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FLEXIBILITIES WITH REGARD TO MEETING EU REGULATORY OBJECTIVES AND REQUIREMENTS

DENMARK

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I. Policies of prioritising economy and ecology

In recent years, EU environmental policies have more and more been framed around an emphasis on boosting competiveness, and preventing obstacles for the single market as such and small and medium sized businesses in particular. Examples for this tendency can be found in almost every area of EU environmental policy, be it the emphasis on the creation of jobs in the circular economy package or concessions for heavy industries in the emission trading system. Looking at the inherent conflicts between the objective of protecting and preserving the environment, and economic activities, it appears that EU policy- and decision-makers believe in a need to prioritise the latter.

This, however, is not a tendency confined to the EU level. In fact, at MS level we observe similar tendencies in policy-making relating to the environment. Austria can provide some examples in that regard:

> In 2017, the federal legislator adopted a law on the 'General Principles of Deregulation' aiming to ensure ia that financial impacts of legislation on businesses are assessed and must be adequate; in transposing EU law, implementing more stringent measures ('gold-plating') shall only be possible in exceptional cases. After an administrative court had annulled an EIA permit for a third airport runway based on climate change considerations and in view of the Austrian state objective of comprehensive environmental protection, a legislative initiative was passed to introduce a constitutional provision (state objective) acknowledging the importance of economic growth, employment and representing a competitive business hub. For the same reason, the Austrian Economic Chambers have argued that – 'just as much as' for environmental interests – there is a need for a representative of business interests in permitting procedures in order to ensure the competitiveness of Austria as a business hub. A so-called 'Business Hub Ombudsman' (*Standortanwalt*) should thus be party to such proceedings.

1. Are you aware of similar initiatives, current or planned, in policy- and/or decision-making in Denmark which result in prioritising economic activities over environmental interests? If so, please provide examples.

In my opinion, the question indicated the unspoken presumption that stricter legislative restrictions on business will good for nature and the environment. It isn't that simple. First, law is about ***balance*** *reflecting the various interest, why the best is always the enemy of the good. If environmental legislation becomes too strict and the unforseenable nature (which doesn't respect the physical planning is seen as an arbitrary interference, people will one way or another evade the legislation and the frog cannot be guarded 24 hours by authorities – and environmental authorities have also their institutional and economic interests not always the same as the environment. Second, the interest of nature is in itself contradictatory: the balance of species is dynamic end what is good for some species will be bad for others – some species actually rely on higher concentration of nitrates or sulphur. Even if human beings are considered the enemy and the enemy is jailed from nature this will not preserve all species or existing ecosystems. Wild life is not a zoo…*

The general trends in Member States towards no gold plating regarding EU Environmental Law is also reflected in Denmark since there now is a Governmental guidance requiring that Denmark shall only adopt stricter measures than required by EU, when this has been decided by the Parliament. This implies that stricter measures cannot be decided administration (mainly the EPA) but needs a democratic mandate as also recommended by the expert panel of professors regarding the future environmental legislation.

II. Techniques aiming at introducing more flexibility to or even diluting regulation

1. Offsetting regulatory directions

a) EU-ETS

In the current EU emission trading system (EU-ETS) framework, MS are allowed to use credits from outside the EU-ETS within this trading system. Those international credits result either from emission reduction projects in developing countries (Clean Development Mechanism; Art 11a EU-ETS Directive) or from greenhouse gas reduction projects among developed countries (Joint Implementation, Art 11a EU-ETS Directive). These credits are tradable within the EU-ETS and can thus be used to comply with requirements under the EU-ETS. As of 30 April 2016 the total number of international credits (CER and ERU) used or exchanged accounts for over 90 % of the allowed maximum.

1. (How) was the possibility of using international credits transposed into national legislation?

To my knowledge, the Danish State is not buying credits from the EU-ETS system, but the State has been involved in Clean Development Mechanism (CDM) under the former Kyoto-system. The current EU-ETS regime is (after some problems) correctly implemented but I don't have updated information on details, so I am not able to answer the questions below.

2. Has your country used the possibility of using international credits to comply with EU-ETS requirements? If so, to what extent? Are you aware of the reasons for relying on this possibility?

After 2020, the emissions reduction target will be a domestic one, thus the use of international credits in the next trading period of the EU ETS is not foreseen.

3. How is the change to a domestic emissions reduction target received in your country? Is this change expected to affect your country's abilities to comply with EU-ETS requirements? Are you aware that other possibilities are discussed to compensate the loss of the flexibility through international credits?

b) Effort Sharing (Non-ETS)

In the current framework for non-ETS sectors, targeted by the Effort Sharing Decision (ESD), MS are provided with a range of flexibilities in order to meet their (respective) reduction targets. MS are allowed to bank and borrow their (surplus) annual emission allocations (Art 3.3 ESD) as well as to transfer annual emission allocations to another MS (Art 3.4 ESD). In addition, MS can also use international project credits from emission reduction projects in developing countries (Clean Development Mechanism) or from greenhouse gas reduction projects among developed countries (Joint Implementation) to meet their commitments under the ESD (Art 5 ESD).

In a 2016 report, the Commission finds that so far, no MS has used any of the flexibility instruments provided in the ESD, yet a change is expected in the years to come (SWD(2016) 251 final).

1. (How) were the flexibility mechanisms of the ESD transposed into national law?
2. Has your country used any of the flexibility mechanisms yet in order to comply with ESD requirements? If so, to what extent?

Support for flexibility mechanisms is still high. In fact, in the current post 2020 reform of the ESD, further flexibility mechanisms are discussed. Those flexibility mechanisms include the use of cancelled ETS certificates and the use of LULUCF credits to meet ESD targets (forestry offsets).

3. How is this proposal on further flexibility mechanisms received in your country? If the proposal becomes law, would you expect your country to rely on those flexibility mechanisms in the future?

2. Exemptions from regulatory directives

a) Water Framework Directive: Establishing less stringent environmental objectives

The Water Framework Directive (WFD) establishes the overall objective of achieving "good status" for all waters, in view of which, ia, environmental objectives are set for different types of waters.

Art 4.5 of the Directive provides for the possibility of deviating from these environmental objectives set by the Directive with regards to specific bodies of water which are affected by human activity or when their natural condition is such that it may be unfeasible or unreasonably expensive to achieve good status. Such less stringent environmental objectives may only be set after evaluating other options and measures are taken to ensure the highest quality status/the least deterioration possible, and all practicable steps are taken to prevent any further deterioration of the status of waters.

MS are required to include the establishment of such less stringent environmental objectives and the reasons for it in the river basin management plan for the respective river basin district (Art 13 WFD). The less stringent environmental objectives are to be reviewed every six years.

1. (How) was the possibility of establishing less stringent environmental objectives transposed into national law? Is the transposing legislation stricter than Art 4.5 by, e.g., adding further requirements for deviating from the environmental objectives?

The exception in art. 4(5) and how the exception must be interpreted was one of the legal issues regarding the many cases (more than 400 civil actions and about 300 administrative claims til the Nature and Environmental Appeal Board) regarding the first water management plans (2009-2015) adopted in December 2011. All the plans was annulled in December 2012 by the appeal board because lack of public hearing when more than 25 % of the draft plan was changed. The Danish EPA took the position that only if improvement is impossible, the exception could be used, which in my opinion ignores the principle of proportionality and the wording of art. 4(5). In October 2014 the water management plans for 2009-2015 was adopted increasing water areas falling under art. 4(5) – and the legal actions from NGOs and farmers of these plans were rejected by the Nature and Environmental Appeal Board in June 2015. The appeal board has because of restricted competence not been able to decide on matters as: factual mistakes regarding where the stream and lakes are placed, the fact that the Danish way of monitor water quality is based on a biological fauna indeks and does not in chemical and physical monitoring in accordance with the WFD annex V.

Moreover, the main requirement and discussion on the Danish water management plans has been focusing on nitrate pollution from farming ignoring that nitrate pollution from farming according to the VRD must be addressed by the Danish action plan adopted under the nitrate directive.

Because of the problems caused by the legal actions from NGOs and farmers and other private owners by the administrative appeal of the first decision of the plans, the access to administrative appeal of the water management plans for 2016-2021 were restricted further by the Parliament in 2014 and the design of the plans was changed – but still based on the fauna indeks.

2. Have national authorities relied on the option of establishing less stringent environmental objectives in their river management plans? If so, to what extent and for what reasons? If not, why?

As briefly explained above, the Danish EPA did to high degree establish more stringent measures than required by the VRD – without any support in the formal implementation of VRD by the Parliament. In my opinion the new water management plans are less restrictive, but still going further than required by the VRD.

3. If national authorities have established less stringent environmental objectives in their river management plans, are these objectives regularly reviewed? Have such less stringent environmental objectives been adapted or even lifted?
4. Are there possibilities for the public to challenge the establishment of less stringent environmental objectives in river management plans? If so, please describe those possibilities briefly.

NGOs have no access to administrative appeal claiming that the environmental objectives should be stricter. Formally, NGOs have access to legal actions at national court claiming that the environmental objective for a specific river or lake should be stricter, but only if the objective is not in accordance with the discretion left under the VRD, and Danish Courts cannot be expected to make a review on this matter taking into account the complexity of the VRD.

b) Industrial Emissions Directive: Setting less strict emission limit values

The Industrial Emissions Directive (IED) requires MS authorities, in permitting industrial installations covered by the Directive, to set emission limit values which ensure that emissions do not exceed the emission levels associated with the best available techniques (BATs; Art 15.3 IED). However, if due to the geographical location/the local environmental conditions or the technical characteristics of the installation concerned achieving those emissions limits would lead to disproportionately higher costs compared to the environmental benefits, MS authorities may set less strict emission limit values as part of the permit. As part of the permit conditions, the less strict emission limit values must be reviewed in accordance with Art 21 IED.

1. (How) was the option of setting less strict emission limit values as permit conditions transposed into national law? Is the transposing legislation stricter than Art 15.4 by, e.g., adding further requirements for deviating from the emission limit values?
2. Have national authorities relied on the option of setting less strict emission limit values in permitting industrial installations? If so, to what extent, for what reasons and for which types of industrial installations? If not, why?
3. If national authorities have set less strict emission limit values in permitting industrial installations, is there a requirement to review these permit conditions regularly?
4. Are there possibilities for the public to challenge the setting of less strict emission limit values as part of permit conditions, the lack of review of such less strict emission limit values respectively? If so, please describe those possibilities briefly.

OPTIONAL:
Should you find the time, please feel free to answer the following optional questions on flexibility mechanisms in Natura 2000 management. Any answers will certainly enhance our discussions.

3. Exemptions and offsetting combined: the case of NATURA 2000

The overall objective of the Habitats Directive is to ensure biodiversity through the conservation of natural habitats and of wild fauna and flora; the establishment of a coherent network of protection areas – Natura 2000 sites – is the main instrument in that regard. Once a plan or project is significantly affecting such a Natura 2000 site, yet no alternative solution exists and the plan or project is in the overriding public interest, MS are required to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (Art 6(4) Habitats Directive). Essentially, an offsetting of negative environmental impacts is thus only permitted in cases where the requirements of the appropriate assessment are fulfilled.

1. How was the obligation to take compensatory measures in view of the coherence of the network as part of the appropriate assessment transposed into national law? Do the national rules go beyond the requirements of the Directive by, e.g. adding further requirements for compensatory measures?

Further avenues of offsetting are discussed within the framework of the Habitats Directive.

So-called 'mitigating measures' are designed to reduce the significant negative effect of a plan or project on the Natura 2000 site after they occur to a level where they no longer affect the integrity of the site; as a consequence, such a plan or project could be permitted based on Art 6(3) instead of Art 6(4) Habitats Directive. The Court found such measures non-compliant with the Habitats Directive as they constitute 'compensatory measures' which can only be taken as part of a permit based on Art 6(4) Habitats Directive (CJEU, C-521/12; C-387/15 and C-388/15).

In contrast, so-called 'protective measures' form part of a plan or project and are aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site in the first place. In such a case, a plan or project can be permitted based on Art 6(3) Habitats Directive. However, questions arise whether such 'protective measures' can also be taken into account in the appropriate assessment when they have not yet been implemented and their positive effect has not yet been achieved (Case C-294/17)

2. Does your national law allow for 'mitigating measures' or 'protective measures' to be considered under the rules transposing the appropriate assessment of the Habitats Directive? If so, to what effect? Can such 'mitigating measures' or 'protective measures' allow a developer not to undergo the test set out in Art 6(4) Habitats Directive?
3. Are you aware of any other options, in law or in court practice, that allow for the offsetting of negative environmental impacts within the context of the Natura 2000 framework? If so, please describe these options. If not, are you aware of discussions on this subject pushing for a change of the law?
4. Does ecological economics provide an answer? Is there any debate in your country suggesting that we should better factor in the socio-economic services of natural resources?