Avosetta

Monção meeting

Bernhard Wegener

Contents

1. Recent developments in member states environmental law

All participants are asked to submit a short paper (max 2-3 pages) which highlights what in their view are significant developments in national environmental law (cases, new laws, new institutional arrangements, significant new policies) which might be of interest to other members of the Group. Please do so until the **23rd January 2009** (two weeks in advance of the meeting) so that the chair of that session will then have the opportunity to present their own cross cutting analysis of the most interesting aspects and lead the discussion accordingly. We want to try and avoid a long and tiring conventional country by country presentation in the discussion.

2. Stricter national environmental standards after minimum harmonization

> *A general remark: not less interesting would be the question of national environmental policies in non-harmonised areas. Here, Member States like Germany do develop more detailed national environmental policies (such as the promotion of renewable energies and "green" products, the promotion of public transport, environmentally orientated tax-policies). They often are hindered doing so by boundaries of EC-law regarding state aid, public procurement or the Four Freedoms of the EC Treaty itself.*

By supervising state aid on an EC law basis (Art. 87-89 EC), a new means of control emerges on a meta-level allowing to reassess national policies on the environment which had already been approved by the EC (e.g. trading emission permits).

2.1. General observations

According to Article 2 EC Treaty, the Community shall have as its task to promote a harmonious, balanced and sustainable development of economic activities. Furthermore, it is stated that it is a Community task to promote 'a high level of protection and improvement of the quality of the environment'. Main instrument for the European legislator is taking measures under Articles 174-175 EC, which triggers Article 176 EC, and the possibility for Member States to take stricter measures. In other words, the layout and structure of the EC Treaty concerning environmental legislation favours more stricter national standards as a means to promote sustainable development and a high level of environmental protection.

Minimum harmonization in European environmental law essentially means that the Member States have the power to lay down more stringent standards in a certain area of regulation than those laid down by European legislation.

Minimum-harmonization of environmental law is however not restricted to measures under Articles 174-175 EC. European environmental law enacted under Article 95 EC can produce minimum-standards as well. Furthermore, even if the standards taken under Article 95 EC cannot be regarded as setting minimum-standards (total harmonization), Member States are allowed under paras. 4-6 of that provision to derogate from the European standards set.

However, there are indications which seem to suggest that Member States make very little use of their powers to lay down or maintain more stringent national standards. Some Member States even seem to have adopted, more or less as a matter of principle, the policy that legislation transposing EU regulations into national law should be based on the minimum level of the European standard ("no gold-plating"). The general question to be dealt with at our next Avosetta-meeting can be formulated as follows: Do the Member States actually use their power to lay down or maintain more stringent environmental standards after European harmonization?

Another general remark: Would that be desirable at all? Is it really something, environmentalist should advocate? Isn't rather the non-use of opting-up clauses a positive signal? On the one hand not opting-up demonstrates the quality of EC law and leads on the other hand to consistency and simplicity in (not only EC-) environmental law which seems from my perspective to be more urgent than ever before.

Subsequently, our meeting should provide us with information regarding possible legal explanations for practices among Member States. One possible explanation for the limited success of 'minimum harmonization' might be that it is not always clear to the Member States whether they are in fact allowed to set more stringent standards. It is not always easy to establish what powers the Member States have on this score. Our meeting should clarify this issue, as far as possible.

That question reminds us of the problematic case of the prohibition of genetically modified organisms in Austria. The Court of First Instance (5. Oktober 2005, Land Oberösterreich und Republik Österreich/Kommission, T-366/03 und T-235/04, Slg. 2005, II-4005) and the ECJ (13.9.2007, C-439/05 P und C-454/05 P) have set tight boundaries on that matter. The judgements have been observed attentively in Germany.

Another possible explanation of this limited success has to do with the fact that in most cases there are certain conditions attached to exercising a national power to lay down or maintain more stringent standards. The power to set more stringent standards does not give the Member State *carte blanche* to adopt whatever measure it chooses. These conditions may vary depending on the directive and also the legal background of the European standard (Article 95 or Article 175?) could play a role. With respect to Article 176 EC there is a universal condition that the more stringent standards adopted must be 'in accordance with the Treaty'. Apart from this there are often various obligations to notify, sometimes the stricter standards are not applicable to imported products but only to the member state's own territory and the realization of 'different' objectives from those targeted by the European standards also seems to create more restrictions. *Our meeting should attempt to provide clarity as to whether the conditions on which stricter national standards may be laid down stand in the way of national governments actually using their powers.*

Another explanation might be found in the level of protection realized by the European standard. By virtue of Articles 2 and 174 EC the European legislators must strive towards a higher level of environmental protection. It is natural to assume that if the European standard already provides a very substantial degree of protection little need will be felt for more stringent national standards. On the other hand, in cases in which the European standard is relatively low, it might be less attractive for Member States to adopt a 'vanguard position' in view of the adverse effects this might have for the competitive position of the state's own industry. It might even lead to 'downgrading' the national standard to the level of the European standard. This hypothesis, which has hardly been researched at all, is also known as the 'race to the bottom' theory. The paradox is obvious: minimum harmonization at a relatively low level does not lead to relatively high usage of national powers to set stricter standards, but to adaptation of more stringent national standards to the lower European standards.

Our meeting should attempt to clarify the 'race to the bottom' theory.

In our view, the reality of European environmental law disproves the "race to the bottom"-thesis. The historical development of the environmental law shows rather a "race to a high level". Examples for a "race to the bottom" – as well as examples for a "race to a relatively low level" – are unknown to us.

What could be observed however is the rather extensive use of temporary exceptions, allowing certain Member States to temporarily not fulfil newly harmonised EC-Environmental-Law-standards.

A final possible explanation for the low usage of these powers has to do with national law. It is known from the literature that from a legislative point of view it is 'easier' to implement a

directive at its minimum level than to go further. As an example we could point at Dutch law. Certain obligations to consult and notify do not apply to legislation which 'serves to implement' binding EC law (Title 1.2 Dutch General Administrative Law Act; *Algemene wet bestuursrecht*). Generally speaking stricter standards cannot be regarded as 'serving to implement' EC law. Another factor is that in a case of this kind the legislators cannot make use of the delegation provisions included in many formal statutes; these provisions mean that the obligations arising from the directive can be transposed by ministerial decree instead of by governmental decree. The Dutch Drafting Instructions for Legislation (*Aanwijzingen voor de Regelgeving*) also contain principles which might stand in the way of setting stricter standards. For example, Drafting Instruction 48 provides that 'in changing a regulation it should be ascertained whether any changes can be included with a view to harmonization'. However, the explanatory note provides that 'in connection with the transposition periods for the EC directives it is undesirable for the assimilation of such a directive into Dutch legislation to be linked to changes with a view to harmonization'. At the same time it should not be deemed impossible that Chapter 8 of the Draft Instructions for Legislation, 'Preparation and implementation of EU regulations', has some influence on the capability and willingness of the Dutch government to establish stricter standards than the European ones.

> *Such kinds of rules concerning German law-making are unknown to us. Of course also in Germany there is a "comfort aspect" and a political pressure, that make "gold-plating" improbably. It should be noted however, that the attempt to avoid any "gold-plating" sometimes makes legislation not less but more complicated. Namely, it makes it necessary to analyse and decide about the exact content of EC-environmental directives. Instead of safely doing a little bit more, the national transformation-legislator is testing the minimum-limits of the directives. There are also no problems with the unique requirements. Finally, the legislation praxis does not show, that the abdication of „gold-plating" makes the law-making easier. In fact, the dogma of the 1:1 implementation causes a more complicated law.*

Our meeting should clarify to what extent these kind of 'internal' explanations play a role.

> *Basically, last decade's German legislation has not aimed for a leading position by enhancing protection beyond EC legislation. Based on political pressure originating mainly from the German Federal States, there is on the contrary a sort of dogma to implement EC legislation at a ratio of 1:1.*
>
> *Below are some examples of the problematic cases, this approach has created:*
>
> *Implementation of the EIA-Directive (Environmental Impact Assessment) (successful infringement procedure against Germany),*
>
> *Implementation of the IPPC- Directive by the German act [c.f. § 10 V 2 BImSchG]*
>
> *Implementation of the environmental noise- Directive*
>
> *Implementation of the Directive 2003/35 with regard to guidelines for the possibility for NGOs to sue in cases in which they are not themselves affected: Germany has*

implemented the directive in a very strict way. Probably the implementation is not even conformity with European law.

Implementation of the Information -Directive

Based on the rationale that German industries are put at a disadvantage with their European competitors by enhancing environmental protection, the implementation of EC legislation into German law takes place on a rather restrictive routine.

German policy wants on the one hand a 1:1 implementation and on the other hand Germany insist on the principles of the subsidiarity. This is quite contradictory.

It is noteworthy that the SRU (Rat von Sachverständigen für Umweltfragen) recommends enhancing environmental protection for economic reasons. (see SRU, Umweltgutachten 2002: „Für eine neue Vorreiterrolle"; UG 2004 and UG 2008 on climate protection). According to the SRU, enforced environmental protection would lead to profits for German industries on European and world markets due to advanced technology (so-called lead-markets-policy).

2.2. Questionnaire

2.2.1. Questions on policies of the MS

1. Is there any (un)official data available from your country on either the use of Article 176 or Article 95(4-5) EC?

   Such kind of (un)official data is probably not available.

2. Is there in your country a (unofficial/official) policy on (avoiding/favouring) 'gold plating'? If so, is this policy applicable only to the implementation of EU *environmental* law or is it applicable with respect to the implementation of *all* EU directives?

   There is an official policy on avoiding „gold plating". The Dogma of the 1:1 implementation is the official policy of the Federal States.

   (See the Government declaration by Chancellor Angela Merkel, from 30.11.05: For Merkel, it is necessary to avoid „gold plating", because otherwise there would be no fair chance for the national industry (with respect to the implementation of all EU directives).

3. If there is an official 'no gold plating' policy, what are the reasons given for this (e.g. detrimental to own industry/business, not necessary because EU standards are high).

   The main thesis is: „gold plating" means drawbacks for the German industry.

4. Is there in your country any public discussion (industry, business, NGO) on 'gold plating', either in general or with respect to environmental standards.

   The SRU criticizes the official policy. There are a lot of law and political scientists, who criticize the dogma of the 1:1 implementation as well.

5. Is there any debate in your country if 'stricter' standards are indeed 'better' for the environment? In other words, is there any debate on counter-productive (hindering, rather than serving, the purpose of environmental protection) standards?

   This is known to us as an exceptional case only. Standard-setting which is labelled as "environmentally-friendly" is still widely and uncritically accepted in the German public. Recently, critical discussions limited the introduction of biomass-fuel. Generally there is only a (too) limited use of ecological balance sheet (Ökobilanz) concerning new environmental legislation. A new critical example is the so called "KFZ-Verschrottungs-Öko-Prämie". Under the scheme, car-owners are paid 2500,- € if they buy a new car (no matter which) and let there "old" (more than nine-years old) car be destroyed.

2.2.2. Questions on national laws

1. Is there, in your national law, a similar provision like Article 176 EC with respect to the relation of central and regional/local authorities?

   Under the reformed Art. 72 III GG (Grundgesetz – German Constitution) German Federal States can enact more or less stringent measures than provided by federal law. This "aberration-competence" however is limited to the areas of hunting, special provision of nature-protection, planning- and ground-use-law, and some areas of water-protection. Up to now there are hardly any cases regarding the environmental law, when the Federal States have used the possibility to enact more stringent measures. The same is true however for less stringent measures.

2. Who is (or as the case may be: who are) the competent authority in your country to notify more stringent measures to the European Commission?

   The Federal (Central) Government.

3. Is it allowed under your national (constitutional) arrangements that regional and/or local authorities enact more stringent measures? If so, who will notify these measures to the European Commission? Direct by regional/local authorities, by proxy of central government or formally by central government?

   (see supra)

4. Are there any internal legal reasons (e.g. more complex legislative procedures) which would make implementation of the European standards at the minimum level easier than going beyond the European standard?

   No.

2.2.3. Questions on court decisions

1. Is there any national case law where either Article 176 or Article 95(4-6) played a role?

2. There are two, more or less recent, cases were the Court of Justice dealt with more stringent measures under Article 176 EC: Case C-6/03 *DeponieZweckverband* and Case C-188/07 *Mesquer*. It would be interesting to analyse the problems addressed in these cases in a more comparative perspective. In *Deponiezweckverband* concerned Article 5 of the Landfill of Waste Directive and *Mesquer* concerned Article 15 of the old Waste Directive

on producer liability in connection with the polluter pays principle. We suggest that participants have a close look at their national legislation and let the meeting know whether more stringent measures exist or not, as well provide us with all relevant information pertaining to the topic of discussion.

Other cases we remember: ECJ, 19.6.2008, C-219/07 Nationale Raad van Dierenkwekers en Liefhebbers/Belgische Staat (Successful Justification of a national animal-protection-rule, hindering the free movement of goods); CFI, 30.4.2007, T-387/04, EnBW Energie Baden-Württemberg/Commission, (legal character of the Commission's approval of the national allocation plan under the CO2-Emmissions-regime).

2.2.4. Concrete examples

3. In your country, are there any concrete examples where the legislator refused taking stringent standards, with the argument that this would conflict with EU law?

4. Are there any examples in your country of 'downgrading' the national standard to the level of the European standard?

   The German Federal States want to „downgrade" the German nature conversation law to the European standard.

5. Are there any examples in your country were the legislator broadened, so to say, the scope of the obligations of a directive on a *voluntary* basis? For instance: the IPPC Directive is only applicable to the installations mentioned in Annex 1; are the examples were the national legislator applied the IPPC-regime to installations not mentioned in Annex 1? By the way, would you regard this as a more stringent measure under Article 176 (and therefore subject to notification)? Or would you regard this a matter not governed by the Directive and therefore completely within the domain of the member state in question?

   The German Federal States (especially Nordrhein-Westfalen) want to „downgrade" the catalogue of 4. BImSchV (facilities which need prior formal permission), which is nowadays wider than the IPPC-catalogue. They would like to limit the catalogue to those (industrial) facilities, that are also mentioned in the IPPC-Directive. I would not consider the broader catalogue of the 4. BImSchV to be a more stringent measure under Art. 176. Notification is therefore not necessary. Member States are generally still free to decide on questions such as permission procedures. The procedure themselves however could become subject of some community-law-conformity-check, especially concerning its proportionality. That would be necessary only, if the procedure itself creates an limitation of EC-law, especially the four freedoms. In this respect, ECJ, 19.6.2008, C-219/07 Nationale Raad van Dierenkwekers en Liefhebbers/Belgische Staat (Successful Justification of a national animal-protection-rule, hindering the free movement of goods) is of special importance.

6. Are there any concrete examples where at national level more stringent emission limit or quality values (air, water) exist?

7. Are there any concrete examples where at national level more stringent environmental product standards (pesticides, biocides, hazardous substances) exist?

2.3. Relevant legal problems relating to the interpretation of Article 176 and 95(4-5) EC.

If you have no particular views or observations on these background questions, please leave blank.

1. How would you define minimum and maximum harmonisation?

   Both terms should be distinguished from the terms high/low level of protection. The former are related to the degree of harmonisation, the latter to the degree of protection. A high level of protection can be established by a minimum harmonisation (allowing for even higher level of protection by more stringent measures), and vice versa. In fact, however, minimum harmonisation will normally correlate with a lower level of protection.

   Minimum means that the legal act explicitly or implicitly expresses that there is room for more stringent measures. Maximum means that the legislator believes that it found a standard acceptable for all MS.

2. What are 'stricter' measures?

   Stricter measures in the sense of Art. 176 EC are measures introduced in cases of maximum harmonisation, not however in cases of minimum harmonization. This is contrary to the judgement of the ECJ in the Eiterköpfe case.

3. How would you distinguish matters covered by a legal act from those not covered (see for instance below: Concrete Examples, question 14.

   A number of tests should be applied:

   (1) Scope of application of a legal act: Matters beyond the scope (eg substances listed in a list of restricted products, installations listed in a list of IPPC installations) are not covered by the legal act. If the MS includes such matters in the national legal act transposing a Directive or adding up to a Regulation it does not apply Art. 176 EC but acts within a space of non-harmonised legislation. In the Eiterköpfe case EC law required waste deposit plans for household waste, not for other waste. Germany introduced planning requirement also for non-household waste. It thus ruled in a space not covered by EC law. The ECJ decided otherwise, but we are not convinced by this.

   (2) Thresholds established for concentrations of eg dangerous substances in emissions or products. They are "covered" by the EC legal act. If the EC legal act explicitly or implicitly expresses that it contains a minimum harmonization only the MS can go further without relying on Art. 176. Only if the EC legal act does not express itself in this way MS must rely on Art. 176. The sense of Art. 176 becomes clear if compared to the rules of concurrent Bund and Land competences in Germany: If a Bund law explicitly or implicitly allow the Laender to go further these may do so. If the Bund law however is neutral in this respect the Laender are pre-empted to go further because the matter (the setting of thresholds) was covered by the Bund.

   (3) Procedures: Normally EC legal acts do not tackle questions of administrative procedures and judicial review. If a MS introduces rules on these matters it does so in a space not covered by EC law. It does not have to rely on Art. 176.

(4) Instruments: An EC legal act may introduce a notification requirement for the construction of an installation without expressing a view on minimum or maximum harmonisation. If a MS wishes to go further and introduces a requirement of prior authorisation it can do so but only on the basis of Art.176.

4. How would you define in this respect those provisions in directives/regulations intentionally leaving matters for MS legislation to decide? Take for example Article 33(1) of the Shipment of Waste Regulation 1013/2006: 'Member States shall establish an appropriate system for the supervision and control of shipments of waste exclusively within their jurisdiction'.

   See answer to 3.: MS regulation matters of this sort do so by empowerment of the secondary legal act. They do not have to rely on Art. 176 for that.

5. Does Article 176 EC exclude total harmonization?

   No. On the contrary, it presupposes total harmonisation.

6. When is a measure a more stringent measure in the meaning of Article 176 and when is a measure falling outside the scope of Art. 176?

   See answer to 3.

7. What is the legal significance, if any, of notification under Art. 176?

   To monitor MS which go beyond maximum harmonisation thus inciting the Commission to elaborate a more ambitious legal act.

8. What is meant by 'in accordance with the Treaty'?

   Any Treaty provision and provision of any other secondary act a MS has anyway to respect if legislating on a matter. As to the applicability of the proportionality principle (see Jans´article) one has first to clarify what kind of proportionality principle is in question here: the one of Art. 5 (3)? No. The one applied if legitimate encroachments on basic rights are tested: Normally not, but could be. The one applied if legitimate encroachments on basic freedoms are tested? Yes.

9. Could a MS ask the ECJ for judicial review of EU environmental measures (high level of protection) if there is a substantial MS practice of more stringent national standards?

   Yes, in procedural terms of course, but more stringent national standards could attain "highest" levels of protection whilst Art. 175 only requires "high" level of protection (see related ECJ jurisprudence)

10. Is minimum-harmonization allowed under Art. 95?

    Yes

11. Appraisal of Commission practice under Art. 95(4-5).

12. Additional question: Does Art. 176 possibly disallow maximum harmonisation? (Could be inferred from the Eiterköpfe judgement.

    No!!