NORWAY

AVOSETTA MEETING Vienna 2018 - QUESTIONNAIRE

FLEXIBILITIES WITH REGARD TO MEETING EU REGULATORY OBJECTIVES AND REQUIREMENTS

I. Policies of prioritising economy and ecology

1. 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.

At the general level, there have been two important trends recently in Norway in the direction of promoting economic activities. The most general example concerns the instructions for preparing cases for internal decision-making in public authorities ("Instructions for Official Studies and Reports"). All references to duties to take into account specific interests were deleted in the new version that was adopted in 2016. Importantly, the references to environmental considerations and the constitutional provision on the right to environment (article 112) were deleted. The overriding approach of the Instructions is broad benefit – cost analyses from the perspective of social economics based on detailed guidelines. The Instructions emphasise the assessment of budgetary consequences, consequences for local communities and regions, and the effects for public and private businesses.

A second important trend is the strengthening of local self-government. This has been most clear-cut and long-term in the context of management of protected areas and the adoption of permits to hunt large carnivores. The government has also proposed amendments to the Planning and Building Act that would curtail administrative and judicial review of their decisions. The extent to which such initiatives will lead to the prioritization of economic activities over environmental interests is, however, unclear.

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.

Some introductory remarks

Norwegian emissions of greenhouse gases has been very stable since 1990 – there has been no major increases or decreases during the period. There has been a slight increase in emissions from sectors covered by the EU-ETS and a slight decrease in emissions not covered by the EU-ETS. Currently, Norwegian emissions within the two categories are approximately the same. Total Norwegian emissions have ranged between 50 and 55 million tonnes CO2

equivalents since 1990. Emissions have been significantly reduced in industries and have significantly increased in the petroleum sector. Emissions from petroleum production has become the largest emitter in Norway with approximately 15 mill. tonnes annually.

The Government's White Paper on climate change policies (Meld. St. 41 (2016-2017), p. 37) presents scenarios for Norwegian emissions in 2020 and 2030 based on current mitigation measures. The estimates are that Norwegian emissions in 2020 will be 51.8 mill. tonnes CO2 in total, of which 26.3 mill. tonnes will be within the EU-ETS. The corresponding numbers for 2030 are 48.3 mill. tonnes and 25.2 mill. tonnes. The Paper considers that planned new policy initiatives will lead to emission reductions of approximately 35 mill. tonnes CO2 during the period from 2021 to 2020 (p. 51).

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

   Norway participates in the EU-ETS framework and has implemented relevant rules through the Greenhouse Gas Emission Trading Act 2004 no. 99) and the Regulation relating to the duty to surrender emission allowances and trading with greenhouse gas emission allowance (2004 no. 1851). The flexibility mechanisms of the Kyoto Protocol are set out in sections 7-7 to 7-15 of the Regulation.

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?

   Norway has used the possibility of including all credits originating from third countries that are approved according to Directive 2003/89/EEC (section 7-10 of the Regulation). During the period 2008-2012, there was a limitation on the use of project-based credits based on the Kyoto Mechanisms to 15.72 % of the total emissions of the enterprise in question (section 7-12 of the Regulation). There is also a general limitation on the transfer of credits from the first to the second commitment period under the Kyoto Protocol to 2.5 % of Norway's assigned emissions units in the first period for each of the two Kyoto Mechanisms – CER and ERU (section 7-15 of the Regulation).

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?

   The Parliament passed the Climate Act in 2017 (no. 60), which sets out the objectives of reducing emissions by at least 40 % within 2030 and transforming Norway into a low emission society by 2050, meaning emission reductions between 80 and 95 % (sections 3 and 4 of the Act). In both cases, the Act mentions that Norway's participation in the EU ETS shall be taken into account. The preparatory works of the Act makes clear that the courts cannot review the authorities' compliance with the Act.

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?

   The Effort Sharing Decision was not made part of the EEA Agreement, and has therefore not been implemented in Norway.

2. Has your country used any of the flexibility mechanisms yet in order to comply with ESD requirements? If so, to what extent?

   Not applicable to Norway.

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?

   The plan is that the Climate Action Regulation will become part of the EEA Agreement and be implemented by Norway. The Government's White Paper on climate change policies (Meld. St. 41 (2016-2017), references in the text are to this Paper) discusses the issue in some detail. The plan is that Norway shall have a reduction commitment of 40 % (from 2005 to 2016, there has been a reduction of only 0.7 % in relevant sectors). Norway wishes to join those countries that are allowed to convert ETS certificates to fulfil its emission reduction obligations (p. 29).

   There is a detailed analysis of the potential for Norway to benefit from LULUCF under the new regime. The proposal of 2016 seemed to be disadvantageous to Norway, and could mean that Norway would face increased emissions of 15 million tonnes CO2 during the period despite the existence of significant expected uptake of CO2 due to increased growth during the same period (p. 31). The Government also considered that the opportunities Norway enjoys under the Kyoto Protocol, where it benefits from approximately 1.8 mill. tonnes of uptake in forests annually, would be significantly altered under the new EU regime as proposed (p. 30-31). Norway has actively cooperated with other "forest countries" in order to promote proposals that would allow it greater flexibility under the Climate Action Regulation (p. 31).

   Against this background, Norway considers conversion of ETS certificates and trade in emission reduction units as being the most important flexibility mechanisms in the Norwegian context. These mechanisms are seen as crucial to Norway's compliance (p. 32). During the period, Norway considers that it will be allowed to convert ETS certificates in the order of 5.5 to 11 mill. tonnes of CO2. The Paper states that this flexibility will be fully used (p. 32). The Government indicates that purchase of emission reduction units will be undertaken to the extent that it is cost effective (p. 33). Norway will also make use of the opportunities to save and borrow as proposed (p. 33).

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?

   Article 4.5 of the Directive has been implemented through section 10 of the Water Regulation (2006 no. 1446). Section 10 is almost a direct translation of Article 4.5 with the following exceptions:

   - It does not open up for less stringent quality standards in cases where the current quality is caused by “their natural condition”
   - It does not include Article 4.5(d). This provision is partially implemented through sections A.5, B.1 and B.2 of Annex VII to the Water Regulation. These rules do not seem to fully implement the duty to state the reasons adopting less stringent quality standards.

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?

   Norway has 13 management plans. In these we find that altogether 710 bodies of water have been exempted under Section 10 of the Regulation. There are no exemptions in two of the plans (both of these are cross-border water regions which are managed in cooperation with Finland and Sweden) and 196 and 149 exemptions in the two plans with most exemptions.[1]

   Guidelines adopted by the ministries establishe that Section 10 can be used essentially where the water quality of a river is seriously affected due to the operation of hydropower (no water during parts of the year). Nevertheless, we see several examples of exemptions for polluted lakes and creeks that have been diverted through pipes..

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?

[1] The exact figures are as follows: Norsk-finsk vannregion: 0 (p. 72 of plan), Finnmark: 6 (pp. 70 and 73-74), Troms: 42 (p. 78), Nordland og Jan Mayen: 61 (p. 85), Trøndelag: 24 (p. 89), Møre og Romsdal: 22 (p. 77), Sogn og Fjordane: 196 including one lake (p. 56), Hordaland: 91 (numbes provided for sub-regions, see pp. 83, 95, 103, 113, and 130), Rogaland: 149 including two polluted lakes (pp. 88-9), Agder: 20 (p. 49), Vest-Viken 83 including two lakes (p. 103), Glomma: 22 (pp. 6 and 70-1), and Västerhavet 0 (p. 6).

This is not applicable to the Norwegian management plans since the current plans (2016-2021) are the first fully operational plans. The previous period (2010-2015) was called a "pilot period" and submission of plans was voluntary.

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.

   The management plans are currently adopted within the framework of the Planning and Building Act as regional plans (it may seem that this is about to be changed for the next generation of plans). The plans adopted within this framework cannot be subject to administrative complaints. In theory it seems to be possible to challenge a plan as unlawful through court proceedings. However, such proceedings would most probably not be successful.

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?

   The basic conditions for adopting emission permits are set out in Section 11(4) of the Pollution Control Act (1981 no. 6, unofficial translation): "

   > When the pollution control authority decides whether a permit is to be granted and lays down conditions pursuant to section 16, it shall pay particular attention to any pollution-related nuisance arising from the project as compared with any other advantages and disadvantages so arising.

   The Act also refers to BAT in Section 2:

   > The Act shall be implemented in accordance with the following guidelines: … 3. Efforts to avoid and limit pollution and waste problems shall be based on the technology that will give the best results in the light of an overall evaluation of current and future use of the environment and economic considerations.

   These rules have not been amended since the Act was adopted in 1981. The Directive was implemented through provisions in the Pollution Regulation (2004 no. 931). Article 15 was implemented through Section 36-15 of the Regulation, which to a significant degree translates Article 15.3 and 4. However, an additional flexibility is introduced by stating that the emission limitations may under no circumstances be more stringent than those established through regulations. This would be acceptable if regulations always comply with the BAT requirements of Article 15, but there is no guarantee that this will be the case. Annexes II of chapter 36 provides details on how to implement BAT. The legislation as a whole therefore seems to be more flexible than Article 15.3 and 4 of the Directive.

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?

I have not been able to find any statistics or overview of the use of the flexibilities in Section 36-15 of the Pollution Regulation. When BAT is discussed in emission permits, it is mostly as a justification for setting strict standards. BAT is also frequently mentioned by enterprises when they are of the opinion that the emission limits are too strict and go beyond BAT.

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?

   There is a general rule in Section 36-15 of the Regulation that exceptions from BAT shall be reviewed whenever the emission permit is subject to reconsideration. According to Section 18 of the Pollution Control Act, a permit may be altered or withdrawn after 10 years. It is also possible to alter the conditions in the permit at an earlier time if certain conditions are fulfilled. In addition, each permit may contain specific provisions on review. There is no easily accessible overview of how often permits are being reviewed. Public authorities have significant discretion when determining whether to review the conditions of pollution permits.

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.

   The public can use administrative review procedures (this follows from the statement that exemptions are to be regarded as individual decisions in Section 36-15 of the Regulation) and bring cases concerning the lawfulness of pollution permits to the courts.

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?

   Not applicable to Norway as Natura 2000 is not included in the EEA Agreement.

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?