1.1. UK Response to Questionnaire

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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 dedicated government data base on A.176 or A 95 applications. However, it is Government policy to require all government departments proposing regulation to conduct a regulatory impact assessment on the costs and benefits. Since 2008 these impact assessments are available publicly on an internet data base. One of the questions that officials have to fill out on the form is whether the proposed regulations go beyond any Community requirement.

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?**

Offical Policy and applicable to all EU Directives. According to 2007 Transpositon Guide of the Dept for Business, Enterprise and Regulatory Reform: It is Government policy not to go beyond the minimum requirements of European directives, unless there are exceptional circumstances, justified by a cost-benefit analysis and extensive consultation with stakeholders. (3.24) Any measures deemed to come within the category of gold plating must also be highlighted in parliamentary 'transposition notes' which are submitted to legislative bodies together with draft transposing legislation.

The same Guide (aimed mainly at civil servants dealing with EC Directives) defines gold-plating as:

- extending the scope, adding in some way to the substantive requirement, or
- substituting wider UK legal terms for those used in the directive;
- not taking full advantage of any derogations which keep requirements to a minimum
- retaining pre-existing UK standards where they are higher than those required by the directive;

- providing sanctions, enforcement mechanisms and matters such as burden of proof which are not aligned with the Macrory principles (e.g. as a result of picking up the existing criminal sanctions in that area); or
- implementing early, before the date given in the directive

Two other concepts are being used in this context of EU implementation:

- 'double-banking' - where there is overlapping existing legislation and EU requirements are imposed on top without reviewing whole system
- 'regulatory creep' - where, possibility due to ambiguities in legislation, regulatory burdens are increased through non-legal means such as guidance notes from regulators, over-zealous enforcement etc.
- 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).

Main arguments concern excessive burdens on business

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

Most extensive recent official examination was Davidson Review (2006) on Implementation of EU Legislation. Lord Davison (senior lawyer) asked by Treasury to examine EU derived legislation and identify measures where unncessary burdens could be reduced etc. Seen as part of programme of Regulatory Reform aimed at improving productivity of UK economy. The Review could not examine all areas of law though it had a wide-spread call for evidence. It acknowledged that many commentators argued that the UK over-implemented EU legislation but the Review concluded the problem may not be as big as alleged.

Key factors were:

- many allegations of over-implementation of European legislation are misplaced as they either relate to concerns about the EU measure itself or wrongly assume that certain UK legislation originated from the EU;
- it can sometimes be beneficial for the UK economy to set or maintain regulatory
- standards which exceed the minimum requirements of European legislation;
- evidence to support assertions that the UK implements and enforces more
- rigorously than other Member States is often lacking. Furthermore, the review

- heard similar concerns about their governments from business representatives in
- other European countries.

Government in Northern Ireland has also commissioned an independent (ongoing) review of agricultural regulation. Although not specifically focused on EU law, concerns about gold plating and over regulation formed part of the motivation for launching the review. The review panel has not yet reported but has informally indicated that while there is need for legislative simplification in terms of implementation of technical standards, there is little evidence of gold plating of EU Directives affecting agriculture. If anything, they are likely to highlight a regional tendancy towards under-implementation in this context.

4. **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?**

A number of the responses to the Davidson highlighted that there may on occasion be good reasons to over-implement EU legislation. These reasons included a recognition that the EU may not always set the most appropriate level of regulation; that higher standards may be necessary to ensure consistency with domestic legislation and that over- implementation can help to achieve a level playing field between UK business. One of the examples given of justifiable stricter standards was the extension of a number of EU health and safety directives to the self-employed.

On the environmental side, there is debate. A signficant body is the Aldergates Group, an unusual grouping of industries, regulators and NGOs which has published on the benefits of regulation. In response to the Davidson Review, it noted " The Davidson Review reveals that many accusations of environmental over-regulation are mistaken. It's time for a mature debate in Westminster and Whitehall to replace the focus on minimising the standards in environmental regulations, which ultimately damages both the environment and the economy. Strong environmental regulation can help the UK's economy use resources more efficiently and thereby become internationally competitive. There is an abundance of evidence that environmental regulation is good for business in the longer-term. It can assist in delivering competitive advantage, reduce business cost and protect resources."

See also its report "Green Foundations: Better Regulation and a Healthy Environment for Growth and Jobs" (June 2006).

1.1.2. Questions on national laws

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

Not aware

6. **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?**

Individual Departments making regulations

7. **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?**

Responsibility for implementation of EU Directives on the environment is a devolved matter in Northern Ireland and Scotland. The UK Transposition Guidelines (mentioned above), while published by Whitehall, are used by civil servants in Scotland and Northern Ireland. There is no constitutional barrier preventing the devolved administrations from enacting more stringent measures and in practice both have shown a clear willingness to depart from Whitehall's greater concern to avoid 'gold plating'. For example, Northern Ireland significantly departed from GB in its approach to the implementation of the Nitrates Directive – adopting a 'total territory' approach as opposed to the designation of nitrate vulnerable zones in England, Wales and Scotland. Whitehall initially tried to prevent NI's use of this approach. However, it was ultimately accepted (a) that differential approaches to implementation were permissible under the devolution arrangements and (b) that total territory did not constitute gold plating in the particularly circumstances in NI. The agricultural industry strenuously resisted this implementation approach and still regard it as an instance of gold plating. Industry dissatisfaction with this situation was also instrumental in persuading the newly devolved Government to carry out the (above mentioned) review of agricultural regulation. Similarly Scotland has adopted approaches to implementation that involved going beyond what was required by the Directive – most clearly in the context of the SEA Directive and its application to policy proposals. However, Whitehall also regarded Scotland's introduction of primary legislation for implementation of the Water Framework Directive (as opposed to secondary regulations in England and NI) as a form of gold plating. In all instances, Whitehall was unable to prevent the regional administrations (on political or legal grounds) from making independent decisions concerning implementation approaches. To a large extent this is because the liability for EU fines has also been devolved which has significantly reduced Whitehall's ability to control implementation practices.

Both of the devolved Assemblies are constitutionally prevented from acting in breach of EU law (under the devolution legislation), but beyond this, the regional administrations have a very high degree of autonomy concerning implementation choices.

The regional administrations notify the EU Commission of their implementation action via routine reporting mechanisms co-ordinated through Whitehall. However, direct communication between the regional administrations and EU Commission occurs in the event that the Commission expresses concerns about or raises questions concerning regional implementation approaches.

8. 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?

Two key ones:

(a) limitation on law making powers most readily used by civil servants

(b) requirement to consult widely if stricter standards proposed Law-Making Powers

When implementing an EC Directive policy makers basically have three legal routes they can choose from:

(a) primary legislation (Act of Parliament). Given Parliamentary pressure of time, each Department only gets a legislative slot once every two or three years so the time-scales for coinciding with the time-limits on a Directive often will not work out.

(b) secondary legislation made under an existing Act of Parliament (regulations). The scope of any such regulations is defined by the Act of Parliament, and it may well be that no existing Act gives sufficient authority to deal with a new Directive. Some recent Environment legislation tries to anticipate future EC laws by giving very broad powers - eg s 87 Environment Act 1995 gives government power to make regulations inter alia "for prescribing standards for air" and "prohibiting or restricting prescribed activities". The defined purposes of such regulations include the implemention of EC Directives (current or future). The main limitation of these types of regulations is that they cannot amend or repeal an Act of Parliament, only other regulations. So if an existing Act is in conflict with a new Directive, this must be amended by either another Act of Parliament or regulations made under European Communities Act (below)

(c) The European Communities Act 1972 , the Act that joined the UK to the Community. This provides a general power to all Ministers to make regulations for the purpose of implementing Community obligations. Very unusually, these regulations can do anything that could be done by an Act of Parliament including repealing or amending existing Acts. This is the simplest route for

officials to follow, especially if they have doubts as to whether regulatory powers under existing Acts are sufficiently broad, or where they wish to amend existing Acts. However there are important limitations - it cannot be used for taxation; where criminal offences are created, the penalties are severely limited; and, in the context, of Avosetta meeting, the powers can only be used to implement a Community obligation, and no further. The powers under ECA are attractive to civil servants especially where they are running out of time to implement, but by definition cannot be used for stricter standards.

Consultation

As noted above, Government policy is to "consult extensively" should stricter standards be proposed. Although this is a policy document, failure to do so would result in a legal challenge, and recent court decisions on consultation policy generally indicates the courts could still hold a regulation invalid on grounds of procedural irregularity (as indicated by a prior policy commitment) even though its has been through the legislative process.

In the context of stricter standards, in 2007 the Surveyors Professional Body challenged the Secretary for State in court concerning regulations on home information packs (energy standards) implementing EC Directive 2002/91 on energy performance of buildings. They argued that the regulations went beyond the requirements of the Directive, and that there had been no consultation on this aspect. A High Court judge suspended the operation of the regulations until further discussion. The Government modified the regulations and reached agreement with the Surveyors Body not to pursue their action. This is one of the first known cases on this consultation policy, and the result acts as a disincentive to go beyond the minimum obligations of a Directive.

1.1.3. Questions on court decisions

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

No cases identifed.

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.

1.1.4. Concrete examples

10. **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?**

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

Haigh (EEC Environmental Policy and Britain 1988) notes that the Health and Safety Executive had prepared new legislation concerning industrial safety reports which went rather further than proposed Seveso Directive. Industry successfully lobbied that it should be required to go no further than other countries had to go, and work on national regulations abandoned in favour of Directive. (In fact Germany and NL in the case of the Seveso Direcive had legislated before the Directive was adopted and required safety reports long before the Directive deadline i.e. they were 'gold plated' in advance).

On new Chemicals (6th Amendment Directive 1979) the Health and Safety Executive had proposed in 1977 legislation that would cover non-marketed intermediate compounds. These were excluded from the Directive but Health and Safety Executive wanted their inclusion in implementing regulations. Industry successfully resisted in grounds that proposed regulations should not impose greater burdens than Directive did on competitors. Haigh comments that "in this field Community legislation is coming to set both the maximum as well as the minimum standard for domestic legislation" (p/246)

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?

Environmental Assessment

When original Environmental Assessment Directive (1985) was implemented, the Council for Protection of Rural England successfully lobbied Government to extend EIA to some categories of projects not covered by original Directive - eg windfarms. Amendments to Town and Country Planning legislation were passed to allow EIA for extra categories. There is some irony in that UK Government had strongly resisted the proposed EIA Directive for many years.

This is an example of applying the requirements of the Directive to a category or area not covered by it. Extending the ambit of a Directive is not, we think, an

example of imposing stricter standards than in the Directive under Article 176. On the other hand, making a 'discretionary' project class in the Directive subject to compulsory assessment (ie equivalent to Annex I) would fall under Art 176

Environmental Liability

Originally the Government intended to adopt a minimalist approach and in respect of nature protection sites only extend the liability provisions to European protected sites (as opposed to extending the Directive to sites designated under national law – SSSIs/ASSIs). Parliament and many NGOs heavily critcised Government for not included national conservations sites even though not designated as European sites. In 2008 Government backed down mainly because this was a relatively small extension beyond minimum required by Directive, and to have two systems of liability for protected sites would be inefficient and provided uncertainty for operators.

SEA Directive

As reported to the Budapest Avosetta meeting, Scottish legislation implementing the SEA Directive apply the EA process to policy proposals from the Scottish Executive (which had been excluded from the terms of the Directive). England/Wales and Northern Ireland did not adopt this approach.

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

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

None identified