Avosetta
Portuguese report for the Monção meeting

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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?

   According to information provided by Ministerial staff there is no register of any use of article 176 or article 95/4-5 and no memory of Portugal ever having notified the European Commission.

2. Is there in your country a (unofficial/official) policy on (avoiding/favouring) 'gold plating'?

   No. However, at the Ministry of the Environment, in the transposition of directives there is indeed a common subconscious rule to do it as smoothly as possible, to avoid conflicts with the European Commission. In the legislative procedure for transposition, any attempt to move away even from the ***wording*** of the directives is faced with great apprehension. As a result, the text is strictly respected and what comes up is the minimal approach.

   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).

   No official "no gold plating" 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.

   Not specially. The public debate is more on the responsibility of the State in case of late transposition of directives (namely the 2007/60 directive on the assessment and management of flood risks to be transposed until November 2009) and on the enforcement deficit (namely on fisheries, waste, ippc, Natura 2000, and so on).

However, in a few situations the State was accused not exactly of *gold platting* but of **fearing** the EU institutions and not protecting enough the national industry when it could. This happened once in setting the thresholds for submission to EIA of annex II installations. The same thing happened again in the Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading. In what concerns installations for the manufacture of ceramic products, the national legislator used a highly criticisable alternative submission criteria maintaining the "and/or" expression instead of making it cumulative by simply choosing the conjunction "and". The national law, just like the directive, submits to the greenhouse gas emission allowance trading [installations] "with a production capacity exceeding 75 tonnes per day, **and/or** with a kiln capacity exceeding 4 m3 and with a setting density per kiln exceeding 300 kg/m3. In Portugal the ceramic industries seem to have a big kilns but short production capacities per day and the consequence is the submission to the emission trading regime of very small industries.

The expression "and/or" was seen as a discretionary clause which should have been used by the legislator to defend the national interest but it wasn't.

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?

Yes, although the debate is not on the relations between European *versus* national standards but rather on the use of "high level of environmental protection" as a political argument to promote the social acceptance of some questionable political options.

One of them is the National Programme for Building Dams with High Hydroelectric Power. In this programme, 10 new dams are considered to be of vital importance for their contribution "to achieve the deadlines for shifting to renewable energy sources, to reduce the Portuguese energetic dependence and to reduce the emissions of greenhouse gases".

Another dam which construction is already going on is the dam on Sabor river, the so called "last savage river in Portugal". The dam is strongly contested by active social movements arguing that it will affect unique priority habitats included in Natura 2000. In the public debates around this problematic project, the government insists in making use of the same kind of arguments trying to persuade the contesters that the promotion of renewable energies represents a higher level of environmental protection. On the last 29th December the Administrative Court decided to suspend the construction works as an interim measure.

An appeal against the Commission (regarding the decision not to proceed with the case in the Court of Justice as asked in the complaint) is now pending in the Court of First Instance in Luxembourg.

The same line of reasoning and the same pre-comprehension — favourable to renewable energy sources at all cost — is present in a series of measures adopted since 2004 for the purpose of speeding up and simplifying the process of licensing new renewable energy projects (aeolian, hydraulic, biomass, biogas, waves and photovoltaic). These measures are applicable when the environmental impact assessment of the project was

favourable with or without conditions (conditionally favourable).
The measures go from the automatic recognition of the “public interest” of the project for the purposes of changing the territorial plans, to the mandatory emission of favourable opinions by the organ responsible for nature conservation.

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?

   Relations between the Central and the Regional Governments are ruled by the subsidiarity principle but the environment is considered a matter of "specific interest" for the Autonomous Regions, which means that it's up to the Regional Parliaments to adopt laws protecting the islander environment.

   So, in the Political and Administrative Statutes of the only two autonomous regions (Madeira and Azores) there is **no** similar provision commanding.

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?

   According to the Council of Minister's internal rules, it's the Ministry of Foreign Affairs, in coordination with the Ministry proposing the act, which sends to the European Commission any notifications or communications due. In the case of environmental laws, it's the International Relations Department of the Ministry of the Environment which prepares the documents to be notified.

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

   The question of the level of protection is not regulated either by the Constitution or by the Statutes of the Autonomous Regions. The levels of protection are independent and neither the central nor the regional government are obliged to respect a high level of environmental protection.

   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?

   It is the Regional Government, directly.

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?

   Not specially. I don't think that the complexity of legislative procedures is the reason for the absence of notifications *ex vi* art 176 and 95 is. However, there are some subtle differences in the procedure that I will shortly describe. Since the constitutional revision of 1997, the transposition of European Directives in Portugal must assume the form of Law (either a formal law of the Parliament or a Decree-law of the Government, which have both the same strength and can abrogate each other).

Ministerial opinion

The procedure for the adoption of legal acts for the purpose of transposition of European Directives (as well as for the fulfilment of any Treaty obligations) is slightly different since it requires an intermediate opinion by the Minister of Foreign Affairs. This procedure is not totally uncommon: a similar procedure, involving the Minister of Finance, is applied whenever the proposed legal act implies increased public expense or decreased public revenue. However, in the case of European obligations, it is indifferent whether the legal act sticks to the minimal European level of protection or goes further granting higher protection standards.

Legal justification note

In Portuguese law it is mandatory to justify (through a so called "justification note") any decision to adopt new laws on grounds of necessity, efficiency and legal simplification. This might make it slightly more difficult to adopt stricter standards as compared to the decision of merely transposing minimal rules.

Legal impact assessment

Considering the economical, financial and social importance of the legal act, its degree of innovation, the presumed capacity to attain its objectives and some other criteria, an *ex post* legal assessment may be imposed. An act creating environmental standards which are higher than the European ones is more likely to be submitted to a successive legal impact assessment.

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.

    Considering that Portugal landfilled more than 80 % of the municipal waste in 1995, these targets were postponed.

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 to my knowledge.

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

    I don't think so.

    There is only one case worth referring: after the transposition of the IPPC directive many industries falling outside the scope of the IPPC law applied for an environmental permit and it was refused. They were industries receiving public aids for the development of the Portuguese industry – called PEDIP programme – and their hidden objective was increasing the financial support on the grounds of "environmental excellence". The idea that came up to the public was that the government was blocking their legitimate attempts to become more environmentally friendly.

    The same thing happened when the State applied fines to some municipalities that were using bio fuel in waste collection without having been awarded a permit. Again the *media* contested the fine and accused the government of impairing environmental progress.

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?

Yes, there are. (our broad conception of "stricter measures" is exposed *infra*)

1. In the environmental impact assessment law:
   a) the binding force of the ministerial decision when the project is likely to have negative environmental impacts.
   b) the existence of a mandatory *ex post* assessment
   c) the creation of a previous optional phase for the "definition of the scope of the EIS"
   d) the obligation to consider the "zero" option
2. In the law on access to environmental information there are less exceptions to the duty to give information.
3. There is a law on observation of cetaceans (for touristic, entertainment, scientific or any other purposes) which falls partially in the scope of the *Habitats* directive (as long as the marine mammalian are protected species or the observation goes on in an area of special conservation or in a Natura 2000 site).
4. Directive 2001/77/CE on the promotion of electricity produced from renewable energy sources in the internal electricity market sets a national indicative target for Portugal of 39% in 2010. In 2007 Portugal

raised this target to 45%. (Of course, environmental NGOs say that this increase is due to a complex fraud in the calculations which is presented as a "correction" using a different average year. In a speech on the 5th of January the Prime Minister declared that renewable energies represent around 42% of the energy consumed in Portugal but the Energy Direction-General of the Ministry presents a quite different figure: 26,7%, which is 16% lower than the figures of the prime minister).

For instance: the IPPC Directive is only applicable to the installations mentioned in Annex 1; are the examples where the national legislator applied the IPPC-regime to installations not mentioned in Annex 1?
No.
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?
I think that there are (at least) two different interpretations of article 176.

A limited interpretation of article 176 could be that *stricter measures* are only those which imply the ***exemption*** of a MS from the application of a complete set of rules covering a certain sector in which the MS believes he's found more effective ways to deal with pollution or environmental degradation.
According to this interpretation the *stricter measures* imply an opting out or withdrawal from the European rules.
In a broader sense, article 176 covers all the situations of MS agreeing on the application of certain EU rules in the national territory, but want to go further in order to achieve a stronger protection of the environment. This can be done through a broader scope of application of a directive (like in the IPPC example), lower emission levels, higher recycling targets, shorter time-limits, stronger sanctions in case of infringement, new burdens or obligations impending on the addresses (like duties to registers, to pay taxes, negative prescriptions, reversing the burden of proof, etc.), and so on.

I'm more in favour of the broad interpretation since it will allow the Commission not so much to control the respect of the Treaty but rather: to be aware of the legislative practices of the Member States and to get a stronger feeling of the need to review the EU norms, considering the legal improvements at the level of the MS.

This could be the basis of a practice of legal experience sharing in order to contribute collectively for a more robust protection of the environment.

In conclusion, in what concerns the question of applying the IPPC rules to other installations I would consider it as a more stringent measure under art 176, which should be notified to the European Commission

considering that in can hinder the freedom of establishment.

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

    In general I didn't find meaningful differences between national and EU standards. I will take a closer look at these laws later.

1.2. 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?

   In minimum harmonization there is a larger discretionarity/*spielraum*/*marge de manoeuvre* left to the MS. They can stick to the minimum or they can go beyond it, as long as the stricter measures adopted are in accordance with the Treaty.

2. What are 'stricter' measures?

   The need to choose between different environmental measures can occur during a judicial process but also during the legislative procedure. In the first case the judge seeks the high level of judicial protection of the environment and in the second it's the legislator who aims at a high level of legal protection of the environment.

   In the context of article 176 of the EC Treaty it's the high legal level that counts.

   Besides, the balancing between two or more environmental norms can be internal or external.

   It's **internal** if the organ (or organs) who performs the balancing is the same which has competence to approve both norms. It's the case of article 174 n.2: "Community policy on the environment shall aim at a high level of protection (...)". Before adopting a legal act the European Institutions have to choose the suitable level or, to be more precise, the adequate high level.

   It's **external** if the balancing is done between norms adopted by different organs belonging to different entities with separate powers over the same territory and the same citizens (as in Federal Sates or in the case of shared competence between the EU and the MS).

   Again, the 'stricter' measures mentioned in article 176 of the EC Treaty involve an external balancing comparing the levels of protection attained with the European rules, on one hand, and with the national rules on the other. It's the national legislator who performs this balancing and the European Commission who controls it.

   "**Stricter" measures** are national rules having an environmental scope which are more protective of the environment than others.

   a) National rules: rules adopted by the Parliaments and competent organs of the MS in areas of shared competence with the EU (falling under the subsidiary principle)

   b) Rules having an environmental scope: This expression covers both measures adopted under

article 175º and measures from other policies and fields (transport, trade, industry, labour, competition, etc.) as long as they have, as a direct or indirect effect, an improvement in the quality of the environment.

c) Rules which are more protective of the environment. national measures which, compared with other EU similar measures in force (although included in a legal act having **neither** the same objectives **nor** the same scope of application) have more stringent environmental effects contributing to a better environment (in quantitative and qualitative terms). A better environment is an environment with:

-less pollution;

-less consumption, spill or degradation of natural resources;

-strongly preserved biodiversity and habitat varieties;

-more favourable conservation status of species and habitats;

-less environmental risks and more management and control over known environmental risks;

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

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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'.

This kind of provisions forwarding the regulation of a certain subject to the MS is a consequence either of the subsidiary principle or of the duty to consider the "environmental conditions in the various regions of the Community" (article 174 n.3 §2).

In the first case, considering the subsidiary principle, matters which have a national scale and don't have direct European *effects* (i.e. transboundary effects, or affecting free circulation, etc.) can be sufficiently achieved by the Member States separately. As an example, this may be the case of the internal shipments of waste. This is the first reason why the forward clauses can occur.

Another reason is when the environmental conditions of the regions or States differ profoundly. Very often, in these cases, and since the EU institutions have to consider the "environmental conditions in the various regions of the Community", the most effective and just policy consists on fixing the *result to be achieved* in a vague way and leaving the choice of the *form* and the *methods* to the MS. This is nothing more than the *spirit* of the **directive** as a flexible legal form to articulate the competences of the EU and of the MS. It's a way of guiding the MS towards a common goal without pushing them too hard. The

Directive 2001/77/CE on the promotion of electricity produced from renewable energy sources is an example... but *a contrario sensu*. Instead of setting national indicative targets at the European level (as the directive does in the annex), it should have fixed the result by means of a clause like: "in the promotion of electricity production from renewable sources the Member-States shall establish national targets which are ambitious, realistic, feasible, regularly updated, controllable and comparable".

In both cases (subsidiarity principle and regional disparities), the "forward" provisions are a recognition that the MS sometimes are in a better position to judge and to decide.

In both cases, the European duty to perform a high level of environmental protection (article 174 n.2) is respected by merely establishing the duty of the MS to regulate internally the environmental matter at stake. And the level of protection adopted by the MS is neither stronger nor weaker than EU because there is no European regulation.

5. Does Article 176 EC exclude total harmonization?

I don't think so, because even in cases of total harmonization MS should be allowed to go further. Why? Because the right to a high level of environmental protection is not only a ***right of the MS*** but a ***fundamental right of the citizens*** (according to article 37 of the charter of fundamental rights of the European Union articulated with article 53).

The right to a high level of environmental protection is a ***fundamental right of the citizens*** with two dimensions:

One is a ***fundamental right*** enforceable before the EU Institutions in what concerns EU law (article 37: "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development")

And the other is a ***fundamental right*** to exercise at the MS level. This is the ***fundamental right*** not to have one's environment impaired by downgrading interpretations or "no gold plating" policies at the national level. Article 53 of the Carter is quite clear: "nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

Is there a better way of ensuring the citizens a high level of protection than allowing the Ms to go further in all cases?

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?

A national measure falls outside the scope of article 176 when, in spite of the apparent environmental features, it was adopted for other reasons different than those of the European norms on a similar matter.

Example: There are laws in Portugal protecting the cork-tree in a particularly strong way. Although it is not in danger of extinction, it is necessary to get a special authorization to cut down a single tree. And very often

it is denied. Is this a "stronger measure" in the meaning of article 176 going further in the protection of flora species than the *habitats* directive? I don't think so.

The objectives of the protection of the cork-tree are different. The objectives are the preservation of economic activities and cultural traditions associated with this charismatic tree, regardless if its ecological functions as natural habitat or as habitat for other species.

Another similar example could be the law which establishes the effects of forest fires whose criminal origin attributable to third parties could not be determined. This law prescribes the total interdiction of any economic use — other than forestry — of the soils for ten years after the fire. The landowners consider this an excessive and unconstitutional burden but the Constitutional Court refused to declare the law unconstitutional. At first sight this law could also be considered as a stricter measure under article 176 for the protection of habitats, flora and fauna against the threat of fires. Still, a closer look at the law will show that although the final objective is the preservation of forests, the ecological concerns are almost absent. In fact, forests are regarded mostly as wood suppliers and the prevention of forest fires is a condition for the preservation of the arboriculture economy.

Considering that these two laws pursues other objectives than those of the *Habitats* Directive they fall outside of the scope of article 176 and therefore they don't have to be notified to the Commission. However, I think that these laws are compatible with the Treaty and should be allowed…

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

Notification is important to prove the Member State's good faith. In the case that the national stricter measure proves to be conflicting with the Treaty and the citizens suffer damages giving right to compensation, the existence of notification can be used as an indication that the Member State acted in good faith... The other way around, the absence of notification can be used against the State to prove its bad faith in a lawsuit based on liability of the State.

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

In my view, "in accordance with the Treaty" is a reference to the mandatory compatibility of national more stringent measures with the general objectives of the Treaty and with other non environmental values protected by the Treaty.

In the likely case that the more stringent national measure hinders some other (non environmental) European objectives or values (like common market freedoms, consumer protection, non discrimination) it is "in accordance with the Treaty" as long as it respects the principle of proportionality (necessity, suitability and proporcionality *stricto sensu*). Proportionality prevents environmental tyrannies.

Examples:

Is it proportionate to give preference to hiring women (or man) workers instead of man if sociological data proves that women (or man) generally have more environmentally friendly behaviours?

Is it proportionate to forbid the circulation of goods in routes longer than 1000 km so as not to spend so much fuel in transportation?

Is it proportionate to grant aids to environmentally friendly undertakings?

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?

Yes, it should be possible to submit any EU environmental measure to a judicial review based on the disregard of the high level of protection rule.

I would say that disregard of Art. 174 n.2 *ab initio*: "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community" is an infringement of the Treaty in the sense of Art. 230 §2 ("It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers").

Of course, in ordinary cases it may be very difficult to prove that a certain measure is not as protective for the environment as it could or should be. After all, the institutions involved agreed that the level of protection approved was correct... However, the fact that a substantial number of MS have adopted more stringent measures has (at least) the effect of reversing the burden of proof. In this case it's up to the European Institutions involved to prove that the EU norms approved are the "*best available **rules** not entailing excessive costs*". In this case the Institutions can either try to prove that stricter measures taken at European level entail excessive costs (not only *economic costs* but also *social costs* or *integration costs* in terms of harm done to other European objectives or values), or that there are other reasons justifying the need of the MS to go further, namely *regional diversity* (as in art. 174/2).

Probably the most likely case of successful judicial review bases on a low protection level is when the EC measures suffer from legal obsolescence due to technical or scientific evolution. In this case there is also a disregard of the duty to take account of the "available scientific and technical data" (art. 174 n.º3) in updating and adapting to technical progress of Directives or other Community rules on the protection and improvement of the environment (Council Resolution of 15 July 1975)

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Also in an action brought by the Commission before the ICJ under article 226 (or similarly by another MS under 227) based on an alleged conflict between a national more stringent measure and an EU harmonising measure, the MS can try to influence the Court's decision arguing that there is a wide spread practice of adopting more stringent measures among MS. The Court should take this into account when performing the "proportionality/necessity test".

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

Yes.

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