Avosetta meeting-Portugal
Spanish Report

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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.

At least at the national level, Spain shows very few new developments in the field of environmental law. As a matter of fact, Spain´s Central Government terminated the Ministry of the Environment after the last general elections (March 2008) and the subsequent governmental reorganization (see *infra*). A new Department was created, merging the pre-existing Ministry for the Environment and the Ministry of Agriculture. It bears the long and controversial name of "Ministry for the Environment, the Rural Environment and the Marine Environment". The new Minister is one lady, the previous Minister of Agriculture. The interpretation is clear: agrarian, hunting and fishing interests have prevailed over the environmental ones. In the new Ministry there is not even a Secretary of State for the environment, since all ministerial services and units are grouped under a "State Secretariat for Climage Change" (here, again, the deleterious influence of climate change policies on "environmental" ones).

The result of this is a clear "degrading" of the environmental policies at the Central Government level. Consequently, there is a clear "atony" for what respects new legal proposals. A a matter of facts, there are only two noticeable regulations to be mentioned: (1st) Royal Decree 1432/2008, of 29 August, on measures to protect birds from electric power lines, (2nd) Royal Decree 2090/2008, of 22 December, partially supplements the Act 26/2007, of 23 October, on Environmental Responsibility.

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?

No.

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?

An official policy does not exist. Implementation of environmental directives follows their wording (copy and paste) and usually adds no further matters beyond their command.

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).

It seems that there is not an official "no gold plating" policy. Industry and businesses usually complain of new burdens imposed on them by EU and national law (red tape) bearing in mind that the seventeen Autonomous Communities are entitled to adopt their own environmental rules respecting basic norms adopted by the Spanish Government. However, this should be regarded as their common position concerning environmental requirements.

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

It is mainly restricted to academic circles and industrial associations. Academics are largely ignored by Administrations.

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?

If such debate exists, it is mainly restricted to academic circles. However, Public Administrations do not pay much attention to what academics argue. Even before the beginning of the current economic crisis, industrial circles have regarded environmental requirements as a burden. Central Government is in the process of approving changes in existing laws to ease administrative procedures, e.g., the time limit for a decision of the environmental effects of a project is to be reduced to less than 6 months which is the present deadline for State projects.

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?

Yes, Article 149.123 of the Spanish Constitution of 1978 which allows the Autonomous Communities to go beyond basic laws adopted by the Spanish Government. Its wording is parallel to that employed in Article 176 EC but it has been sparingly used. Nearly all environmental laws adopted by the Spanish

Parliament refer to this clause.
The Constitutional Court dealt with this matter in a case concerning a ban on imports and exports of crayfish due to a plague. It upheld the ban for environmental reasons (judgment 66/1991).

The powers of the Autonomous Communities have also been considered by the Court in respect of administrative fines. Theoretically, they could go well beyond the ones adopted by the Spanish Parliament. However, the Court has held that they cannot diverge from the basic framework adopted by the State unless the Communities provide proper reasons for the divergence.

The Autonomous Communities cannot reduce the amount of fines adopted by the State (judgments 156/1995, 196/1996, 16/1997 and 166/2002).

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?

Under Spain constitutional and legal arrangements, the central government is that competent authority. Normally, it is for the Ministry of Foreign Affairs to notify any such legal or administrative measure to the Commission, "via" the Permanent Representation (REPER). When the measures are adopted by the Autonomous Communities, the information-circuit is two-fold: first, the Autonomous Communities notify them to central Government and thereafter the central Government notifies it to the Commission (Article 10 of Law 30/1992, Basic procedural law), following the previously described procedure.

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?

This matter has already been answered above (question 6).

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?

Implementation of minimum harmonisation rules is favoured by public Administrations due to several reasons:

(a) Spanish environmental legislation mainly follows what Brussels previously does. The Autonomous Communities do indeed adopt environmental rules but it is difficult to assert that they pursue a policy of stricter standards as compared to those adopted by the State. It should be observed that "basic rules" adopted by the Spanish Parliament (i.e., those that must be uniformly be applied throughout Spain) tend to transpose the exact level the EU has previously adopted while leaving for the Autonomous Communities the achievement of higher standards. This can be explained by the fact that basic rules have to accommodate diverse positions, as it happens at EU level.
(b) Unlike the presentation, according to which "it is not always clear to the Member States whether they are in fact allowed to set more stringent standards", the question is rather different, i.e., the lack of political willingness to adopt stricter rules; in fact, the environment has been included with agricultural and marine matters in a single Department; therefore, it lacks its own minister and a proper voice in Central Government since she has to deal with many other matters. Public Administrations also face difficulties in applying environmental requirements. This matter would lead to a different debate, i.e., whether EU law has in mind the lack of expertise and manpower on the part of some Southern Member States as reflected in the IPPC Directive. This clearly affects the adoption of more stringent measures if even basic ones

approved by Brussels are badly applied.
(c) The environment is not in the agenda of politicians, especially under the current economic crisis; for instance, a vice-president has never been in charge of the environment. Major political debates regarding the environment never take place in plenary sessions in parliaments.
(d) The environment has mainly been absorbed by climate change concerns.
(e) More stringent measures have been, in a way, absorbed by the new tendency to approve strategies and programmes similar to those adopted by the EU. However, the law does not indicate in express terms that more stringent measures must be applied.

It should also be indicated that the Spanish Governments have also resorted to Royal Law Decrees to transpose EU environmental rules due to apparent delays to implement them within the time frame set out in those rules. The result is that (a) those measures merely change the words "the State" and replace them with "Autonomous Communities", and (b) this course of action also avoids discussion in Parliament since Royal Law Decrees do not need any previous submission to Parliament. They are ratified (most of the time) or rejected within 30 days from their submission to Parliament.

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?

No. As a matter of fact, the Constitutional Court has sparingly dealt with cases invoking Article 149.1.23 which is very similar to Article 176 EC.

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.

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?

No. As said before, Spanish implementing legislation mainly copies the text of Directives without setting out more stringent measures. The prohibition of plastic bags in supermarkets or even of traditional bulbs has not been examined by the Spanish government, or by the majority of the Autonomous Communities.

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

Unfortunately, there are various (remarkable) examples in the case of horizontal measures:

(a) *Environmental impact assessment*. The first and more striking example was the decision to delete the majority of Annex II projects of EIA Directive 85/337 in 1986. It took 11 years (only!) for the Commission to come to the conclusion that Spanish law was breaching the Directive. The ECJ delivered a judgment in Case C-332/04 declaring that it was a gross breach of the Directive. The interesting point about this matter is that the Commission did not request the Spanish authorities to review all decisions granting development

consent that had breached the Directive since, legally speaking, the judgment has retrospective effect and requires the Member States to put an end to the infringement adopting all necessary measures for such purpose.

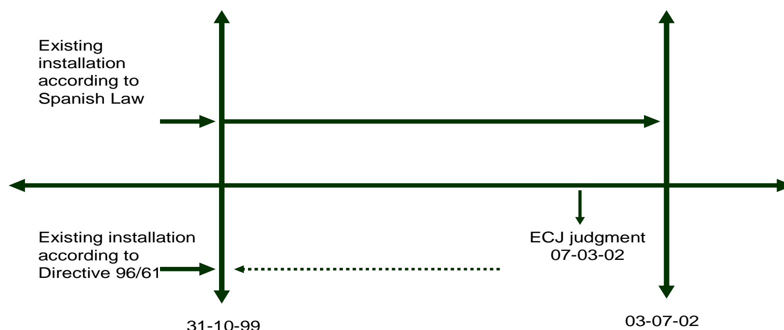
Secondly, many Autonomous Communities have defined the list of projects subject to EIA without taking into account the three criteria set out in Article 2, that is, nature, size and location. The ECJ has recently reiterated that it is compulsory to define proper lists of projects taking those three criteria into account (*Commission v. Ireland*, Case C-66/06). The Commission has not acted against any of them.

Third, the EIA implementing legislation sets out rules on administrative fines to be solely imposed on private individuals. Public Administrations cannot be fined (by other Administrations, e.g., Central Government authorises without EIA a project for the construction of a jail in an Autonomous Community) even though they are most important developers in Spain. However, this contradicts basic case law on this matter. Royal Legislative Decree 1/2008, which repeals the first measures on EIA (of 1986), maintains this approach.

(b) *Access to information*. Law 38/1995 on access to information did not grant that right to every person. Quite the contrary, it mainly referred to EU citizens and to other citizens of third States provided they also guaranteed that right to Spanish nationals.

Current Law 27/2006 has correctly modified this matter. However, the Spanish Parliament has introduced definitions of various terms not defined by Directive 2003/4. This is the case of requests concerning "material in the course of completion or unfinished documents or data". Spanish law defines this notion as documents the Administration is actively working with. This definition does not clarify whether the change of a heading, or the use of different characters, e.g., instead of TimesNewRoman 12, the civil servant may be "actively working" on the document by changing it to Arial 14, may be included within that definition.[1] It should be finally noted that the ECJ has held that where EU law does not define a term it is not for the Member States to do so (*Barker*, Case C-290/03; *Ecologistas en Acción v. Ayuntamiento de Madrid*, Case C- 142/07)

(c) *IPPC*. A further example is provided by the implementing legislation regarding Directive 96/61. It came into force on 3 July 2002. Unlike the Directive (31 October 1999), the notion of existing installations was extended until 2nd July 2002. However, by judgment of 7 March 2002, Case C-29/01, the ECJ held that Spain had breached the deadline for the transposition of the Directive. To show it graphically:



[1] This is just to show the broadness of the definition.

The aforementioned approach represents a clear breach of the stricter criteria set out in the Directive. Needless to say, the Commission has not brought any case before the ECJ.

The Spanish legislature has also granted extra time to existing installations to adapt themselves to the requirements of the Directive. According to Article 8 of the Directive authorisations must be in writing ("the competent authority shall *grant a permit* containing conditions guaranteeing that the installation complies with the requirements of this Directive or, if it does not, shall refuse to grant the permit". Likewise, Article 2(9) defines permit as: that part or the whole of a *written decision* (or several such decisions) granting authorization to operate all or part of an installation, subject to certain conditions which guarantee that the installation complies with the requirements of this Directive.[2]

Existing installations required a written permission by 31 October 2007 in order to fully comply with the Directive. However, by Law 42/2007, on the Natural Patrimony and Biodiversity (!) the Spanish Parliament extended that deadline until April 2008 by allowing all those installations to continue their activities under previous authorisations provided the new one created by Law 16/2002 had not yet been granted. It has been reported that not all existing installations have yet obtained the authorisation

A similar approach exists in the case of changes in the nature or functioning, or an extension, of the installation. According to the Directive a "substantial change" means a change in operation which, *in the opinion of the competent authority*, may have significant negative effects on human beings or the environment. Spanish law requires a fresh authorisation if a substantial modification is to be carried out. However, it leaves this matter to the operator since if he considers that a substantial change is not involved, he can proceed with it provided the Administration does not expressly contradicts this finding within one month from the submission of his application. Needless to say, one month may be a very short period of time.

It does not seem that the European Commission is willing to act against these gross breaches of EU law.

(d) *Nature conservation*. Spanish Law only transposed SPAs by Law 43/2003. It has finally complied with the basic requirements of both the wild birds and habitats Directives by Law 42/2007, on the Natural Patrimony and Biodiversity.

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?

There are some examples of that broadening:

1) The legislator has broadened the scope of the IPPC Directive to other installations. It has also adopted a stricter approach regarding the definition of "existing installation", a matter that does not collide with the remarks mentioned in the previous question, albeit this difference has had very little impact in practice.

[2] Emphasis added.

It should be observed that the Directive defines this term as “an installation
- in operation or,
in accordance with legislation existing before the date on which this Directive is brought into effect,
- an installation authorized; or
- in the view of the competent authority the subject of a full request for authorization, provided that that installation is put into operation no later than one year after the date on which this Directive is brought into effect”.

Spanish law has joined the first two indents. Therefore, in order to be considered as an existing installation it is necessary to be in operation and also be (previously authorised). Nevertheless, neither the Directive not Spanish law define (a) what in operation means (e.g., does it include clandestine installations operating without an authorisation?[3]) and (b) which authorisations must be necessary for the purposes of the Directive (e.g., does the definition include town and country planning or human health authorisations?).

2) Hunting provisions in Law 42/2007, on the Natural Patrimony and Biodiversity have limited recourse to exceptions set out in Article 9 of Directive 79/409 (wild birds), particularly in the case of migratory species. This Law also hampers the complete declassification of SCAs and has made it clear that a decision from the Commission is required in order to carry out a partial declassification.

3) In the case of Directive 2004/35 (environmental liability), the implementing national statute (Act 26/2007, of 23 October) has set more stringent rules:
(a) The definition of “damages to wild species” is broader, in the sense that it refers not only to species protected by EC Law (as the directive does)
(b) The act enshrines the obligation of having financial securities for affected economic activities, while this is not so mandatory under the Directive

4) Environmental Impact Assessment (EIA)
There are eighteen regulations about EIA in Spain: the national statute and the regional rules. The cumulative effect of the different rules and the several annexes is that, considered globally, the Spanish legislation includes at the end of the day more projects subject to EIA that those required strictly by Directive 85/337.

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

Stricter standards have been adopted in the field of noise law. Directive 2002/49 (environmental noise) does not set out any standards. Royal Decree 1367/2007 has adopted several ambient standards, including existing urban infrastructures.

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

No, save perhaps the prohibition on the use or simply possession of ammunition containing lead in wetlands, SPAs and SCAs.

[3] The express wording of the Directive may lead to this conclusion.

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?

It is doubtful whether a definition may be provided since a comparison should be made between the existing situation in the Member States and the level the legislature aims to achieve. The EC Treaty acknowledges that environmental conditions are different in the Member States and this also has an impact in new rules adopted by the EU. Having said that, minimum harmonisation should be regarded as the common denominator of Member States' laws whilst maximum harmonisation could be considered as the one which adopts the highest level already in force in most advanced Member States. Admittedly, this definition has its own weaknesses because it should be analysed in the light of the different requirements EU rules impose, e.g., standards, procedural requirements or prohibitions, and on certain occasion it may be difficult to assess whether a procedural requirement may enhance the protection of the environment. Minimum and maximum harmonisation should also be examined in the light of ECJ case law since it has also demanded obligations that were not initially specified by the Community legislature, e.g., the application of the precautionary principle in the case of assessment of plans and projects affecting SPAs and SCAs, Case C-127/02; the ruling on the declassification of SPAs (Case C-57/89), or the somewhat erratic case-law on the notion of waste.

2. What are 'stricter' measures?

Stricter means that it goes beyond what has been adopted by the Community, e.g., a standard, a rule, or a procedural requirement. If the purpose of environmental law is to protect the environment, any requirement increasing its protection, no mater how, should be included within that notion. However, as said before, it may be difficult to verify whether a particular requirement does in fact protect the environment.

3. How would you distinguish matters covered by a legal act from those not covered (see for instance below: Concrete Examples, question 14.

(question 14 is not included in the questionnaire)

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'.

The question leads in effect to a different debate, i.e., the enforcement of EU environmental law. The aforementioned provision plainly reflects the lack of willingness on the part of Member States to adopt stricter measures in the field of supervision. It is for this reason that those provisions should be regarded as minimum harmonisation, if one may say so, since there are no criteria as to the definition of "appropriate". The apparent failure in the case of the fisheries policy to organise proper supervision rules speaks of itself. Unfortunately, something similar happens with provisions indicating that Member States shall adopt all measures necessary to comply with a certain piece of environmental legislation. What do "all" and "necessary" really mean and how the Community institutions analyse the effectiveness of measures attempting (or not) to comply with that mandate? It should be observed in this particular case that several pieces of legislation do not even refer to the adoption of fines candidly assuming that the Member States will do so and properly apply them.

5. Does Article 176 EC exclude total harmonization?

In a way it does, since the very Treaty foresees the adoption of more stringent measures by the Member States. However, in the *van den Burg* case the ECJ came to the (wrong) conclusion that the wild birds Directive (79/409) had in effect achieved complete harmonisation of Member States laws regarding the commercialisation of species (save few cases, e.g., those included in Annex I), even though Article 14 of the said Directive expressly empowers the Member States to adopt more stringent measures.

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?

It may depend on two main factors:

(a) *The criterion of protection*. If a measure goes beyond an existing EU rule, taking it as the basis for those measures, then it should be regarded as a stricter measure, e.g., a Member State decides to limit the number of exceptions to access to information, or regarding the hunting of species, or requires any emergency or financial plan to be subject to EIA (which are outside the scope of Directive 2001/42). Similarly if it goes beyond an existing noise, water or air standard.[4] The ECJ referred in *Deponiezweckverband Eiterköpfe*, Case 6/03, to a measure that followed "the *same policy* of protecting the environment as Directive 1999/31 did (at para. 41). This compatibility may greatly depends on the wording and obligations of a Directive. According to that ruling, for instance, the carrying out of EIA in the case of policies submitted by governments to parliament could be regarded as a more stringent measure (see at para. 49 of the aforementioned case).

A measure falls outside Article 176 if does not have any relationship with previously adopted EU rules. However, it may be difficult to adopt such rules bearing in mind that, according to the ECJ in *Deponiezweckverband Eiterköpfe*, it is the "policy" that matters.

(b) *Competence*. It should be observed that despite the amount of measures adopted under the heading of the Environment, the Member States retain powers in this particular sphere (e.g., Article 175(2) EC). Any measures that do not correspond to any of those adopted by the EU could be regarded as measures falling outside the scope of Article 176, e.g., town and country planning. Admittedly, they may be limited in some cases but nothing indicates that Member States are incapable of adopting those measures (as it has happened with ambient noise before the adoption of the 2002 Directive). Nevertheless, if the EU acts within a certain field then it is not for the Member States to act outside that field as the ECJ has repeatedly indicated (e.g., any general measures adopted under Article 175(1) EC).

7. What is the legal significance, if any, of notification under Art. 176?

The legal significance is:

(a) To keep the Commission informed to allow this institution to open an infringement procedure. Alternatively, it may also serve to encourage the approval of further measures by the EU.

(b) More importantly, to keep Member States' measures within the EU powers. This is expressly referred to in *Deponiezweckverband Eiterköpfe* (at para. 61): "It is clear from the broad logic of Article 176 EC

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[4] A matter for discussion would be whether a Member State could auction most of allowances under the existing Kyoto Protocol regime, even though EU legislation indicates that at least 90% of them should be freely granted, provided funds obtained from the auction could be employed to reduce CO_2 emissions.

that, in adopting stricter measures, Member States still exercise powers *governed by Community law*, given that such measures must in any case be compatible with the Treaty. Nevertheless, it falls to the Member States to define the extent of the protection to be achieved."[5]

8. What is meant by 'in accordance with the Treaty'?

This is general clause usually adopted as a safeguard, e.g., free movement of goods. The exact meaning and application is mainly a matter for the Commission and the ECJ since they can invoke it to challenge or declare void a Member State's rule or action subject to review.

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?

This matter may depend of various aspects:

(a) How many Member States have a "substantial practice" of more stringent standards?

(b) Whether there is a great difference between EU law and the Member States;

(c) Whether the Member State voted against the measure; otherwise it could be invoked the principle *venire contra factum proprium*.

It is doubtful whether the situation explained in the question could happen. Should it be necessary to go before the ECJ? Could other tools be employed, e.g., previous negotiations with the Commission, or the application of the mechanism set out in Article 95 EC?

The history of EU environmental law shows that it has tried to accommodate diverging standpoints without causing too much trouble to advanced Member States.

10. Is minimum-harmonization allowed under Art. 95?

A high level of protection, as Article 95 indicates, is a matter for the institutions. It could not denied that on certain occasions, minimum harmonisation may also achieve a high level of protection, e.g., if Member States's rules merely refer to general principles without having any real binding obligations.

11. Appraisal of Commission practice under Art. 95(4-5).

[5] Emphasis added.