Belgian Report

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Stricter national environmental standards after minimum harmonization - *Answers to the 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?

There is no comprehensive study or database available on the use of Article 176 or Article 95(4)(5) EC. It seems that in practice Belgian authorities make no distinction between Art. 176 notifications and the notifications of the measures taken to implement Art. 175 Directives as prescribed in recent years by most of these Directives. As far as I know there was never an Art. 95 (4) notification. There was only one Art. 95 (5) notification. Belgium planned at a certain moment an interdiction of the use of TBT *in paints for seagoing vessels at a moment that such a use was under the existing Art. 100 a Directive only forbidden for certain inland water boats. The Commission rejected these plans saying that the TBT-pollution problem was not specific to Belgium nor based on new scientific evidence. Eventually a solution (interdiction) was found on the international level (IMO) and subsequently introduced on the European level, so that there was no further need for derogating measures.*

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 no such an official policy on the federal level. However, as federal competences in the environmental field are concerned (product policy, protection against ionising radiation, protection of the marine environment….) there is a de facto *'no goldplating policy' in the field of product policy, as most of the directives in this field are Art. 95 Directives.*

On the regional level (the main part of environmental policy is indeed a competence of the regions) there is such a policy under the actual Flemish Government Coalition Agreement 2004-2009. In this Agreement it is stated that European and International obligations will be timely en correctly implemented. "Only were there is a broad societal consensus or a clearly added value in the area of food safety, traffic safety or human health or for the building up of a technological leading position that results in eco-efficiency, we can go further and/or faster than what is prescribed in said international and European rules. *We will do that without unnecessary administrative burdens and taking into account the competitive position of our companies". This idea is developed more in detail in the Policy Paper of the regional environmental Minister and it is there described as "we should avoid goldplating". The actual policy can be seen as a reaction to*

the policy of the previous regional government in which the post of Environment Minister was hold by the Green Party.

The policy is reflected in the way some Environmental Directives were implemented recently. The clearest examples are the Environmental Liability Directive and the Emission Trading Directive. In both cases the idea was to do nothing more than imposed by these Directives. However, as the ELD is concerned, we have since 1995 a comprehensive legislation on soil sanitation in the Flanders Region, dealing both with new and historic soil pollution. There was a "broad societal consensus" that we should keep this legislation,that is of course far more developed than the ELD on this issue. Although the legislation was updated somehow in the light of the ELD (mainly as some terminology is concerned), the main modifications that were introduced are based on an evaluation of ten years of experience on the ground with the existing legislation, not on the ELD For all other aspects (prevention, damage to nature and water) the ELD was very closely followed

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).

Both arguments are used.

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 have been discussions about the "no goldplating policy" of the actual Flemish government. Where this policy is supported in general by business and industry, it is rejected by the environmental ngo's. The Environment and Nature Council (an advisory body dominated by environmental ngo's) was e.g. of the opinion that such a policy is not indicated. Given the high pressure on nature and the environment in Flanders a strong and ambitious environmental policy is needed to attain e.g. the environmental quality standard set for by European Directives. One cannot reach this objectives by simply applying Directives that try to combat pollution at source. They are not sufficient to ascertain that the environmental quality standards will be met.

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 as far as I know.

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.

As the division of competences between federal and regional government *is concerned, this is based on the principle of exclusive competences (when federal government is competent for an issue, regional governments are incompetent and vice versa) and of autonomy. Within their competences regional governments may in principle determine themselves the level of*

environmental protection they like to have, as far as they respect some other fundamental principles (right of property, freedom of trade and enterprise, free circulation of goods and services, principle of proportionality if their rules have an impact upon federal policies…). A recent example can illustrate this. There is since some years federal legislation on immission standards for GSM-antennas. Federal government believed that she could introduce such standards on the basis of her competence to protect public health. The Brussels Capital Region introduced in 2007 a far more stricter immission standard, based on the regional competences to protect the environment. This regional act was attacked before the Constitutional Court, both by mobile phone operators and by the federal government. In a judgement of 15 January 2009 (n° 2/2009, Belgacom Mobile and others.)[1] *the Court found that setting immission standards for non-ionizing radiations is a regional competence, being a matter of environmental protection even when these standards contribute to the protection of human health and that federal government is not competent to set such standards on the basis of her residual competence for public health. The Court noted that this Brussels Regional Act is intended to implement the Constitutional Right to the protection of a healthy environment (art. 23 of the Belgian Constitution) in this particular field. The Court acknowledged that imposing, by applying the precautionary principle, a strict immission standard is within the discretionary power of the regional legislator and cannot, in the absence of international and European binding standards, be criticized by the Court. The Court found furthermore no violation of the territorial competence of the Brussels Capital Region (the Brussels immission standard can have indeed consequences for GSM-antennas in the Flemish Region, close to the boarder with the Brussels Capital Region), and added that although there is no constitutional obligation for the regions to pass a Cooperation Agreement to harmonize their standards in this field, the fact that such radiations may have by nature transboundary effects can inspire them to pass such agreements on a voluntary basis. The Court was also of the opinion that this standard was not violating federal competences in the area of telecommunication. There was no evidence that due to this standard it would be impossible or very difficult for the federal government to exercise her competences in this field. Finally the Court held that the principle of freedom of trade and enterprise was not violated: the mobile telephone operators were unable to show, on the basis of experts reports, that it would be economically or technically impossible to meet this standard in a period of 2 years.*

As local governments *are concerned (provinces and municipalities), they have very limited competences to regulate in general and in the environmental field in particular. They may only issue regulations on matters that are not yet regulated by federal or regional legislation. As soon there are such "higher" regulations, they will no longer be competent to regulate the same matter. So they cannot regulate the matter in a "stricter" way. The situation is of course different when it comes to individual administrative decisions. Although local governments are not important as legislators, they are very important while implementing environmental law on a day by day basis. Environmental permits are e.g. delivered by local governments (for the bigger establishments there is an administrative appeal to the government). In general, the*

[1] www.const-court.be

environmental standards imposed by (mainly) regional legislation (often an implementation of EC Directives), are to be considered as minimum standards. In individual cases, and subject to given reason for that, they can impose stricter (and complementary) standards in individual permits, taking into account e.g. local circumstances and environmental quality standards.

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?

Its the federal or regional authority that is taking (are is intending to take) more stringent measures. These notifications are centralised by the Permanent Representation of Belgium by the E.C. under the responsibility of the federal Department of Foreign 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?

As far as regional authorities are concerned, see answer to question 7.

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?

As a general rule: no. But there is an exception to that rule. This is the case for product policies on the Federal level. The Federal Act on Product Standards is giving extremely wide powers to the federal Government for the purpose of adopting measures intended to regulate within an environmental perspective the placing of products on the market. Draft regulations must before they are adopted (and follow the normal process for adopting executive orders) receive the advice of not less than 4 Advisory Councils (Federal Council for Sustainable Development, Central Economic Council, Council for Consumer Protection, High Council for Public Health). However there is an exception to that rule. If the draft regulation is a mere transposition of harmonised European rules such an advice is not necessary ant the said councils will only be informed of the draft. But the provision in question states also: "Draft regulations that make use of a margin of appreciation of a directive or that contain elements that are going beyond the mere implementation of the directive are subject to the advice of the aforementioned councils." It is clear that for this reason a mere transposition of a product related directive is less cumbersome than going for some form of goldplating.

1.1.3. Questions on court decisions

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

There is very limited case law in this field.

- *Council of State, N°. 177.488, 30 November 2007, nv VFT Belgium. The Council of State annuls art. 4.1.11.2 of the Regulation of the Flemish government containing general and sectoral standards for environmental protection (VLAREM II). This provision forbids the use of certain substances and preparations (creosote and similar substances) in the*

treatment of wood. The same matter is regulated by point 32 of Annex I to Directive 76/769/EEC, as Amended by Commission Directive 2001/90/EC. That Directive also forbids the use of these substances in the treatment of wood and wood so treated may not be placed on the market. The Directive contains however some derogations to this interdiction. In the Flemish regulation there were no such derogations. With references to ECJ, 15 September 2005, Cindu Chemicals BV and others (C-281/03- 282/03), the Council comes to the conclusion that Directive 76/769/EC provides for full harmonisation and that the regulation violates the Directive in not providing the same derogations. Furthermore the Council notes that there is no evidence at all that Flemish Government has notified the European Commission under art. 95 (5) CE of its intention to regulate the matter in a stricter way and of the grounds for introducing such measures.

- *Constitutional Court, N° 186/2005, 14 December 2005, Nestlé Waters Benelux and others. The Court came to the conclusion that although Directive 94/62/EC of 20 December 1994 on packaging and packaging waste is based on Art. 100 A, it provides not for full harmonisation for all the matters dealt with in it. Article 5 states e.g. that Member States may encourage reuse systems of packaging, which can be reused in an environmentally sound manner, in conformity with the Treaty. So, on the national level, MS may introduce environmental taxes to stimulate the reuse of packaging, as long as they respect the other Treaty provisions So, there is no need to relay for that on art. 95 (4) or (5) EC.*
- *Constitutional Court, N°92/2006, 7 June 2006, Cockerill Sambre and Arcelor. Directive 2003/97/EC establishing a scheme for greenhouse gas emission allowance trading within the Community is based on Art. 175 EC. MS can take stricter measures pursuant to art. 176 CE. The Walloon region could thus have extended the scheme to the chemical or the non ferro-industries. To answer the question if the Walloon Region has violated the principle of equality and non-discrimination by including the steal and iron industry in its scheme and not having included both other sectors, it is not necessary to refer for a preliminary ruling to the ECJ the question if the Directive is valid in the light of some fundamental rights. Given the room for manoeuvre the Walloon Region had by implementing the Directive, the question if the Regional Act is in breach of the equality principle can be answered without referring the question to the ECJ. The Court found no violation of Belgian constitutional principles. Note that the recent ECJ judgement of 16 December 2008 Société Arcelor Atlantique et Lorraine and Others (C-127/07) came to very similar conclusions as the Directive itself is concerned.*

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.

As art. 5 of Directive 1999/31/CE is concerned, there is in the Flemish region of Belgium a ban on landfilling of "unsorted municipal and industrial waste" of "waste that is collected separately in view of recovery" and of "waste that is fit for recovery due to its composition, quantity and homogeneity" (art. 5.4.1. Regulation of the Flemish Government of 5 December 2003 ("VLAREA")), but the Minister of the Environment can allow derogations in individual cases up to 2 years (art. 5.4.3). At least 9 different municipal waste fractions (and 14 industrial waste fractions) are to be collected separately (art. 5.2.1.), including garden waste. This can be done by collection at home or trough container parks. Due to the Household Waste Plan 2003-2007 (that is binding for local governments) a selective approach of vegetable, fruit and garden waste was imposed, but local authorities could choose between home-composting or collection and they could set themselves their targets. The approach can be different between urban and rural areas. In 2006 38 % of the population was doing home composting and 86 % of them were doing this according to the state of the art. In 2005 53 % of organic-biological waste was collected separately. According to the new Implementation plan for environmentally responsible household waste management 2008-2015 the objective is to have in 2015 42 % home composters and a selective collection rate of organic-biological household waste of 56 to 96 % (depending on the fractions). The result of all the different actions will be that in 2015 only waste that cannot be recycled and that cannot be incinerated, will be admitted to landfills. So the conclusion is that in the Flanders region the targets of Art. 5 are largely met and that we can speak of stricter measures in the sense of Art. 176 EC. In the Brussels Capital Region there are no landfills,

As Article 15 of Directive 75/442/EEC is concerned the situation is varying according to the type of waste. Collection and recovery or disposal of household waste – waste generated by private households and street waste - is a responsibility of the municipalities (who can work together to that end). Municipal regulations are applicable on the collection of municipal waste. Holders of the waste have to pay for that service, according to these local regulations Different systems exists and are also varying according to the type of waste (e.g. a relative high price per bag for residual waste, a very modest price per bag of packaging waste (collection and recovery is financed by the producers in the framework of a take back obligation), free collection of glass, paper and cardboard, a price per container vegetable, fruit and garden waste, free access to container-park for private persons with some limits as the quantity is concerned…). In some areas there is a sophisticated system, called DIFTAR (differentiated tariff). Every body is paying according the type of waste and the quantity of it. The waste containers have chips and are weighted before going in the dustcart(s). The invoice is send to the holder of the waste. This system is supposed to be in line with the "polluter pays principle" and the "who prevents waste saves"[2].

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[2] http://www.iok.be/htmlsite/ABdiftarmain.html

As industrial waste is concerned, art. 19 of the Flemish Waste Management Decree of 2 July 1981 provides that producers of such waste are obliged to recover or dispose of their waste on their expenses. The definition of the notion of "producer" (art. 2,3° of the Decree) is identical to that of the Directive (art. 1, b). So it seems that our legislation is following in this respect closely the Directive without going "stricter". Besides that there is still one article applicable of the Toxic Waste Act of 22 July 1974 (art. 7) that provides strict liability for damages caused by toxic waste. It's the (original) producer of the toxic waste who is held liable for all damages.

1.1.4. 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?

Not as far as I know. Of course, it is not excluded that earlier in the legislative process some ideas were abandoned for this reason.

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

The only case that comes close to this hypothesis was the revision of the Flemish legislation on SEA. As part of a comprehensive piece of legislation a Title IV on environmental impact and security assessment was introduced in the Decree of 5 April 1995 on general provisions concerning environmental policy by an Amendment of 18 December 2002, under the previous government. One of the chapters was dealing with SEA, it was better developed than the SEA directive and was supposed to enter into force on July 21, 2004 at the latest, after publication of the executive orders by the government. It was to the new government to decide on these executive orders. Before doing that, the new government decided to introduce a bill in parliament to rewrite the chapter. This was done by Amendment of 27 April 2007. The chapter is now more or less a copy and paste exercise of Directive 2003/35/CE. Although the main argument for rewriting this chapter was that there ware serous doubts if the original chapter was sufficient in line with Directive 2003/35/EC, the new approach is certainly in line with the "no goldplating' approach of the current government.

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?

In the 3 Belgian regions there are systems of environmental permits, that have replaced the old system of "operating permits" which dates back to Napoleon times, with a much broader scope than the IPPC-Directive. In the Flanders Region this system applies since September 1991 (Decree 28 June 1985 – Executive Order 6 February 1991); in the Brussels Capital Region since 1 December 1993 (Ordinance 20 July 1992) and in the Walloon Region since 1 October 2002

(Decree of 11 March 1999). All these systems are following in one or another way an integrated approach of pollution prevention and control. There are a lot of similarities with the IPPC-Directive, but the obligations for the smaller establishments are no as strict as those of the Directive. All these systems were, often to late, adapted to take into account the IPPC-Directive. However, the specific rules for IPPC installations only apply to installations listed in Annex I of the Directive. So I don't think we can speak here of measures in the sense of art. 176 EC

It happens that the implementation of a Directive is the trigger to update the legislation in an certain field, taking the opportunity to regulate in a more comprehensive way a certain problem, not restricting one self to simply transpose a Directive. This happened e.g. in the Flemish Region with the Water Framework Directive. The Decree op 18 July 2003 concerning integrated water management implements the Water Framework Directive, but is doing more than that, in adding objectives and principles, reorganizing water management structures, introducing policy instruments not included in the Directive (water check, river bank protection area's, flooding area's..).

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

In the Flemish Region general and sectoral emission values were set in the Executive Order of 1 June 1995 (amended frequently). The emission values for air are largely inspired by the German TA LUFT 86. As the regulation says that in individual cases one cannot derogate from this emission values, in reality the Flemish values are a little more stricter than the German ones, because derogations in individual cases are possible under German law. The general and sectoral emission values are baseline values. In an individual permit stricter values can be imposed with a view to respect environmental quality standards. In 1999 for different sectors a limit value for the emission of dioxins and furans was introduced. In general, when there are Directives containing limit values, these are as such copied and past in the said Executive order. If there were already pre-existing stricter emission values for a certain type of installations, normally they will no be lowered down and also limit values for substances not dealt with in the Directive (e.g. limit value for dioxins), will stay in force. However, there are only a limited number of such situations. As water is concerned the same Executive Order contains also general and sectoral emission values. If there are Directives, the emission values of these Directives will also be copied and paste into the Executive order.

As Environmental Quality Standards are concerned, the relevant values of the Directives are also copied and paste into the said Executive Order. Of course, there are also environmental quality standard for items not regulated till now by European law (environmental quality standards for inland waters without specific function, for groundwater, soil, for air pollutants not regulated yet on the European level). In general the European values will be taken as such, without making them stricter. However, in some areas (e.g .agglomerations) the old limit values for SO_2 and NO_2 were made stricter (to 80 %). That is not longer the case with the new European limit values for SO_2 (from 1 January 2005) and NO_2 (from 1 January 2010).

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

As biocides and pesticides are concerned, Belgian legislation (Act of 11 July 1969 and subsequent executive orders) was rather progressive. Only licensed products were authorised and the policy was rather restrictive. Long before some products were banned on the European level, some of these products were already not allowed in Belgium. (This lead also to important illegal imports from neighbouring countries were products not allowed in Belgium were free on the market). Others were banned due to subsequent European legislation. The legislation on market access and re-evaluation of existing products were brought in line with the Biocides Directive. Besides market access, we have traditionally strict legislation on the further commercialisation of biocides and pesticides and the use of them. Some products may only be selled by recognised business and some particular products may only be used by professional users, recognised users or special recognised users. They must keep books of sales and uses. There are also specific rules for stocking these products. Sellers and users must follow some special training programs.

As other product standards are concerned, most of the standards in the federal legislation are simply implementing European standards. There are few product standards for products not regulated yet on the European level (e.g. interdiction of phosphate containing textile cleaning products (A.R. 13.02.2003 – notified under Directive 98/34/EC); emission limits for new oil and gas fired central heating systems (A.R. 8.01.2004 – also notified under Directive 98/34/EC).