

Avosetta

Monção meeting

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1.1. Questionnaire

1.1.1. 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?**

Not in so far as I am aware/

- 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?**

No official or unofficial policy on goldplating policy although there are some recent efforts to be more stringent where animal wastes are concerned. The new Green environmental Minister would aspire to goldplating.

- 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).**
- 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 some discussion between the Irish Employers and Business Federation and the EPA and the Department of the Environmental on implementation policies on an ad hoc basis. There is no public debate of which I am aware

- 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?**

Not in so far as I am aware

1.1.2. 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?**

No.

- 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?**

Department of Environment, Heritage and Local Government for most Directives. Other departments for Directives within their areas of responsibility e.g Department of Energy.

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?

Generally speaking standards are set a national level. Local authorities could only set standards in byelaws and these would be very unlikely to be stricter than any relevant national standard. Regional authorities have no real legislative powers.

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?

Yes for two reasons:

1. EC law, acts done and measures adopted in pursuance of its environmental policy are applicable in Ireland, and laws enacted by the Parliament take effect subject to them. EC law may not be challenged on the grounds that it is unconstitutional. Neither may any laws enacted, acts done or measures adopted by the State necessitated by the obligations of EC membership. If standards set by Irish transposing measures are stricter than necessitated by the obligations of EC membership, it is arguable that they could be challenged on constitutional grounds.

This immunity from constitutional scrutiny is significant in environmental law particularly in the area of private property rights which are protected by the Constitution and which are sometimes perceived as inhibiting the powers of environmental regulatory authorities.

1. The most convenient, quick, and easiest way to transpose directives is by Regulations made under the European Communities Acts 1972-2007. Regulations are a form of subordinate legislation. The Government decided in 2006 that it should be possible to transpose EC law by regulations made under other statutes as well. The European Communities Act 2007 provides:

1.1. **4.—(1)** A power to make a statutory instrument conferred on a Minister of the Government by a provision of a statute may be exercised for the purpose of giving effect to a European act if the obligations imposed on the State under the European act concerned relate, in whole, to matters to which that provision relates. Again, it is arguable that if the obligations imposed on the State under the European act do not relate to that provision, it will be ultra vires.

2. Questions on court decisions

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

Not in so far as I am aware in the Environmental field.

11. There are two, more or less recent, cases where 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.

1.1.3. 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.

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

Yes. For example:

Before Directive 2003/35/EC. Almost any NGO would be given locus standi before the Irish Courts. Even NGOs founded after the contested decision was taken were allowed to sue. Since then the Planning and Development Act 2006, s.37 (3) (d) imposes new and stricter for NGOs in cases where permissions are required for developments involving EIA or IPPC licences.

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?
2. What are 'stricter' measures?
3. How would you distinguish matters covered by a legal act from those not covered (see for instance below: Concrete Examples, question 14.
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'.
5. Does Article 176 EC exclude total harmonization?
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?
7. What is the legal significance, if any, of notification under Art. 176?
8. What is meant by 'in accordance with the Treaty'?
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?
10. Is minimum-harmonization allowed under Art. 95?
11. Appraisal of Commission practice under Art. 95(4-5).