannot give the desired results.

The de facto double standards for new and existing facilities may be the only way to gradually reach compliance and effective enforcement. At the same time, however, the very stringent requirements for new industries by means of environmental impact assessment (EIA), emission charges and penalties, and the prohibition of operation without treatment facilities puts them in a more unfavourable competitive position compared to existing ones, towards which enforcement is often non-existent because of their present economic state and de facto bankruptcy and continuous subsidizing on the part of the State. Thus new private industries have to bear a much heavier financial burden, complying with more stringent requirements and not being able to rely on any significant market incentives in order to demonstrate their inherent advantages.

The presumption that privatization itself automatically will lead to stricter compliance could be seriously questioned, since highly polluting industries are such regardless of the type of ownership, although private interests in principle are more considerate of environmental requirements as far as they contribute to increased competitiveness, lower production costs, and company image. The decrease in polluting emissions the last few years, which some tend to explain as a result of the measures introduced with the new legislation, are misleading since they are mainly due to the severe and continuing drop in production and not to better enforcement. Significant changes in this aspect could be expected only when privatization is effectuated so that market incentives can play a more important role. Even more critical is the radical restructuring of the economy from the present heavy industrial, highly polluting model to more environmentally friendly sectors.

The precautionary principle in the EPL relies mainly on the EIA procedure. A wide range of both public and private economic activities, as well as policy documents in all sectors, are subject to mandatory EIAs with obligatory public participation and possibilities of administrative and judicial appeal. In cases of a negative environmental impact statement, the proposed activity cannot be carried out, while existing facilities can be closed down.

The regulation of standards does not play to the full extent its precautionary functions. The extremely stringent quality standards together with the lack of permits with individualized emission standards seriously undermine the whole regulative system, making all industries violators regardless of their efforts to reduce pollution. Thus existing standards hardly play any precautionary role, rendering compliance and enforcement less credible and more difficult to practice.

The polluter-pays principle embodied in the new Law relies mainly on the aforementioned charges and penalties. The fixed amounts (up to approximately \$1 million U.S. per month) lack the necessary flexibility. The very high amounts, if collected, instead of preventing polluting activities, could lead to the ruining of the industries altogether, thus killing the hen which lays the golden eggs. The amounts do not reflect the behaviour of the polluter, not providing for differentiation, when attempts are made to reduce pollution, or postponement of payment or use for the installment of treatment facilities.

In many cases, even when penalties are imposed (and enforcement is very selective and inconsistent in the first place), they cannot be collected because of the financial state of most industries at present. Thus the sums collected from penalties still are small, playing a very limited fund-raising function while their precautionary, conduct-motivating function is even less significant. In addition, the lack of real market competition, the controlled monopoly of certain industries, and the lack of effective industrial legislation make possible the inclusion of the collected penalties in the price of the products, thus transforming the polluter-pays principle into the "consumer pays". In this way, the consumer both suffers from the pollution and carries its financial burden, while the polluter is under no pressure, nor is he liable for his actions.

Thus environmental liability still very much depends on administrative tools, while civil and criminal liability continue to be almost non-existent for the reasons mentioned above, which have not undergone any significant change. The introduction of the possibility of citizen suits by nongovernmental organizations (NGOs) cannot play any role, since the necessary amendments in the Civil Procedure Code have not been adopted and judicial standing exists only in cases of suffered damages due to intent or negligent conduct, thus eliminating NGOs from environmental civil suits and enforcement.

There is still much to be desired from the distribution of environmental management- and-control functions among central government, the Regional Inspectorates, and municipal government authorities. The democratization process, by its nature, presupposes significant transfer of power to local authorities. Yet still too much management-and-control power is concentrated in the Ministry itself. At the same time, if some of it were to be transferred to the lower level, significant practical difficulties would arise. For decades local authorities had little real power or responsibilities—they were mere executive bodies on orders from the Center. In many cases both the Regional Inspectorates as well as the local authorities are very much understaffed and lack competent personnel who are aware of the new environmental requirements and the way to achieve compliance and enforcement.

A significant drawback is the absence of lawyers on the staff of the Regional Inspectorates. The new legislation introduces significant additional legal requirements and procedures and their enforcement is also very much dependent on qualified legal personnel.

The role of the regulated industries themselves in self-monitoring and control is still very much underestimated, thus leaving the burden of enforcement entirely on the government agencies. Moreover, the introduction of public access to information and participation in environmental decision-making is still very limited, although the positive step to include the public in environmental protection for the first time should not be underestimated.

The EPL introduces provisions for free access to information. The information includes data on the state of different media and the results of activities which cause or may cause environmental damages as well as information on protective and restoration measures. Still, detailed regulation concerning these issues is lacking and often the information provided to the public is not accompanied by adequate explanation of the scientific data. Thus, the information often becomes a cause for undue social panic, rather than an advantage. Detailed regulation is lacking on the costs which should be borne, as well as the concrete scope and form of the data in the three mentioned categories.

The only form of public participation in environmental decision-making at present is the EIA procedure. There are certain flaws in the existing provisions, however, creating possibilities to eliminate public participation (e.g., the ending of the procedure for activities without a significant impact on the preliminary report stage, where public participation is not provided for without introducing criteria for such a decision.) A very important drawback for public participation is the still very low level of environmental awareness in the general public. This is related to a continuation of the past lack of credibility of government authorities. No less important are the present economic, financial, and social difficulties suffered by most citizens. Thus environmental concerns, with limited exceptions, lack priority as far as the ordinary individual is concerned. Environmental NGOs, although initially one of the major driving forces for political change, are losing social credibility, and often they lack the necessary "know-how" for efficient participation and co-operation with the regulating and enforcing agencies.

The harmonization of Bulgarian environmental legislation with existing international and European requirements is also an extremely difficult task. In the first place, the existing European legislation is not well known (although for the first time it is available); also, it is intended for a totally different political, legal, economic, and social reality. So harmonization in fact entails significant adaptation in order to give even limited practical results.

## **5 CONCLUSION**

The past two years have shown that despite the efforts and the introduction of new legislation, low compliance and enforcement continue to be the most severe problem. The new Law still lacks a lot of the implementing regulations needed to be effective; thus a lot of the good initial intentions remain very much only on paper. Also, some contradictions exist between the Law itself and the provisions in the adopted implementing regulations, as well as between the EPL and laws in other sectors. The "instrumental" laws are slower in changing, thus diminishing the possibilities for effective enforcement.

Environmental concerns, despite the declarations, are still not integrated into economic and policy decisions and they are rapidly being pushed into the background by purely economic priorities. Moreover, the general political situation is deteriorating. The former lack of credibility in the law and institutions remains unchanged; economic reform is de facto entirely blocked—there has been no significant privatization or structural reform. All this underlies the severe difficulties in achieving significant changes in environmental protection and effective enforcement of the newly adopted environmental legislation.

The implementation of the new Law proves that achieving effective enforcement will be a very slow and painful process, marked by serious contradictions and conflicts of interest. At the same time, society has the unique chance to make a radical change in environmental protection, but such protection will not make significant progress if it relies only on legislative provisions, which without the necessary political and economic preconditions will continue to remain declarations of good intent and the constitutional right to a favourable environment without effective guarantees.