Hungary – Questionnaire and Recent Development

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Questionnaire

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?*

Unfortunately, there is no official data available. I checked the MoE, asked my former students, working in the field of EC harmonization, and they also have sporadic answers. It seems to be that either noone is taking care for any such issues, or we do not really use this option. I could only find very few exact answers.

- first example is the VOC Directive (94/63/EC – 20 December, 1994), as the Hungarian legislation already introduced the Stage 2 requirements, whihc are only under introduction to the EC as a whole today
- in case of water for human consumption (98/83/EC – 3 November, 1998), there are some minor differences, e.g., we have stricter standards for trihalometan, and some similar very limited issues.

Also there are some stricter standards in large combustion plants and some sewage treatment facilities, due to the special environmental situation (e.g., greater nitrate vulnerability of the country)

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?*

As in most of the cases the implementation took place in a relatively formal way, thus accepting most of the provisions as they appear in EC legislation, adding the procedures, authorities and domestic specialities, there is not too much need for 'gold plating'.

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).*

See above

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

There is a very low public interest in connection with environmental legislation. Also, the public in general has a limited knowledge on EC matters, thus 'gold plating' in theory or in practice is not an issue. Business has a much deeper knowledge, mostly the multinational companies, while in case of SMEs, the relative disinterest is also the case.

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?*

The answer is very much connected to the previous question. As there is a low interest towards environmental regulations, also there is a very limited interest in connection with stricter standards. When I asked the MoE colleagues, generally speaking they mixed the problem of stricter standards with the problem of derogations at large and also it became clear that the whole derogation business proved to be a matter of consideration at the time and before the accession, and it is not an issue now.

2. Questions on national laws

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

The Act on Environmental Protection (Act LIII of 1995) in its Art. 48, Par. 1 has an authorization for the local (in case of Budapest, the Municipal) governments to adopt only exclusively stricter regulations for their territory then the national ones, using the means and methods, defined in acts of Parliament of government decrees. There are no further explanations. Actually, there are only some provisions of this kind, mostly related to local air pollution, smog alert plans.

7. *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 MoE has an European Integration Unit, who is the responsible organ, in harmony with the same unit within the Ministry of International Affairs.

8. *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?*

This issue has not been raised yet. If one looks at the answer for question 6, there is a mostly theoretical possibility to have more stringent measures, but the means and methods are provided for by national laws. Thus this limitation may serve as an answer, if any such problem ever arises.

9. *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?*

There is no such regulation.

3. Questions on court decisions

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

No information up till now. I personally have a case against the MoE, representing a waste management company, in connection with the misuse of EC regulation on transboundary movement of wastes. The Ministry refers to the possibility to use stricter

requirements, but in my opinion, using 'pre-treatment' of waste – which appears also as a D and as an R operation – e.g. R11,12 - as a separate classification beside recycling and disposal is not a stricter regulation, but a different legislation. The first hearing of the court is at 12th February. I will also ask the MoE to show the official notification document to the Commission concerning the stricter standards (interestingly enough, there is no information within the European Integration Unit of the same Ministry about any kind of notification document). Otherwise, we do not have any case related to the matter.

11. *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.*

4. Concrete examples

12. *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?*

No information about any such case.

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

Generally speaking, in Hungary the EC requirements still mean the best option, as there is no legislative or government interest to go for environment.

14. *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?*

There are examples within the EIA legislation, where some more elements are added to the original list of projects, in List B cases. The same is true in connection with IPPC list. Personally, my opinion is that it is not a really stricter measure as the directives give room for such additional requirements, thus a bit it is matter of discretion.

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

See Question 1.

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

No such information.

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

1. *How would you define minimum and maximum harmonisation?*

I could never understand what should it mean in real life examples. I believe that the real difference is that we either have harmonisation or not. Minimum may mean that there member states use their freedom or discretion to have different means and methods, but at the same time maximum should not mean that everything is simply translated, as there is always room for adapting requirements to national circumstances.

2. *What are 'stricter' measures?*

The main problem here is not to mix stricter measure with other measures (for the latter see my ongoing case in connection with waste management). Stricter means that is there are stronger, or more demanding environmental requirements than that of the EC law, these requirements may be used to achieve a better environmental performance. Thus stricter should always be connected with the environmental aim in general and related to the particular purpose of the given piece of legislation. For example to use higher ambient air quality standards, to use lower emission values, etc. Stricter is a quantitative approach, representing quality requirements, too. Thus stricter belongs to „the very nature of the directive, which obliges Member States to achieve a certain result".[1]

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

In the light of the question 14 above, my view has already been expressed, that is to make a distinction between choice of member state legislation, provided by the same legislation and stricter measures, to step over a clear EC requirement. To add a new project in this respect is not a stricter measure, but a kind of power of discretion, or a kind of derogation from the exact word of the norm. Stricter is to fix some other standards.

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'.*

Using such words, as 'appropriate', 'other legislation', 'within a reasonable period' are different, there are those general definitions, which may again allow certain discretion to member states to understand them properly. Here the limit are wider, but again, everything shall be compared with the original purpose of the legislation.

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[1] Ludwig Krämer: EC Environmental Law, Thomson, Sweet & Maxwell, 2003, p. 53.

The indefinite legal definitions - among others, the definition of "as soon as possible", or "at the earliest possible time" - are widely applied by the Community law. In these cases, the timeframe of the Member State transposition – consequently, a type of time scope - is questionable when, for some reason, in the absence of a specific implementation date, a time-limit will inevitably arrive which, even if not as a precisely defined expectation, but still as one that will endanger the effectiveness of a Community rule that constitutes an obligation, consequently, should not be allowed in the interest of preservation of the seriousness of the rule at issue.

From among the available several cases there is the decision[2] in the issue of designation and licensing of landfills:

"37 … The Court accordingly inferred that the words 'as soon as possible' are to be interpreted as stipulating, in principle, a reasonable period for compliance by the competent authorities of each Member State with that particular obligation, that period being unconnected with the period laid down for transposition of Directive 91/156.

38 The answer to the third question must therefore be that Article 7(1) of the Directive must be interpreted as requiring Member States to draw up waste management plans within a reasonable period, which may go beyond the time-limit for transposing Directive 91/156 laid down in the first subparagraph of Article 2(1) of the latter."

An other good example is the 'significant effect', used in environmental areas in a number of regulations. Taking into consideration that individual environmental cases that also use this concept will be further discussed separately, we will rather mention issues that deal with environmental impact assessment where the essence of the procedure is that, before the commencement, change or end of installations and activities that go together with the significant environmental impact, their expected environmental impact has to be examined and decisions on the authority procedures have to be based on those. (See, e.g. *Kraaijeveld* case[3], or Irish bogs[4]

5. *Does Article 176 EC exclude total harmonization?*

I do not think so. But what is the difference between 'total' and 'maximum'?

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 answers above.

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

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2 Cases C- 53/02 and C- 217/02, preliminary rulings submitted by the Belgian State Council in a case between the Commune de Braine-le-Chateau (C-53/02), and Michel Tillieut and Others (C-217/02) and the Walloon region, April 1, 2004.

3 Case C- 27/95, preliminary ruling in proceedings between the Aannemersbedrijf P.K. Kraaijeveld BV e.a. from the Dutch State Council vs. Gedeputeerde Staten van Zuid-Holland, October 24, 1996. (E.C.R. 1996, page I-05403).

4 Case C- 392/96, Commission vs. Ireland, September 21, 1999.

Notification is a procedural guarantee on the one hand and a chance to have a survey of the merits of the case on the other hand. As a procedural requirement one may refer to it as a question of validity. As a survey of the merits means that the Commission shall have the chance to control the justification and that the 'stricter' measure should not mean simply a different measure. Of course, if any of the options are missing, the member state legislation is against Community law, but someone has to refer to it, this is not an automatic legal consequence. Someone has to ask the annulment of the domestic law, otherwise the mere lack of notification may not form a basis for any steps.

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

Stricter measures may not be used to circumvent the Treaty provisions (see, e.g., the *Dusseldorp* case), thus to be used instead of limitation of the market or against the purposes of the other regulatory field. This is similar to the concept of the 'right to environment' and 'right to property' in the practice of the Hungarian Constitutional Court. Both are basic rights and may only be limited if the protection of an other basic right needs so. Of course, there is a certain priority of these rights, thus property rights may never be used in absolute terms, environmental rights have some priority. But it is not always so easy, there are the issues of national defence and environmental protection, in case of which there shall be a balance of interests and the limitations of the other rights should not exceed the minimum necessity. Thus, free market and market economy is a major aim of the Community, which may only be limited if the direct needs of environmental protection require it as a must – which may also happen solely in case of one member state. Thus alterations, changes, stricter options shall always be backed by a direct and clear reasoning in case of doubt.

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?

High level of protection may not be taken as a direct legal requirement and also the weakest among the principles. The high level of protection was introduced in paragraph 2 of Article 130r. [174.] by the EU Treaty, raising it to the level of general basic principle of environmental policy, placing it as a requirement before any environmental political activity of the Community. In accordance with the new paragraph 2, in addition to setting the objective of high level of protection, the diverse situation of the different regions of the Community needs to be taken into consideration. Consequently, the quality requirement of the level of protection cannot be applied disproportionately to the economically more developed regions. Consequently, we cannot define content that would mean direct requirement to the principle, not because there are at least three different groups of Member States that represent various levels of environmental requirements in the Community. Thus, the so-called „nothern" states had a higher level set of requirements already at the accession, while for the „southern" states environmental protection does not mean adequate priority, and the high level of protection is not realised among all New Members States either.

Thus it would be extremely difficult, if not impossible to compare the two.

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

See answers above

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

Recent development in Hungarian environmental legislation

Acts of Parliament

In 2008 the following acts have been adopted:

- *Act LIII. of 2008, on the amendment of the CITES Convention*
- *Act XLVIII. of 2008 on business advertisement*, which refers to enviromental issues as follows:

7. § (2) – it is forbidden to advertise such conduct which are harmful to the environment or nature

8. § (4) – in childcare institutions advertisement is forbidden, with some exceptions, among other with the exception of environmental protection ads.

12. § (1) – it is forbidden to use delusive advertisement, which among others covers the qualification of a product, within which the environmental impacts are also relevant.

- *Act XLVII. of 2008, the prohibition of unfair commercial activity related to consumers*

1. § (4) *d)* – opening the chance that other legislation may define stricter standards related to consumer information

6. § (1) – the commercial practice is delusive if it covers either false information or correct information may be misunderstood in order to influence the consumer, relating to the qualities of the product, in particular environmental effects.

- *Act XIX. of 2008, on the amendment of the Aarhus Convention*
- *Act V. of 2008 on the Stockholm Convention on organic pollutants*

Government Decrees

- *Gov. Decree No. 224/2008. (IX. 9.) on the fines related to chemical load*

The specific environmental proteftion fine wishes to assist in the implementation of the new set of EC chemicals legislation, first of all the REACH Regulation in a way to assign different levels of fine in connection with the infringement of the obligations of the requirements. There are different levels, e.g., private persons shall pay a lower amount, etc. The level of the fine shall be assigned according to the danger and quantity of the given chemicals, to the qualities of the infringement (e.g., repetition of the action) and to the size of the company.

- *Gov. Decree No. 181/2008. (VII. 8.) on the taking back, collection of used batteries and accumulators*

The decree is implementing the 2006 battery directive, regulating the obligations – information, take back or collection duties - of the manufacturer. This may be contracted out to a service, authorized and registered. The producer must have a financial guarantee, fixed according to the quantity of the batteries. There are several options open for the producer from bank guarantees to insurance contracts.

- *Gov. Decree No. 176/2008. (VI. 30.) on the verification of energy qualities of buildings*

The Decree wishes to implement parts of the 2002/91/EC directive. There are verification requirements

related to new buildings, and in several cases to old buildings (e.g. in case of selling them). The characteritics of the verification document and the procedures related to the issue of such documents are regulated in details. The document in case of lower energy efficient building should cover energy efficiency proposals, too.

- *Gov. Decree No. 136/2008. (V. 16.) related to the amendment of the Espoo Convention*
- *Gov. Decree No. 78/2008. (IV. 3.) on natural bathing areas and waters*

The Decree is implementing the 2006 new bathing water directive. All the Community requirements and necessary procedural and authorization issues are regulated, also the requirements related to proper information, etc.

- *Gov. Decree No. 64/2008. (III. 28.) on the fee of waste management public services*

As the fee of the public service is probably the most delicate issue, the older regulations are replaced by a more detailed one, defining the general provisions how the fees shall be set. Also the general obligations of the consumer to payt the fee are stipulated. There shall be no fee in case of seperate collection of wastes.

- *Gov. Decree No. 14/2008. (I. 30.) on the amendment of the implementing regulations related to the trade of greenhouse gas units*
- *Gov. Decree No. 13/2008. (I. 30.) on the National Allocation Plan between 2008-2012*
- *Order of the MoE No. 21/2008. (VIII. 30.) KvVM on the treatment of batteries and accumulators and also thei wastes*

OECD Environmental Performance Review, 2008

In September 2008, the OECD published the above mentioned review, covering a general survey of environmental performance, among others environmental legislation and administration. According to the Review the EC accession is the most decisive element of the recent history, but still there is a lot to be done in order to reach the European level. The Review also underlines that most of the present environmental legislation is the implementation of Community requirements.

There are three major issues in the summary:

- developing the environmental infrastructure (waste management and sewage treatment as the most important);
- more effective integration of environmental consideration into economic decision-making;
- strengthening the international cooperation in this field.

From among the details, we may refer to the backward situation of environmental administration, as for example in the middle of the decade within 3-4 years, the number of personnel was cut to approx. half of the number of the beginning of year 2000, while the tasks are more demanding. Also the economic instruments are not used properly, and also the SEA-type requirements are mostly in paper.

Court decisions

There has been only one interesting and new decision of the Supreme Court in a case, where myself represented the plaintiff. In the name of a waste management company, we questionned the administrative decision of Budapest municipality which did not want to accept that the economic operators should not necessarily belong to the scope of compulsory public servic. So the question is both waste management problem and the question of fight against unnecessary monopolies. The waste legislation in Hungary allows economic operators to use other waste management services than the compulsory public service if the other services also have the necessary environmental and waste manegement authorisation. There is one minor reference in waste legislation which allows the municipalities to require public service also in case of economic operators – if there is waste produced outside the scope of the economic activity and this waste is not collected seperately. The Supreme Court accepted our argument, that this limitation shall be exceptional, in case of which the burden of proof is on the public administration, so they have to prove that there is waste outside the scope of economic activity. But the Court indirectly referred to the relative impossibility of this situation. The judgment also refers to the rule of law requirements as the public administration did not want to prove anything, but they simply refused the request of the economic operators to be relieved under the burden of compulsory service without giving the exact reasons, referring only in general terms.