AVOSETTA MEETING Vienna 2018 – QUESTIONNAIRE

Latvia

FLEXIBILITIES WITH REGARD TO MEETING EU REGULATORY OBJECTIVES AND REQUIREMENTS

I. Policies of prioritising economy and ecology

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

There is no similar legislative initiative in Latvia with respect to amending the constitution or discussion to that respect as in Austria.

In general, there is increasing tendencies in policy and decision-making prioritizing economic activities "to boost competiveness" in Latvia. However, one may not conclude that there is an overall trend in prioritizing economic interest over environmental interest in either governmental or parliamentarian level, though with some clear exceptions in recent years, like in area of agriculture and forestry as noted below. Moreover, there is increasing tendency to slow down or object to any new initiatives for nature protection,[1] as well as today it is relatively easy to stop any initiative aimed at improving environmental protection in case it is not required by EU law and the implementation would require some additional investments for concerned market "players."[2]

Additionally, there are quite some initiatives launched under political commitment at reducing administrative requirements and simplifying procedures for economic operators and, in particular, small and medium size businesses. Hence, as noted in the national report of 2016, during 2014-2015, it resulted in reconsideration of legislative requirements in area of construction and environmental impact assessment (including, e.g., limiting public participation possibilities during issuing of building permits).[3]

In the last couple of years there are initiatives to reconsider requirements of nature protection to ease such economic activities as in the area of the forestry or other developments. Furthermore, decisions in area of agriculture demonstrate prioritization of economic interests over ecology at the level of Government, including when adopting positions of Latvia for voting at EU level, like a position not to support a decision of EU Commission aimed at banning Neonicotinoids.[4]

In short, one may note that even if there is no overall trend of prioritizing or reducing environmental requirements at any price, there are areas where such trend is admittedly present.

---

[1] One of such examples is connected with long lasting disputes on the need and ways of making "habitat mapping" for all the territory of Latvia (initiated by the Ministry of Environmental Protection). In 2016, the project got a "green light" only thanks to quite some compromises excluding a number of areas where habitat inventory may be performed, as well as committing to some other limitations, for example, to ensure that any new proposals for the protection of forest habitats may be initiated only in such a level as not reducing areas of forestry (available for the wood extraction). Decision of the Cabinet of Ministers of 3 Nov.2015, No. 57, para 59.

[2] Typical example here: a legislative initiative (launched for the third time in 2017 by the Ministry of Environmental Protection, the first was ~15 years ago) to establish mandatory refund-deposit system for plastic and glass bottles and cans. It has been stopped by intensive lobbying groups at different stages (in the Parliament in the first case, now in the Government) ending up with no-decision.

[3] See "Recent developments in Latvia" in Avosetta reports of 2016.

[4] The negative decision was based on the concerns of the farmers without giving appropriate attention to the concerns raised by the Association of Beekeepers and some environmental NGOs. This position of the Government was approved by the relevant Committee of the Parliament however adding some conditions to it (that's why Latvia had to abstain in voting on COM decision).

With respect to "gold-plating," in a sense similar to Austrian activity took place during 2009 in Latvia, when the requirements on the preparation of a new legislation have been amended and adjusted by adopting a new Order of the Cabinet of Ministers. The Order of 2009 to the rules of preparation of so-called *Annotation* for legal acts (Impact Assessment) adjusted a section to the requirements of compliance with the EU law (Sec.V). Now any new legislation connected with the implementation of the requirements of EU law has to be accompanied by the assessment on *inter alia* whether the implementation measure sets a stricter rule, if so, than one needs to include a justification and information on proportionality of such approach, as well as information about possibilities to avoid a stricter rules.[5] Since these norms have been introduced there is no Impact Assessment of a new environmental law identifying that the stricter rule has been aimed to be introduced while implementing EU law requirements. At the same time, it is worth noting that it does not mean that there are no such norms adopted, as, for example, the Parliament adopted amendments to the Law on Waste management in 2017, establishing a "notification procedure" in a sense similar to one with respect to hazardous waste, however, applying it to any type of waste imported in Latvia. (That was one of measures in the range of actions aimed at improving waste management system after some incidents in this area, including some most likely illegal waste disposals and burnings that got very high resonance in the society. Hence, one may say that these measures were introduced thanks to quite some pressure from the side of the society and particular circumstances.)

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

1. Offsetting regulatory directions

a) EU-ETS

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

The possibility of using international credits was transposed through the Law on Pollution and Regulatory enactment of the Cabinet of Ministers No. 250 (2014), permitting operators falling under the scope of Dir.2003/87 ("ETS operators") to use (exchange their emissions by) CER and ERU. The limitation for using Kyoto units is close to that permitted according to the EU Regulation No 1123/2013, thus, e.g., for the period of 2013-2020 an amount corresponding to a maximum of 11 % of allocation to the operator in the period from 2008 – 2012. For a newcomer, it is up to 4.5% of its verified emissions in the period from 2013 to 2020.[6]

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?

Up to publicly available information no operator has used Kyoto units to add to their emission allowances in complying with their obligations as stems from the ETS Directive. One may assume that there is no need for using international credits, as emission allowances (available for them or in the EU market) have been enough for complying with their obligations in Latvia. In general ETS sector of Latvia is not exceeding the annual emission allocations as allocated as well as projected up to 2020.

[5] Annex to the Order No. 19 of the Cabinet of Ministers of 15.Dec.2009, Sec.V.
[6] Art.49 of Regulatory enactment No. 250 of 2014.

In fact, the division of emissions between ETS and non-ETS sector in Latvia is ~20% / 80% respectively. Moreover, if ETS sector is indeed reducing their emissions by up to - 23% (in 2016 if compare with 2005, 2196,998 kt CO2 ekv), then emissions of non-ETS sector has been rather growing. So, the latter is the most problematic one with respect to compliance with emission reduction targets, as it seems to be set for the new period - post 2020 for Latvia.

b) Effort Sharing (Non-ETS)

According to the target of non-ETS for period up to 2020, there were no major need to use international credits or other flexibility mechanism for Latvia, as the target of +17% has been possible to be complied with (no emission gap faced). This will be different in relation to a new target set for the period post 2020, as it is going to be -6% for Latvia in non-ETS sector. This is indeed quite radical change in targets that has to be achieved in non-ETS sectors within the period from 2021 to 2030. Moreover, the projections indicate the growth of emissions in non-ETS sector rather then reduction. Therefore, next to a number of policy planning and legislative initiatives indicated as needed steps for Latvia in order to achieve its reduction targets post 2020, [7] in particularly, in the areas covered by non-ETS requirements, there is an interest to keep flexibility mechanisms in post-2020 regulatory framework.

[7] http://cdr.eionet.europa.eu/lv/eu/mmr/art04-13-14_lcds_pams_projections/pams/envwqhspw/

2. Exemptions from regulatory directives

a) Water Framework Directive: Establishing less stringent environmental objectives

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?

In Latvia, the possibility of establishing less stringent environmental objectives is transposed through the general framework law on Water Management (WML, Art.12). The wording is corresponding to that of Directive Art.4(5) without adding any additional requirements for deviating from the objectives.

In general, Latvia has established division of its waters in four districts taking into account the main rivers basins and accordingly there are four river basin management plans (RBMP) adopted: Daugava, Gauja, Venta, Lielupe. The situation with respect to achieving "good status" differs taking into account different factors affecting the quality and potential, for example, the intensity of agriculture is a major factor affecting Lielupe's river basin, at the same time, for Daugava river basin there are rather other challenges, including transboundary pollution.

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?

According to all four RBMP there is no Art.4(5) "quality exception" applied to any of the rivers. With respect to lakes, the Daugava EBMP indicates two "quality exceptions" applied to lakes: Lubans and Razna; however, one may question whether they are indeed "quality exceptions" that have been introduced in accordance with Article 4(5). The general remark indicating justification for particular exceptions identify that they are applied due to firstly, "uncertainties of the cause of the problem" and secondly (as the main reason) indication on the contradictory objectives: on the one hand, that supposed to be achieved under the WFD; on the other hand, the obligation to keep these lakes as Natura 2000 site (SPA for birds) where eutrophication of particular water bodies is part of the site management. Hence, under the justification for "quality exception" the RBMP is noting that a "complex assessment is needed" in order to clarify how these different objectives could be integrated.[8] In any event, it is clear that there are no incentives to achieve "good" ecological status in both these lakes. At the same time, it seems that these two exceptions could not neatly fit under Art.4(5) exception, as neither of its justifications have been applied.

Additionally, it is worth noting that there are a number of so-called "term exceptions" applied extending the term for "the purposes of phased achievement of the objectives for bodies of water" corresponding to Art.4(4) of WFD setting the term up to 2027 for achieving quality standards of the Water Framework Directive (according to the River Basin Management Plans as adopted for the second period: 2016 – 2021). If one compare the second RBMP with the first RBMP of 2009-2015, there are exceptions that have been reconsidered and lifted for some of water bodies and for some other the term exceptions applied (mostly in accordance with more precise data available on particular water body that indicates quality problems).

[8] Daugava River Management Plan of 2016 – 2021, pp. 143 – 144. Available: https://www.meteo.lv/fs/CKFinderJava/userfiles/files/Vide/Udens/Ud_apsaimn/UBA%20plani/Daugavas_upju_baseinu_apgabala_apsaimniekosanas_plans_2016_-2021_g__final.pdf

Thus, for example, in Lielupe river basin there are 10 term exceptions applied with respect to surface waters in achieving quality requirements extending the term up to 2027. At the same time there are 10 other body of waters (rivers and lakes) where the term exception have been lifted for the second planning period. In relation to Daugava river basin, there are 18 of surface waters where term exception has been lifted (thus aimed at achieving "good" status by 2021), however, for 9 the extension has been applied up to 2027.

Overall assessment of the river basins indicates that there are quite some incentives needed to achieve "good" status of water bodies in accordance with WFD, as according to the latest updates used for the elaboration of the RBMP for the second period of planning, there are in average 24 to 30% of those water bodies checked during 2015 that comply with the requirements on "good status."[9] One of the major challenges in achieving quality improvements (used also often for extending "term exception") is the effect of transboundary pollution (affecting more than 50% of water bodies of Latvia). Another most often used reasoning of applying term exception is indication of "insufficiency" of existing (and planned) events (included in the action programme) for achieving the quality standards or indication of "uncertainty" on whether planed actions will result in the needed improvements due to the complexity of effects affecting one water body or another, as well as insufficiency of data (and quality of data available).

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?

Exceptions from environmental objectives shall be reviewed together with a review of each management plan within 6th year cycle as prescribed by the Directive, as well as through the mid-term review.

There are no examples of "quality exceptions" review or lifted, as only recently two have been applied. However, "term exceptions" indicates the approach that in principle the exceptions are reviewed and lifted or objectives adjusted (to the higher level) for some water bodies, however, also some other are included in addition, which were missing in the majority of cases due to inappropriate/inadequate/incomplete data and monitoring information on a quality of one body of water or another during the first drafting stage of water management plans.[10] (see additionally response also under Q 3 above).

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.

River management plans are approved by an Order of the minister of environmental protection and regional development. The plan is considered as mid-term planning document. There are no any cases reported where the public would have attempted to challenge any of exceptions applied in any of those plans.

[9] National report on the environmental conditions 2012 – 2015 prepared in 2016. Available: http://www2.meteo.lv/varam/2015/ It is worth noting that data available are only with respect to small proportion of all water bodies (in each year this proportion varies), thus the question may be raised on the representativeness of data, as well as one may not draw convincing conclusions on the overall situation in water bodies.

[10] See e.g. River basin management plan of Daugava (2016-2021), pp. 16 – 19, (detailed description of the problem of data and information (however, only in Latvian). Available: https://www.meteo.lv/fs/CKFinderJava/userfiles/files/Vide/Udens/Ud_apsaimn/UBA%20plani/Daugavas_upju_baseinu_apgabala_apsaimniekosanas_plans_2016_-2021_g__final.pdf

At the same time, it is worth noting that there is an uncertainty about a legal status of such Order of a minister approving RBMP, as according to a hierarchy of legal norms of Latvia, minister is not entitled to adopt external regulatory enactments, at the same time, it is neither internal act of a public authority nor an administrative act (according to the definition of the Administrative Procedural Law). There is no case law available interpreting a legal nature of such Order. On the one hand, there is a presumption that the public may initiate a dispute on the elaboration of plan and action programme, including on inadequate implementation of public participation requirements, as well as some exceptions applied (as one may read from Art.26(1) and (2) of WML), however, it is not clear what one may challenge and there is no practice clarifying it.

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

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?

The Law on Pollution (Art.31 (6)) sets the overall preconditions of permits for operating installations under certain category (including Annx.I installations), entitling the Regional Environmental Board to apply exception derogating from BAT on emission limit values under certain conditions.

In order to apply such derogation, the operator has to submit an assessment proving that - due to the geographical location, the local environmental conditions and the technical characteristics of the installation – achieving emission limits, as determined in BAT would lead to disproportionally high costs compared to a threat to the environment. In case the derogation is applied, it is attached to the permit as Annex containing the assessment and justification (confirmation) of the exception applied, as well as emission limits for particular installation that may not exceed emissions limit values defined according to Article 11 of the Law on Pollution. One could note that the above mentioned requirements for derogating from BAT limits is in a sense stricter than in the Directive (Art.15(3)) as they are formulated as cumulative preconditions rather than alternatives meaning that the operator has to prove both - the geographical location /local conditions and technical characteristics - in order to be entitled to particular exception. However, it seems there was no intention to implement these preconditions stricter than the Directive requires.[11]

Up to date there is no derogation applied (and in fact has not been requested by any operator),[12] therefore, it is difficult to assess whether and how that functions, including whether an operator has to prove existence of both preconditions in order to apply derogation.

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?

[11] Annotation of the amendments of the Law on Pollution, Nr.90/TA-2419 (2012), indicating that the norm implementing Art.15(3) "is not stricter than required by EU law."

[12] Information from responsible person on the permitting system (legislation, policy) for such type of installations in the Ministry of Environmental Protection, (27.04.2018.)

In general, although IED permits are issued without fixed term, there is a requirement to review and if need be re-new permits within each 7 years cycle (and 10 years for EMAS installations).[13] In addition, Article 32(3) of the Law on Pollution sets quite some preconditions under which a permit has to be reviewed, e.g., a competent authority receives an information on adverse effect to the environment or human health caused by particular polluting activity or there is a prove of exceeding limits of environmental quality standard etc. Hence, one may presume that permit conditions derogating from BAT as exception would be reviewed as part of general revision of a permit, however, there is no obligation to review permit due to applied exception.

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.

As a derogation, if applied, has to be adopted as attachment to a permit, thus a part of an administrative act, it shall be possible for the public to challenge such decision.
In Latvia there are two different approaches to standing before the administrative courts: on the one hand, there is the "traditional" "subjective right" approach that would rather preclude to challenge such type of decision by any other person than addressee. On the other hand, through the "environmental exception clause" the requirement on "holding" "subjective right or legal interest" is abolished in case where a private applicant is challenging an administrative act that might be contravening environmental law. [14] Accordingly, under the latter rule, one may presume that the public may challenge such type of decision of a public authority in principle. However, as no derogation applied, no dispute appeared and thus no case law available.

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

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?

The provisions on compensatory measures to be applied in view of the coherence of the Natura 2000 are implemented through the several amendments in the Law on Specially Protected Nature Areas of 1993 (Art.43). Now it is closely following the wording as well as the main principles with respect to Directive Article 6(3) and 6(4) and their interlinkage. According to the Law, it should be implemented through in a sense "two step" procedure when a decision on the compensatory measures has to be taken after AA confirms adverse effect to Natura 2000 site.

The enforcement of these requirements are to be ensured by procedure detailed in several implementing enactments of the Cabinet of Ministers, including regulation on "Criteria for determining compensatory measures" for Natura 2000 sites (594/2006).[15] Thus, formally there is the regulation determining how the compensatory measures are to be chosen and applied, however, as there is no case where this regulation has been indeed applied, one may only speculate whether and

[13] Article 32.(3.[2]) of the Law on Pollution.
[14] According to Article 31(2) of the Administrative Procedural Law read injunction with Article 9(3) of the Law on Environmental Protection.
[15] Regulation No. 594 (2006) of the Cabinet of Ministers, defining also principles that measures cannot be substituted by a monitary payment to compensate advers effect (damages) to the site concerned.

how it functions. In fact, a brief look through the regulation leads to a question whether the main norms of Regulation on compensatory measures could indeed function requiring, for example, from a developer enforcement of the compensatory measures such as creation of a new territory or extension of existing.[16] It seems the main three types of measures more or less are reflecting those mentioned in the Commission's material of 2000,[17] however, the main question is about possibilities of enforcing one or another measure by the developer as the Regulation of 2006 requires in Latvia. thus on the responsibilities and application of one measure and another.

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?

The mitigating measures *stricto sensu* are a part of the implementation measures of Article 6(3), i.e. part of the appropriate assessment procedure.[18] It seems the implementing approach chosen by Latvia follows the logic expressed by the Commission on Article 6(3) admitting that although "for purposes of Article 6(3), an assessment does not, strictly speaking, need to look beyond the plan or project proposed to address alternative solutions and mitigation measures, there may be a range of benefits from doing so."[19] As well as confirmed by the CJEU in e.g. *Briels case*.[20] Hence, according to national law of LV, a developer as well as the competent authority (the Environment State Bureau - ESB) is obliged to indicate and assess mitigation measures respectively in order to reduce or avoid adverse effect to the site concerned.[21] Additionally, the ESB might set other mitigation measures as well as in fact protective measures in its (reasoned) Conclusions on one assessment or another grounding it on the principles of prevention and precaution and the Law on EIA. At the end of the day, these preconditions (as mandatory requirements) set by the ESB allows to proceed with the project through the presumption that if correctly applied they shall ensure that there is no adverse effect to the site concerned. Additionally, monitoring requirements are mandatory part of the authorizing permit setting condition of the obligation to stop an activity if adverse effect is appearing. In result, application of mitigating and protective measures has indeed allowed to avoid from undergoing the test of Art.6(4) in all cases so far.

Ultimately, the line between "mitigating" (and protective) measures and "compensatory" measures has been often blurred, as one may also see from the cases analysed by the CJEU (quoted in the Questionnaire), as well as when one analysis examples in practice when measures under one label or another are applied (indicated under the next question). In general one may observe the

[16] Section 5 of Regulation No.594 (2006). At present, there is one project initiated (to build a bridge over the river in Natura 2000 site) where the competent authority has indicatively noted that it could be the first project which as this moment is going through the "procedure of Art.6(3)" but it seems to be leading to the next step and thus, decision on the compensatory measures. So, probably, soon one could finally assess whether and how the system functions.

[17] EU COM material on „Managing Natura 2000 sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC." (2000), p. 47, Available: http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

[18] Regulation No 300 (2012) of the Cabinet of Ministers detailing the procedure and responsibilities in assessing impact on Natura 2000 sites (in cases when the competent authority has took a decision that there is no need to make full EIA), according to the Law on Environmental Impact Assessment (Art.4^1(1)).

[19] EU COM material on „Managing Natura 2000 sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC." (2000), p. 38.

[20] C-521/12 para 28, stating "the application of the precautionary principle in the context of the implementation of Article 6(3) of the Habitats Directive requires the competent national authority to assess the implications of the project for the Natura 2000 site concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project 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."

[21] Paras 9.9. and 40.11 of Regulation No 300 (2012) of the Cabinet of Ministers.

incentives to apply any possible measure under which a decision can be taken to conclude that there is no adverse effect to the site and thus a developer does not have to undergo the test set out in Art. 6(4) of Habitats Directive.

It is worth noting that it seems the approach adopted by the competent authority (ESB) in assessing and applying mitigation and protective measures have not triggered questions up to date at least such that have been resulted in a case before the court. However, sometimes it is debatable whether indeed "protective" or rather "compensatory" measures have been applied in some cases and thus, whether correct implementation of Article 6(3) is always achieved. [22]

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?

One may always discuss weather indeed all projects that should be covered by Art.6(3) requirements are indeed captured by the legislation in place. On the other hand, there are quite detailed regulation (legally binding external enactments) for almost each Natura 2000 site that sets quite some prohibitions of certain type of activities in one area or another. Thus, one the one hand, there could be activities in some sectors (as forestry and agriculture), which are out of the scope of those projects that have to go through preliminary assessment and thus fall outside the requirements on the appropriate assessment. On the other hand, there are quite some actions forbidden at all to take place in one Natura site or another. Thus, such type of actions cannot even get till assessment procedure as they are forbidden to be performed according to regulation. Nonetheless, this approach of "individual regulations" forbidding one activity or another (and in fact differently approaching what and where is forbidden that dependent on "zones" and type of the site) is often criticized as indeed representing quite cumbersome (and fragmented) system that is difficult to implement as well as understand for individuals and private owners that supposed to know it. Hence, one may say that there is a system in place aimed at additionally allowing for the offsetting of negative environmental impacts, however, it is rather difficult for even describing in short report.

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?

The socio-economic services of natural resources as one of the main factors to focus in the area discussed above is indeed one of issues appearing often in the discussions on the nature protection system. However, they have not materialized in examples that could be indicated here.

[22] For example, as one may question in analysing the assessment and the Bureau's Conclusion on a project to construct 10 private houses and relevant infrastructure in Natura 2000 site (in the coastal area). There seems all – mitigation, protective and compensatory measures were applied as preconditions for authorization to proceed, however, no Art.6(4) procedure has been undergone. Conclusion No. 3-n of 2016 on the assessment of the effects of construction of buildings and infrastructure in Natura 2000 site – Nature park "Piejura" p. 20. Available (in Latvian): file:///Users/zm/Downloads/atzinums-nr-3-n-lilastes-kapas-natura2000.pdf