Avosetta Meeting 2009

Italy

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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?

No official data is available on this issue.

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 specific policy on gold-plating can be detected.

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.

In general, industries and business stakeholders do not promote gold plating policy, but no official discussion on the topic has been yet started in Italy.

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?

In general terms, stricter standards for the environment are perceived as slowing down the industrial activities and the economy. No specific debate can be detected on standards which may be counter-productive for environmental protection.

2.2.2 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?

Some similarities with article 176 EC can be found under article 117 of the Italian Constitution, modified in 2003, which determines the subject matters for State's exclusive competence as well as the subject matters for concurrent competence between the State and the Regions.

To this respect, as far as environmental issues are considered, "protection of the environment, the ecosystem and cultural heritage" falls within the State's exclusive area of competence.

However, there are other areas of concurrent competence between the State and the Regions which may have some relevance for our analysis, such as "health protection", "land-use planning", "transport and distribution of energy", "enhancement of cultural and environmental assets".

It should be noted that in areas of concurrent competence, article 117 of the Italian Constitution foresees the subsidiary power of the State in case of non-performance of their duties by the Regions and autonomous provinces.

With regard to the possibility for the Regions to adopt more stringent measures with respect to the State's ones, article 176 type may hardly occur, since in areas of concurrent competence it normally determines just "the fundamental principles" for action in a given field, leaving the Regions the power to determine the detailed provisions to regulate the subject matter at stake.

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 competent authority is the competent Ministry according to the sector of reference.

For the protection of the environment, the competent Ministry is normally represented by the Ministry for the Environment, Land and Sea.

There are however some exceptions to such a rule. For instance, in the case of GMOs' regulation, notification of more stringent technical rules is demanded to the Ministry for Economic Development.

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?

Under article 117 of the Italian Constitution, the adoption of more stringent measures by the Regions is possible in all areas of concurrent competence. In this case, Regions are also empowered to notify their measures to the European Commission, although normally the notification is made by the State.

In any case, Regions remain fully competent for the adoption and notification of more stringent measures in areas of exclusive competence, such as agriculture, which may be relevant also for the environmental field, as in the case of the regulation of GMOs coexistence with conventional and organic cultivation. To this respect, it may be interesting to recall the case of the notification regarding the coexistence of GMOs, made by Region Piemonte pursuant to the Regional Law of Piemonte No. 27/2006. Following such a notification, the DG Enterprise observed that the notification could not be considered legitimate as it concerned a technical standard already adopted in a legislative measure rather than a proposal of a legislative measure. Moreover, it added that insofar the law was introducing a general ban on GM crops, it should have been notified to the European Commission following the conditions stated in Art. 95 (4-5).

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?

No specific legislative reasons, but a certain lack of political will to go beyond European standards may be generally detected.

2.2.3 Questions on court decisions

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

Article 176 plays no role in national case law, while article 95 does.

In particular, in two famous cases related to the GMO sector article 95 is relevant:

- Decision of the Italian Constitutional Court n. 150 of 12/04/2005: The government (ie. The President of the Council of Ministers) had challenged the provisions which put a general ban on the use of GMOs contained in regional statues as "*in breach of art. 22, 23 and 25 Directive 2001/18/EC which provide a sophisticated procedure for the release of GMOs into the environment*". After a long examination of procedural and preliminary matters, the Court stated that the regional bans were not in breach of the EC obligations because they were not aimed at hindering the trade of GMOs in the territory – underlining that Directive 2001/18/EC is based on art. 95 of the Treaty -, but they were norms directed at forbidding "*specific forms of use of such GMOs ie. release into the environment, which affect the agricultural and farming local industries*" and hence they could be upheld.

- T.A.R. Lazio Sent. No. 14477 of 29/11/2004: the case involved Monsanto, Novartis Seeds and Assobiotec (the Association of Biotech Industry) against the Council of Ministers. The latter had issued a decree (Decree 04/08/2000) forbidding the "*trading and use of some GMOs in the national territory (specifically, Mais BT11, Mais MON 810, Mais MON 809) using art. 12 of Regulation 258/97/EC*" (ie. the "safeguard clause" based on art. 95(5) TCE). The plaintiffs claimed that there was a violation of their rights because the measure adopted by the Italian Government was barring the use and trading of products "*which on the basis of present scientific expertise pose no risk for human health and animal health*" and therefore the safeguard clause was inapplicable. Moreover, the application of the restrictive measure of art. 12 of Reg. 258/97/EC was inconsistent with the applicable EC regulatory framework in relation with products that had been previously enjoyed a special authorization through the "simplified procedure", accorded to products that were "substantially equivalent" to existing (ie. not genetically modified) food. The defendants opposed the plaintiffs'arguments saying that the decree was adopted according to "the precautionary principle " and argued that the products were not substantially equivalent to non-GM like products and that the application of art. 12 was justified.

  The Administrative Court decided to refer the questions to the preliminary ruling of the ECJ (on the basis of art. 234 of Treaty), which stated with the ruling C-236/01 that the application of art. 12 of Regulation 258/97/EC (ie. the safeguard clause) was consistent with products authorized on the basis of the "simplified procedure", but that nonetheless the adoption of such a restrictive measure should be adopted "*after a complete evaluation of risks against human and animal health taking into account specific and detailed new elements*". On that basis, the Regional Administrative Tribunal found that the risks for human health and environment claimed by the authorities to uphold the decree were in fact "generic" and based on "a merely hypothetic approach", and so were not scientifically grounded. Therefore, it declared the annulment of that decree.

- Constitutional Court decision No. 116/2006: a more recent case, still related to GMOs regulation in Italy, were article 95(5) was not officially an issue at stake, relates to judgement No. 116/2006 of the Constitutional Court on the regional bans. In that case,

Therefore, following the latest decision by the Constitutional Court, it is to be assumed that the Regional total bans on GMOs use and cultivation adopted before Law 5/2005 have to be considered contrary to the national legislation as well as to EC Law. Despite that, most of the Regions have maintained such bans also after the adoption of Law 5/2005 and the following judgement of the Italian Constitutional Court. Such bans are *de facto* forbidding or restricting the use of GMOs in their territory and, to my knowledge, no Regional law containing a ban on GMOs has never been notified to the European Commission.

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.

More stringent national measures based on Article 176 EC Treaty could not be detected in the Italian legal system.

2.2.4 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?

I cannot recall any concrete example in this sense.

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

The implementation of Directive 2004/35/CE on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage provides such an example. The new 19 provisions on environmental liability introduced by Part VI of Italian Decree 152/2006 lowered down the previous legislation standards and introduced coordination problems among the provisions. An example of restriction to the protection of environment under the new Italian system implementing the Directive can be found in article 300 where the new definition of environmental damage is provided. Article 300

refers to the three categories of environmental damage mentioned by the Directive, i.e. water, habitat and protected species and soil, while the previous definition of environmental damage elaborated by the Italian Constitutional Court, when interpreting the former Law 349/1986, defined the environment as a comprehensive unitary immaterial good, which can be also considered as including many components, each one protected under the law. More specifically, the Italian definition of environment included the following elements: air, climate, surface water and groundwater, land, flora and fauna, ecosystem, health, landscape and noise.

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?

Decree No. 152/2006 (as amended in 2008) contains *inter alia* the national legislation on environmental impact assessment (EIA). The Decree contains the lists of projects which are subject to an EIA procedure at national or regional level, in compliance with the EC Directive 85/337/EEC, as amended. The lists included in the national legislation contain more categories of projects than those provided by the Annexes to the EC Directive. Furthermore, certain categories of projects which, according to the European directive, have to be subject to an EIA only when exceeding a certain thresholds, are subject to the national EIA independently from the said thresholds. Examples are: LNG terminals (without any threshold), asbestos plants (without any threshold), underground parking areas with a surface of more than 5 hectares placed in historical areas and underground electrical line of more than 40 km (projects not subject to the EC directive). Such 2008 amendment to Decree 152/2006 has been notified to the European Commission, considering it a more stringent national measure pursuant to article 176. I tend to agree with such an interpretation.

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

The specific national legislation for the protection of the Venice lagoon from water discharges (Ministerial Decree of 9 February 1999 – Ministry for the Environment – *GU No. 35 of 12 February 1999*) established a differentiated regime, based on *ad hoc* maximum emission limit values for certain dangerous substances in water discharges, which is more stringent both with respect to the national legislation in force for water protection and management (presently Legislative Decree No. 152/2006, which confirmed such an exception for the Venice lagoon) and to the applicable EC legislation.

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

No specific example may be recalled in this sense.