Avosetta

Monção meeting

Contents

1. Recent developments in member states environmental law

All participants are asked to submit a short paper (max 2-3 pages) which highlights what in their view are significant developments in national environmental law (cases, new laws, new institutional arrangements, significant new policies) which might be of interest to other members of the Group. Please do so until the **23rd January 2009** (two weeks in advance of the meeting) so that the chair of that session will then have the opportunity to present their own cross cutting analysis of the most interesting aspects and lead the discussion accordingly. We want to try and avoid a long and tiring conventional country by country presentation in the discussion.

2. Stricter national environmental standards after minimum harmonization

2.1. General observations

According to Article 2 EC Treaty, the Community shall have as its task to promote a harmonious, balanced and sustainable development of economic activities. Furthermore, it is stated that it is a Community task to promote 'a high level of protection and improvement of the quality of the environment'. Main instrument for the European legislator is taking measures under Articles 174-175 EC, which triggers Article 176 EC, and the possibility for Member States to take stricter measures. In other words, the layout and structure of the EC Treaty concerning environmental legislation favours more stricter national standards as a means to promote sustainable development and a high level of environmental protection.

Minimum harmonization in European environmental law essentially means that the Member States have the power to lay down more stringent standards in a certain area of regulation than those laid down by European legislation.

Minimum-harmonization of environmental law is however not restricted to measures under Articles 174-175 EC. European environmental law enacted under Article 95 EC can produce minimum-standards as well. Furthermore, even if the standards taken under Article 95 EC cannot be regarded as setting minimum-standards (total harmonization), Member States are allowed under paras. 4-6 of that provision to derogate from the European standards set.

However, there are indications which seem to suggest that Member States make very little use of their powers to lay down or maintain more stringent national standards. Some Member States even seem to have adopted, more or less as a matter of principle, the policy that legislation transposing EU regulations into national law should be based on the minimum level of the European standard ("no gold-plating"). The general question to be dealt with at our next Avosetta-meeting can be formulated as follows: *Do the Member States actually use their power to lay down or maintain more stringent environmental standards after European harmonization?*

Subsequently, our meeting should provide us with information regarding possible legal explanations for practices among Member States. One possible explanation for the limited success of 'minimum harmonization' might be that it is not always clear to the Member States whether they are in fact allowed to set more stringent standards. It is not always easy to establish what powers the Member States have on this score. *Our meeting should clarify this issue, as far as possible.*

Another possible explanation of this limited success has to do with the fact that in most cases there are certain conditions attached to exercising a national power to lay down or maintain more stringent standards. The power to set more stringent standards does not give the Member State *carte blanche* to adopt whatever measure it chooses. These conditions may vary depending on the directive and also the legal background of the European standard (Article 95 or Article 175?) could play a role. With respect to Article 176 EC there is a universal condition that the more stringent standards adopted must be 'in accordance with the Treaty'. Apart from this there are often various obligations to notify, sometimes the stricter standards

are not applicable to imported products but only to the member state's own territory and the realization of 'different' objectives from those targeted by the European standards also seems to create more restrictions. *Our meeting should attempt to provide clarity as to whether the conditions on which stricter national standards may be laid down stand in the way of national governments actually using their powers.*

Another explanation might be found in the level of protection realized by the European standard. By virtue of Articles 2 and 174 EC the European legislators must strive towards a higher level of environmental protection. It is natural to assume that if the European standard already provides a very substantial degree of protection little need will be felt for more stringent national standards. On the other hand, in cases in which the European standard is relatively low, it might be less attractive for Member States to adopt a 'vanguard position' in view of the adverse effects this might have for the competitive position of the state's own industry. It might even lead to 'downgrading' the national standard to the level of the European standard. This hypothesis, which has hardly been researched at all, is also known as the 'race to the bottom' theory. The paradox is obvious: minimum harmonization at a relatively low level does not lead to relatively high usage of national powers to set stricter standards, but to adaptation of more stringent national standards to the lower European standards. *Our meeting should attempt to clarify the 'race to the bottom' theory.*

A final possible explanation for the low usage of these powers has to do with national law. It is known from the literature that from a legislative point of view it is 'easier' to implement a directive at its minimum level than to go further. As an example we could point at Dutch law. Certain obligations to consult and notify do not apply to legislation which 'serves to implement' binding EC law (Title 1.2 Dutch General Administrative Law Act; *Algemene wet bestuursrecht*). Generally speaking stricter standards cannot be regarded as 'serving to implement' EC law. Another factor is that in a case of this kind the legislators cannot make use of the delegation provisions included in many formal statutes; these provisions mean that the obligations arising from the directive can be transposed by ministerial decree instead of by governmental decree. The Dutch Drafting Instructions for Legislation (*Aanwijzingen voor de Regelgeving*) also contain principles which might stand in the way of setting stricter standards. For example, Drafting Instruction 48 provides that 'in changing a regulation it should be ascertained whether any changes can be included with a view to harmonization'. However, the explanatory note provides that 'in connection with the transposition periods for the EC directives it is undesirable for the assimilation of such a directive into Dutch legislation to be linked to changes with a view to harmonization'. At the same time it should not be deemed impossible that Chapter 8 of the Draft Instructions for Legislation, 'Preparation and implementation of EU regulations', has some influence on the capability and willingness of the Dutch government to establish stricter standards than the European ones.

Our meeting should clarify to what extent these kind of 'internal' explanations play a role.

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?

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?
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.
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?

2.2.2. Questions on national laws

1. Is there, in your national law, a similar provision like Article 176 EC with respect to the relation of central and regional/local authorities?
2. 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?
3. 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?
4. 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?

2.2.3. Questions on court decisions

1. Is there any national case law where either Article 176 or Article 95(4-6) played a role?
2. 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.

2.2.4. Concrete examples

1. 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?
2. Are there any examples in your country of 'downgrading' the national standard to the level of the European standard?
3. 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?

4. Are there any concrete examples where at national level more stringent emission limit or quality values (air, water) exist?
5. Are there any concrete examples where at national level more stringent environmental product standards (pesticides, biocides, hazardous substances) exist?

2.3.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).