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Environment - Switzerland

'Polluter pays' principle applies to litter disposal costs

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Facts

In 2007 the city of Berne enacted a new waste regulation. Pursuant to the regulation, all property owners must pay a basic fee to cover the costs of removing litter from public areas. The amount of the fee depends on the size of the property (gross floor area) and its use.

A number of major retailers challenged their obligation to pay the fee. The appellants disagreed on the use of the fee to cover litter disposal costs. They argued that such a fee is not in line with federal environmental laws. After proceeding through several cantonal instances, the dispute reached the Supreme Court, which issued a fundamental decision on the scope of the 'polluter pays' principle.⁽¹⁾

Legal framework

Pursuant to the Environmental Protection Law,⁽²⁾ the following applies with regard to the disposal of waste:

- Cantons are responsible for disposing domestic waste, waste from the maintenance of public roads and from public waste water treatment, as well as waste generated by unknown parties or parties that are unable to pay for the disposal of their waste.⁽³⁾ In this case, the disposal costs are borne by general fiscal means.
- As a general rule, the Environmental Protection Law provides that the holder of waste must bear the costs of its disposal (the 'polluter pays' principle), except for waste for which the Federal Council enacts another cost allocation. If the holder cannot be identified or is unable to pay the disposal costs, the canton must bear the costs of disposal by way of general fiscal means.⁽⁴⁾
- The law further defines the polluter pays principle with regard to domestic waste. Cantons must ensure that the costs of disposing domestic waste are passed on to the waste producers by way of fees or other charges. The fees and charges must consider several factors, such as the nature and quantity of waste produced and the costs of disposal facilities.⁽⁵⁾

In connection with the disputed regulation, the following questions arose:

- In which category do waste from public waste bins and other 'ownerless' waste which is removed from public areas fall?
- Must the disposal of such waste be covered by the state or is the state permitted to pass these costs on to the waste producers?
- If the state is allowed to pass on these costs to the waste producers, is it allowed to consider all property owners as the producers of such waste?

Cantonal administrative court decision

The Berne Cantonal Administrative Court held that the duty of disposal of the cantons according to Article 31b of the Environmental Protection Law is valid for three categories of waste:

- domestic waste;
- waste from the maintenance of public roads and from public waste water treatment; and
- ownerless waste.

It further held that Article 32a allows disposal costs to be passed on to the polluter only with regard to domestic waste. In the court's view, the concerned ownerless waste removed from public areas cannot be technically considered as domestic waste and therefore the state is not permitted to pass on these costs

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to the polluters.

Supreme Court decision

The Supreme Court disagreed. Based on the wording, structure, purpose and history of the Environmental Protection Law, it argued that the determining factors with regard to waste disposal and cost allocation are the origin and the composition of waste, not the fact that it might be ownerless. In particular, the court held that ownerless waste is a separate type of waste not referring to its origin or composition, and that all categories of waste can be ownerless. Considering the composition of waste, the court held that, for instance, leaves and grit fall into the category of waste from the maintenance of public roads; waste resulting from littering (carelessly discarded items) does not fall into this category, but constitutes domestic waste. Such waste (ie, litter) remains domestic waste even when it is classed as ownerless.

With regard to the allocation of disposal costs, the Supreme Court specified a previous decision.⁽⁶⁾ The polluter pays principle of Article 32a does not require that each waste holder pay the exact disposal costs of its waste. Rather, it is sufficient that all waste producers together bear the totality of disposal costs, and that the amount paid by each individual waste producer relates to the quantity of waste that it generates. Finally, the court held that covering the disposal costs of ownerless waste by general fiscal means and not allocating them to waste producers is contrary to the polluter pays principle, and thereby violates a fundamental rule of Swiss environmental law.

Further, the Supreme Court decided on the disputed allocation of littering costs to property owners by charging a basic fee. The court acknowledged that federal environmental laws allow charging both a basic fee and an individual, volume-based fee, and that cantons and communities have considerable freedom to define such fees. The court pointed out that charging solely a fee that is not volume based is not allowed, because such a fee has no steering effect. In case of a basic fee, there must be a certain connection between the fee and the party that is charged with that fee. Such a connection between the use of property and the costs of waste removal from public areas exists, for example, in the case of take-away businesses. The required connection may be the result of a certain schematisation, and the polluter pays principle does not require a direct, individualised relation between the concerned amount of waste and the fee. The schematisation even allows a minor, negligible part of a basic fee to be used to cover costs of public waste bins, if an attribution of such costs to the disposal of waste from properties is possible. Against this background, the court held that a basic fee charged to all property owners may cover only the waste disposal costs that are caused by the totality of property owners.

The disputed basic fee did not fulfil these requirements. In particular, the property owners had to pay for waste removal from public areas and for litter disposal costs in general and – in contrast to take-away waste – without sufficient connection between the use of their property and these costs. The part of the basic fee (nearly one-third) that was used to clean public areas and to cover litter disposal costs clearly exceeded the admissible schematisation. Therefore, the court decided that charging all property owners with the disputed fee was unlawful.

Comment

According to the Supreme Court, litter falls into the category of domestic waste and the polluter pays principle applies to litter disposal costs. That principle does not require that each holder of waste pay for the exact disposal costs of its own waste. It is rather sufficient that all waste producers together bear the totality of disposal costs, and that the amount paid by each individual waste producer have a certain relation to the quantity of waste that it generates. Consequently, a basic waste fee charged to all property owners may cover only waste disposal costs that are caused by the totality of property owners.

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Endnotes

- (1) Supreme Court Decision 2C.239/2011, February 21 2012 (BGE BGE 138 II 111).
- (2) *Umweltschutzgesetz* (SR 814.01).
- (3) Article 31b of the Environmental Protection Law, governing the duty to dispose of domestic waste.
- (4) Article 32 of the Environmental Protection Law, containing a general principle of the financing of waste disposal.
- (5) Article 32a of the Environmental Protection Law, governing the financing of domestic waste disposal in particular.
- (6) BGE 137 I 257 E 4.1.

Comment or question for author

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