Short overview of recent developments in The Netherlands

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1) Urgenda decision

As is well known by now the civil section of The Hague District Court ruled—in its judgment of June 24th 2015 (60 pages translated into English) that the Netherlands has breached the standard of due care by implementing a policy that would lead to a reduction of CO2 emissions by 2020 of less than 25% compared with 1990 emissions. Any such policy of the Netherlands was seen as insufficient to avoid dangerous climate change and was therefore unlawful towards the Urgenda Foundation, a citizen's platform that instituted the proceedings, partly on behalf of 886 Dutch individuals. The Court ordered the State to cut CO2 emissions by 25% by 2020 against a baseline of 1990 emissions. The Netherlands has lodged an appeal against the judgment and the appeal court will hear the parties on 28 May 2018.

In light of this judgment the government is however working on a first ever climate change act (predominantly based on the structure UK Climate Change Act but probably with a smaller scope), on a first ever Climate Agreement and on a new Energy Agreement. It is also working on a legislative act that will prohibit coal being used in power plants (from either 2025 or 2030 onwards depending on net electrical efficiency of the power plant). A proposal for such an legislative act was posted on the internet on 19 May 2018.

2) Dutch Programmatic approach on Nitrogen and article 6 Habitats Directive

The Dutch Council of State has on 17 May 2017[1] asked the ECJ for a preliminary ruling on whether the Nitrogen Approach Programme is compatible with EU law, specifically the Habitats Directive.[2] The programme is known in the Netherlands as the *Programmatische Aanpak Stikstof* ("PAS") and is based on the Dutch Nature Conservation Act (which has been renewed since 1 January 2017). Activities that contribute to nitrogen deposition are only allowed if they meet the requirements set out in the PAS. If the ECJ rules that the PAS conflicts with EU law, this would mean that issuing a permit based on the PAS is no longer deemed legal and also that the system of exemptions for minor nitrogen deposition has to be reconsidered. While the Netherlands wait for the court's ruling, the big question is what to do with activities that contribute to nitrogen deposition, the existing permits granted on the basis of the PAS and with pending procedures under the PAS until it is clear whether the PAS is allowed in light of the Habitats Directive.

What are the key questions asked by the Council of State? The ECJ has been asked to decide if the Habitats Directive allows a programme-based approach where the appropriate assessment of an individual project (as required by EU law) is replaced by the appropriate assessment under the PAS. The Council of State is also asking the ECJ if how the PAS is carried out is compatible with the Habitats Directive. Due to the economic and ecological

[1] Cases ECLI:NL:RVS:2017:1259 and ECLI:NL:RVS:2017:1260 (see uitspraken.rechtspraak.nl)

[2] Also see the recent research by Helle Tegner Anker, Lasse Baaner, Chris Backes, Andrea Keessen and Stefan Möckel, *Comparison of ammonia regulation in Germany, the Netherlands and Denmark – legal framework*.

interests involved, and the uncertainty faced by permit holders until the ECJ issues its ruling, the Dutch Council of State has urgently requested to give priority to these questions and issue its ruling before 1 July 2018. This request has been without effect so far.

The Council of State has also ruled that a number of choices, data and assumptions on which the PAS is based are unclear. It ordered the Dutch authorities to clarify these uncertainties. The legality and permissibility of the PAS depends on how the ECJ answers the preliminary questions and on whether the existing deficiencies can be remedied. The Council of State assumes that the PAS is permissible and first decided not to issue a preliminary injunction, meaning that the PAS was still valid. It stated that it will defer all PAS proceedings. Holders of a permit can, as long as no preliminary injunction is issued, use these permits. However, according to the Council of State they do this at their own risk. In March 2018 the Council of State decided that it will order a preliminary injunction under certain conditions and it did so in 2 pending cases.

3) Civil law court ruling on air quality

Although the District Court of The Hague has conceded that the government does not at present meet the European limit values throughout the Netherlands and will not meet those values in 2020 either, therefore being in violation of the air quality rules, the (civil law) court nevertheless held in its judgment of 27 December 2017 that the government is not at fault for this situation.[3] That ruling was a major blow to Friends of the Earth Netherlands and other claimants, who deemed that the government violated human health rights (articles 2, 3 and 8 ECHR and/or article 6 of the International Covenant on Civil and Political Rights (ICCPR) and/or article 12 of the International Covenant on Economic, Social and Cultural Rights).

This ruling by the District Court in The Hague was quite the opposite of the judgment of 7 September 2017 rendered by the same court in the preliminary relief proceedings.[4] The court instructed the government to speed up the process of improving air quality in the Netherlands. Friends of the Earth Netherlands had instituted those preliminary relief proceedings as the proceedings on the merits were progressing too slowly and it sought measures to combat situations where air quality standards are exceeded and can have a negative impact on public health.

All parties agreed that the NO2 (nitrogen dioxide) and PM10 (particulate matter) limit values were being exceeded in some places in the Netherlands, whereas pursuant to Directive 2008/50/EC on ambient air quality and cleaner air for Europe, implemented in Title 5.2 of the Dutch Environmental Management Act (*Wet milieubeheer*), those limit values (after derogation) should have been met on 1 January 2015 and 11 June 2011, respectively. Pursuant to article 23 Directive 2008/50/EC, the government is obliged to adopt an air quality plan that sets out appropriate measures to ensure that the exceedance period is kept as short as possible. The preliminary relief court held that an enumeration of general and national measures in the National Air Quality Cooperation Programme (NSL) was insufficient for that purpose and that it did not follow from the programme that the exceedances would be eliminated in the shortest period possible.

[3] Judgment (on merits): ECLI:NL:RBDHA:2017:15380.

[4] Judgment (preliminary relief): ECLI:NL:RBDHA:2017:10171.

The judgment rendered in the preliminary relief proceedings instructed the government to identify all places in the Netherlands where limit values were being exceeded or were expected to be exceeded and to subsequently adopt an air quality plan in accordance with the requirements imposed by the Directive. In addition, the preliminary relief court prohibited the government to take measures or to make arrangements for measures to be taken which in the opinion of the National Institute of Public Health and Environmental Protection (RIVM) are statistically expected to result in the continued or new exceedance of the limit values. The latter point, i.e. the potentially far-reaching prohibition to take measures was reason for the government to appeal the preliminary judgment, while the proceedings on the merits were also still underway. The government has appealed the judgment in the preliminary proceedings and was proven right in the court's decision of 22 may 2018.[5]

In the proceedings on the merits the claimants were of the opinion that the obligations arising from the Directive as implemented in Title 5.2 of the EMA were insufficient; achieving the target values for PM10 as well as PM2,5 (particulate matter) set by the WHO, which are more stringent than the European limit values, was necessary to effectively protect public health. The court ruled that the government was already taking measures to improve air quality, was working towards achieving the WHO's target values and was on the right path to effectively improve air quality, as a result of which the number of exceedances had been cut back. The government did not have to meet the WHO's target values at present or in the near future. The court held that even if the exceedance period lasted long and all requirements were not yet met by 2020, it could still be the case that the government kept the exceedance period as short as possible since, in the court's opinion, improving air quality in problem areas is a very complex task. The court also ruled that the envisaged improvements would not occur overnight, but that the matter is a long-term process.
The District Court of The Hague dismissed all claims and ruled in favour of the government, whose arguments included that "the bottlenecks in city centres are generally necessary for the accessibility of city centres". Friends of the earth Netherlands has lodged an appeal against this judgment.

4) Claim in civil court against Shell for its role in Climate change

Possibly motivated by the Urgenda decision (but surely by the desire to act against climate change) Friends of the Earth Netherlands also announced that it will take Shell to court if it does not act on demands to stop its destruction of the climate. It stated that 'Shell is among the ten biggest climate polluters worldwide. It has known for over 30 years that it is causing dangerous climate change, but continues to extract oil and gas and invests billions in the search and development of new fossil fuels.' The Friends of the Earth Netherlands case is unique because it is the first climate lawsuit demanding that a fossil fuel company acts on climate change, rather than seeking compensation.

5) Environment and Planning Act (EPA) in 2021 (?)

The Netherlands has been working on a restructuring of environmental law by working towards the introduction of the Environment and Planning Act that will replace 26 existing Acts in the field of Environmental Law. There is an unofficial English translation of both

[5] Judgement (appeal against preliminary relief): ECLI:NL:GHDHA:2018:1128.

the Act itself and the explanatory memorandum. Both are no longer up to date. Recent information suggest that the EPA will be in force in 2021; many doubt however whether this will indeed be the case. It is expected that the newest texts of the legislative act implementing the EPA and the Governmental Decrees (4) will be available this summer, together with the advice of the Council of State.

6) Gas extraction in Groningen gas field

Since 1963 natural gas is extracted from the Groningen field and practically all households in the Netherlands make use of it for heating their homes (and for cooking). The consequences of the gas extraction have become more and more serious in recent years; earthquakes caused by the extraction have resulted in damage to houses and stressed and angry inhabitants of the Groningen province. The Dutch company NAM extracts the gas and has been held liable for all damage caused by the earthquakes that are caused by the gas extraction. The Netherlands has now concluded that this situation is no longer socially acceptable. From 19 March 2018 it accepted that the government will take an important place in the administrative process of providing compensation for the damage, including paying for the damage caused by NAM. The minister decided that he will be competent to award compensation (by way of administrative order!). The minister will negotiate with NAM in order to receive restitutions.

On 29 March 2018, the Ministry of Economic Affairs and Climate furthermore wrote a letter to Parliament announcing that natural gas extraction from the Groningen gas field will be terminated entirely in the coming years. No later than 2022 and possibly one year sooner, the natural gas extraction level will be reduced to below 12 billion Nm^3 (compared to an average of 42,5 billion Nm^3 from 2006-2015 and 27 billion Nm^3 in 2015-2016. In subsequent years, it will gradually be reduced to zero until the year 2030. In order to remove the cause of earthquake risks, the Dutch Government is taking measures to end natural gas extraction from the Groningen field as soon as possible. Although the feasibility of some of these measures is still being reviewed, the letter describes a number of far-reaching measures which have to be taken to reduce natural gas extraction in Groningen. A new nitrogen installation will be built for conversion of high-calorific natural gas into low-calorific natural gas (other possibilities are being studied). By 2022, all large industrial Groningen gas users must have switched to other sources of energy (170 companies that consume around 4.4 billion Nm^3). By 2029, low-calorific natural gas will no longer be exported from the Netherlands. Natural gas-free home construction will become the norm during the present government term and the Dutch Government has made funds available for the conversion of existing homes to natural gas-free properties.