

Danish report for the Monção meeting

Peter Pagh

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?**

There is no official data on notification of the Commission of the use of Article 176 of the Treaty. Article 95(4) has been used regarding certain dangerous substances as PCP and creosot and regarding additives in food and was in 2006 used regarding certain greenhouse gasses as derogation to the EC Regulation 842/2006 on certain fluorinated greenhouse gasses.

**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?**

The official Danish approach is to favour minimum standards in the EU. However, with few exceptions the main polity today is not to go further than EC law requires, which also reflects that Denmark has substantial problems in implementing EC Environmental Legislation on almost all areas - which has become a big surprise for legislator. In the last five years a number of opening letter has been filed from the Commission on none compliance with EC law on nature protection, on water management, on environmental impact assessment and on pollution prevention and control. This means that the former approach: - that Denmark did better and didn't need to concern about compliance - has finally come to an end. Taking the implementation of the environmental liability directive, the political position was just to comply - and even this the legislator didn't manage to do so, since the strict liability for environmental damage under the directive isn't applicable if the polluter is not able to establish financial guarantee for the cost of remedying the damage.

**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).**

There is no official "no gold plating" policy - but on certain areas it has been the policy.

**4) Is there in your country any public discussion (industry, business, NGO) on 'gold plating', either in general or with respect to environmental standards.**

Some years ago there was a strong public opinion - and particular from the green organizations - favouring gold plating, but this mainly reflects the lack of knowledge on EC environmental law obligations. Lately it is still argued from some of the green organizations that the nature protection has become divided into an A-nature (EC-protected area and species) and B-protected nature (the nature not within the scope of EC-protection). Taking into account the lack of compliance with the EC obligations the position more reflect that under

the old Danish system, the public access to nature is given a much more favourable position than under EC law.

The favouring of gold plaiting is still the formal approach regarding combating of green house gasses – but as on other areas it is difficult to take serious since Denmark is among the 3 Member States (beside Italy and Spain) which seems not to be able to comply with the Kyoto CAP.

**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?**

See answer to question 4.

### *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, there are no similar provisions to article 176. Regarding pollution prevention and nature protection Denmark has in principle one standard and decisions made by local Councils are subject to appeal to a the Environmental Appeal Board and the Nature Appeal Board. In the old system (until 2007) the former counties did have the power to adopt stricter water quality standards but since these were not binding but only intentions and since the system reflected that Denmark didn't implement the old water directives, there was no real implication. Only regarding land use planning, the local Council is left with some discretion, but this discretion doesn't include stricter standards on nature or environmental protection.

**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?**

It is the Danish Government only which has this power. Notifications from the Ministry of Environment normally pass the Ministry of Foreign Affairs.

**8) Is it allowed under your national (constitutional) arrangements that regional and/or local authorities enact more stringent measures?**

The local Councils only have such discretion if provided by national legislation and isn't granted such

**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.

### *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?**

No.

**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 as provide us with all relevant information pertaining to the topic of discussion.

Regarding landfill of waste, Denmark has adopted more stringent measures on to what extent waste can be considered inert waste implying that the definition of inert waste differs from the landfill directive. One might dispute this interpretation of stricter, but until now this hasn't been done.

#### *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**

Regarding pesticides and industrial chemicals and cosmetics this argument has been presented.

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

Not to my knowledge.

**14) Are there any examples in your country where 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 there examples where 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?**

Yes, this was done in the implementation of the Environmental Liability Directive despite the approach was the opposite. The reason for this was that the directive simply didn't fit into the Danish system and to avoid to complex legislation, legislator decided to enlarge the scope of strict liability for the environmental damage covered by the Directive to all pollution from business. Another example is that the IPPC-directive and EIA-Directive (despite not correct implemented) also apply to big farms with cows.

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

Not to my knowledge.

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

Not to my knowledge.