Section 2.3 minimum legislation

Stricter Standards - EC

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1. How would you define minimum and maximum harmonisation?

EC law does not know these terms. They are a creation by legal authors. EC law allows, under certain conditions, to introduce or maintain more stringent national legislation. These words stem from Article 176 EC Treaty, but Articles 137 (4) for social policy and 153(5) for consumer protection contain a similar provision. It is suggested not to deviate from this wording. Other legislation where the Treaty does not provide for such a wording, does, in principle, not allow to maintain or introduce more stringent national legislation, unless this follows implicitly from the different provisions.

It also should be noted that articles 174-176 EC do not talk of "harmonisation" of national legislation – except in the rather obscure provision of article 174(2). This is different in article 95((4) and (5), where the measures under article 95 are explicitly called 2harmonisation measures".

It is important to note that in case C-374/05, the Court of Justice stated that a "complete harmonisation exists, when a directive "lists expressly the cases in which Member States are authorised to adopt provisions departing from the rules laid down by that directive". This judgment concerned legislation that had been adopted on the basis of Article 95 EC Treaty.

2. What are 'stricter' measures?

Stricter measures are such measures which go into the same direction as the Community measure, but go further than it. The concept is that a Member State should not be prevented from running ahead. However, that Member state must take the same direction, in order to allow other Member States, and in the last instance the Community, to catch up. Where Member States would be allowed to take "another" direction than the one which was adopted by the Community, there would be the risk of seeing 27 different directions of legislation, and the benefit of having, via the Community legislation, achieved a common approach to a problem, would be deleted. "Stricter" legislation must therefore be differentiated from "other" legislation.

3. How would you distinguish matters covered by a legal act from those not covered?

It has to be carefully examined, what activities are covered by a legal act. For example, Directive 96/61 in IPPC covers some industrial activities. Other installations, for example small and medium-sized installations, are thus not covered. This means that Member States are free to regulate small and medium-sized installations as they wish (in the limits, of course, of the EC Treaty and in particular of articles 28-30). Also, Directive 85/337 on environmental impact assessment only covers some projects. Other projects may be subject to an environmental impact assessment by virtue of national legislation (for example golf courses), but this is not

stricter legislation. A stricter legal act would, for example, require that electricity line with a length of 5 km (Directive 85/337: 15 km) have to undergo an environmental impact assessment.

4. How would you define those provisions in directives/regulations intentionally leaving matters for Member States to decide? Example Art.33 of Reg.1013/2006.

The example of Article 33 of Reg.1013/2006 is an example of Article 176 EC Treaty: Member States are obliged to set up a system for the supervision and control of waste. This system must be "appropriate". The Commission has the obligation to ensure that such a system exists in all Member States and that it is appropriate (=effective); it may take legal action where it believes that this is not the case. Member States are thus not free to set up or not set up a system – which is the criterion for areas which are left to national law for regulation.

5. Does Article 176 EC exclude total harmonization?

No. This follows from the point of departure that "total" and "minimum" harmonization are not opposing terms, but aim at a different objective. For example, when Regulation 1013/2006 enumerates a number of grounds on which a Member Mtate may object to a transfer of waste, it does not make sense, to consider that supplementary grounds are a "more stringent" legislation which may therefore be adopted by the national legislator (Case C-203/96 Dusseldorp). The acquis communitaire would thereby be destroyed. This appears now to be the opinion of the Court of Justice, see C-374/05 and no,1, above.

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 Mrticle 176?

See point 3 above.

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

There is a legal obligation to notify and the Commission can bring a Member State to court (Art.226), if this notification does not take place. Indeed, how can the opportunity to propose measures in order to catch up with the front-running Member State, be assessed, if it is not known, whether some – or many – Member States adopted more stringent measures? After all, there is an obligation to aim at a high level of protection, which means that the quality of the EC environmental measure shall be improved, whenever this is possible.

In practice, though, notification only takes place in exceptional circumstances. And the Commission does not monitor this obligation by Member States.

Article 226 EC does constitute a legal sanction in the full sense of the word.

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

Member States have to respect all Treaty provisions, when they recur to Article 176. This applies in particular to Articles 28/30. There might, though, also be other Treaty provisions which must be respected: for example, a Member State could not enter into an agreement with a third State on the providing of services – for example on waste collection – which would run counter to the freedom to provide services. Also competition rules must e respected, etc.

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The formula also refers to all secondary Community legislation, as this legislation is based on Treaty provisions. Otherwise, Article 176 would allow, in the name of the environment, opt out of secondary legislation; examples would in particular be Reg.2037/2000 on ozone-depleting substances and Dir.1999/32 on the sulphur content of petrol etc.

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

The question is not clear: it could mean to ask whether a Member State may request the Court to examine, whether EC legislation is breaching or not respecting the principle of high level of protection, based on the high standard at national level. This is possible. However: the EC decision has been legally correctly adopted, under Article 175, be it against the vote of the requesting Member State. Then, according to the established case-law of the Court, only if there is a really arbitrary decision under Article 175 ("gross negligence"; "contrary to what is obvious to any reasonable person"), could such a challenge be successful.

10. Is a minimum harmonization allowed under Article 95?

Yes, by virtue of secondary legislation. The European Parliament and the Council may decide that, at the stage of Community integration, a minimum harmonization constitutes the first step towards the ultimate objective of having full-fledged internal market rules. For example Directive 90/314 on package holidays (OJ 1990, L 158/59) is based on Article 100a (now Article 95) and contains in Article 8 a clause that Member States may adopt or retain more stringent national measures to protect consumers. Also Directive 93/13 on unfair contract terms (OJ 1993, L 95/29), based on Article 100a, contains in Article 8 such a clause.

One might quote Directive 94/62 on packaging in this context, which allows Member States to continue to apply more stringent provisions (Article 6(6)), though these provisions will have to be confirmed by the Commission under a procedure which is similar – though not equivalent to that of Article 95.

This last example also shows that within a legal act adopted under Article 95, specific provisions which have a more environmental orientation, might allow more stringent national measures, either when this is laid down explicitly – this appears to be uncontested – or where it follows from the environmental nature of a provision (own opinion).

Finally, Reg.689/2008 on export and import of dangerous chemicals should be mentioned. This Regulation is based on Articles 133 and 175 EC. It left undecided, whether Article 176 could apply mutatis mutandis. In my opinion, this is well the case. The Court of Justice, in case C-178/03, gave no answer to this question.

11. Appraisal of Commission practice under Article 94(4-5)

The discussions take mainly place in the absence of public opinion. The Commission appears internal-market biased. It is surprising and not acceptable that it does not accept health-related grounds as reasons for invoking Article 94(4) and (4) where bans and restrictions of dangerous substances are in question; indeed, Article 174

also intends to contribute to protect human health; thus, for example a measure to restrict the use of asbestos, is a health-related environmental measure.

The Commission is not systematic in its approach under Article 95: for example, it tolerates GMO-free zones, though this might interfere with Article 95, it tolerated national bans of asbestos, though EC law allowed the free circulation. It tolerates the ban of lead in ammunition, the large phase-out of lead, cadmium and mercury in some Member States, etc.

Also, the Commission´s assessment is not coherent and there is a large amount of political judgment in the Commission's decision.