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Flexible Mechanisms in Turkey

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QUESTIONNAIRE: FLEXIBILITIES WITH REGARD TO MEETING EU REGULATORY OBJECTIVES AND REQUIREMENTS

I. Prioritising developmental activities over environmental interest

1. Initiatives, current or planned, in policy- and/or decision-making in your country which result in prioritising? If so, please provide examples.

There is no legislative initiative directly and explicitly indicating that developmental activities should be favored over environmental protection. However there are several policy texts emphasizing only developmental goals as well as various regulations providing significant financial incentives for investors. To put it shortly, indeed the ruling party AKP (*Adalet ve Kalkınma Partisi*) does not need such a specific regulation because prioritisation of developmental activities over environmental protection became nearly a tendency under its administration for more than eleven years. This tendency gradually became stronger as parallel to problems related the “rule of law”, and it can be observed in terms of every aspect of governmental process such as adoption and amending legislation, establishing policies, making decisions, and implementation. Attempts toward regressive amendments on current legislation; ignorance or undermining the requirements of environmental legislation with regard to several protection areas such as forests, sensitive ecosystems, nature conservation and productive agricultural areas as well as environmental impact assessment; noncompliance with the annulment decisions of the courts are the main examples of that kind of policy¹.

A recent example of weakening certain strict requirements of the current environmental legislation in favor of development is related to the by-law on the protection of agricultural lands (*Resmi Gazete 24 February 2018*). The qualified majority requirement for decision to allow using of those areas for developmental goals such as energy and transport projects was removed and replaced by just a simple majority of the attendants to the relevant council’s meeting.

Most initiatives with regard to regressive amendments favouring development are related to environmental impact assessment. It seems that the Government does not give up weakening that process in spite of several annulment decisions declared by both the supreme administrative court (*Danıştay*) and the Constitutional Court against such initiatives until now. A recent governmental effort in this context is an amendment on the Mining Law allowing an indirect derogation from environmental impact assessment procedure (October 2017) for mining activities. According to the draft provision, “if the EIA procedures cannot be completed within three months, the consent with

¹ Various examples of this tendency can be seen in the report on “Recent Developments on Environmental Policy and Law- Avosetta 25-27 May 2018” written by the Author.

regard to relevant application would be considered as granted".² This provision which is clearly against Article 56 of the Constitution on the right to the environment is, fortunately removed from the relevant draft law just before the last voting on the draft law in the parliament.

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 ETS Directive is not transposed into national legislation, and there is no regulation on using international credits either. That is partly because Turkey is a party to both the United Nations Framework Convention on Climate Change and the Kyoto Protocol under a *sui generis* position³. In that context, Turkey had never have been under a mandatory emission reduction commitment with regard to greenhouse gases for the first period from 2008 to 2012 of the Kyoto Protocol, neither she has for the second period from 2013 to 2020. Consequently Turkey has not being a participant in the flexibility mechanisms set out in the Kyoto Protocol. To put it shortly, Turkey's position under the UNFCCC and the KP does not allow either to participate in emission trading or benefit from CDM and JI projects.

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?

There is no requirement to comply with EU-ETS for Turkey because she is not a member to the EU yet.

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?

Turkey is not obliged to comply with EU-ETS requirements, consequently no official consideration on the issue, and no academic discussion within my knowledge.

b) Effort Sharing (Non-ETS)

1.(How) were the flexibility mechanisms of the ESD transposed into national law?

No transposition yet. Indeed, no legislation with regard, respectively to the scope of the ETS, cap setting, defining temporal flexibility, price predictability, cost containment, and defining the distribution of allowances except MRV system⁴. Works with regard to a complete transposition are ongoing under several projects funded mostly by the EU countries and the World Bank.

² See, Nükhet Yılmaz Turgut: "Yaşam Hakkı ve ÇED: Çevresel Etki Değerlendirmesinin Etkisizleştirilmesi Yaşam Hakkına Tehdittir" ("The Right to Life, and EIA: The Weakening of the EIA is a Threat to the Right to Life"), *Cumhuriyet Herkese Bilim Teknoloji*, 3 Kasım 2017.

³ The special circumstances of Turkey are briefly explained in Annex 1.

⁴ Regulations with regard to MRV are the by-law on Monitoring of Greenhouse Gas Emissions (*Resmi Gazete*: 17.5.2014, amended in 29.6.2016 and 31.5.2017) and the Communiqué on Voluntary Carbon Market Project Registry (*Resmi Gazete*: 9.10.2013). The former establishes an installation level MRV system that covers all major sources of GHG emissions from the energy (combustion fuels with output of 20 MW) and industry (cement,

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

Turkey is not obliged to comply with ESD requirements, and there is no transposition.

As mentioned above Turkey's position under the UNFCCC and the KP does not allow to participate in and benefit from the flexibility mechanisms of the KP. Therefore, Turkey can only host project based activities under the voluntary carbon markets (VCMs). The VCM was introduced in 2005 and is considered as a preparatory instrument for a future ETS in Turkey. The main regulation in that context is the "Communique on Voluntary Carbon Market Project Registry". It establishes a registry for offset projects, which could in the future be linked to the establishment of an ETS registry and related rules

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?

There is no official document on the issue because it is not under the consideration of Turkey yet, and no academic discussion within my knowledge. According to determinations and recommendations put forward under preparatory documents with regard to the establishment of ETS in Turkey as well as under the experience regarding the voluntary carbon market, it can be predicted that Turkey shall rely the flexibility mechanisms in the future.

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?

WFD and related directives have been only partially transposed into national legislation. The main reason is that, above all it needs to adopt a water law under the legislative structure based on the Constitution. A draft of such a law has been prepared in the previous years but was not adopted in the parliament yet. Therefore, the works with regard to a complete transposition are currently ongoing⁵, and they would be completed by 2023.

Presently, there are several by-laws transposing some provisions of the WFD and related directives. The regulations as regard to environmental objectives and river basin management plans (RBMP) are the By-law on the Preparation, Implementation and Tracking of River Basin Management Plans (By-law)⁶, and the Communique on the Organization, Duties, Working Principle and Procedures

ceramic products, coke production, glass, insulation materials, metals, paper -pulp, chemicals over determined threshold sizes or production levels) sectors.

⁵ A report on the Execution of the National Implementation Plan for WFD in Turkey titled Technical Assistance for the Conversion of River Basin Action Plans to River Basin Management Plans was completed on December 2017 under a project funded by the EU (EuropeAid/134561/D/SER/TR). It can be reached on www.ribamap.ormansu.gov.tr/shared/files/en_15154964.pdf. www.cfcu.gov.tr/tender737166 (reached on 15 March 2018)

⁶ Havza Yönetim Planlarının Hazırlanması, Uygulanması ve Takibi Yönetmeliği. *Resmî Gazete* (Official Gazette) 17.10.2012 (amended 28.10.2017), number 28444.

of Basin Management Committees (Communique)⁷. The former only states environmental objectives of general nature under the title of principles (Article 5) not transposing Article 4.5 of the WFD. Only article with regard to deviation (Article 10.9) is ambiguous. It states that if the targeted environmental objectives in the RBMPs are not reached in spite of taking the required measures, deviations with regard to these situations would be defined according to the relevant reasons.

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 the official information on the website of the relevant ministry, the works with regard to preparation of RBMPs were completed for only 4 out of total 25 river basins at the end of 2017. However since these plans are not officially published and made available to the public yet it is not possible to make a comment on the issue.

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?

In terms of implementation, it is not likely to make a comment on the issue because the completed 5 RBMPs were not published, and consequently not applied yet.

In terms of legislation, according to the By-law, RBMPs should be reviewed every six years thereafter as mentioned in the WFD. Apart from timing, the provisions with regard to review procedures of RBMPs (Article 11 of the By-law) are in line with the WFD as well. Additionally, Article 10.12 of the By-law also allows updating on environmental objectives (without referring to the less stringent objectives) for the cases that reaching the targets in the RBMPs is impossible due to natural, socio-economic and technical causes in spite of the measures specified in the RBMP are taken.

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. There are two possibilities.

First, local public and nongovernmental organizations can challenge less stringent environmental objectives by submitting written opinions on draft documents to the local Governor within the timetable (six month) announced in accordance with the By-law. The competent Ministry has to take these opinions into account before finalize reviewing/updating of the relevant plans. Requirements regarding public information and consultation under Article 14 of the WFD, have mostly been transposed into the above mentioned By-law (Article 11). However the related provisions of the By-law are not well designed. For instance there is not any statement in terms of participation of the public on Article 9 titled “participatory approach in the basin management”, instead, it only indicates “active participation of relevant institutions into the process, and access to information by stakeholders through the Water Management Coordination Board, Basin Management Central Board, Basin Management Committees, and Provincial Water Management Coordination Committee” without mentioning the term public explicitly. Access to information and participation are provided for public under Article 11 titled “updating of basin management plans”. Apart from that, Basin Management Committees are charged for providing public to participate both the preparation,

⁷ *Resmi Gazete* (Official Gazette) 20. 05.2015, number 29361.

reviewing and updating of the RBMPs under the Communiqué (Article 7.d). On the other hand there is also an inconsistency among several provisions of the By-law with regard to the wording of public. Articles 11 and annex 1.8, 1.10 of the By-law indicate the term “public” while Article 4 with regard to definitions refers to the term “local public”. This conflict should be overridden in favour of the term public because the Environment Law refers to the term public.

Second, the representatives of universities and NGOs can challenge the less strict measures for environmental objectives during the meetings of the Basin Management Committees because they are legally placed among the members of that committees established for each basin. The conducting of the initial works with regard to the preparation of RBMPs are among the duties of these committees.

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?

Transposition of the IED into national legislation is still not completed. A **Draft** By-law on Integrated Environmental Permit has been prepared but is not published in the official gazette yet. Indeed, currently to estimate the date for publishing is not likely since discussions have been ongoing, particularly on the objections raised by industry. Main objections are related to the additional burdens such as investment in new technologies that the adoption of the IED would impose on related industries and to active public participation procedures and measures⁸.

The provisions of this **Draft** By-law with regard to setting less strict emission limit values (Article 8.5, 8.6) are in line with Article 15.4 of the IED. It also allows temporary derogations not exceeding nine months for the testing and use of techniques referred in BAT reference documents as indicated in Article 15.5 of the IED (Article 8.7).

Draft By-law does not include further specific requirements for deviations, instead it gives discretionary power to competent authority to regulate general binding rules for certain activities in addition to integrated permit requirement (Article 6.1).

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? There is not any available data or information yet.

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?

The above mentioned **Draft** By-law includes a specific Article on monitoring and updating of permit conditions by competent authority (Article 28). However this article does not provide a clear statement in terms of “regularly review”, instead it set outs 4 years beginning the publication of decisions on BAT final documents for certain cases. Therefore there is no time requirement for other

⁸ It is also put forwarded under these discussions that prepared BAT documents are not aligned with the economic and technical realities of Turkish industry and they should be revised. See **Tepav**, *Turkey's Compliance with the Industrial Emissions Directive, A Legislation Gap Analysis and its Possible Costs on Turkish Energy Sector*. March 2015, p.17. www.tepav.org.tr/upload/files/haber7142747557-5-turkey_compliance (reached on 10 March 2018).

mentioned situations, and monitoring and updating would be conducted according to the relevant conditions.

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 **Draft** By-law on Integrated Environmental Permit includes all provisions of the IED on access to information and public participation in the permit procedure although they are not well designed in terms of integrity and legal certainty. In any case there are four possibilities for public to challenge less strict emission limit values under this Draft By-law. **First**, public can submit written opinions and objections following the official announcement with regard to the relevant application and before the draft permit is prepared. The competent authority has to take these opinions into account during the preparation of the draft permit (Articles 11 and 16, Annex 4). **Second**, public can object the draft permit by submitting written opinions to the local Governor within the timetable announced in accordance with the By-law (Article 19). **Third**, public can object the permit before the competent administrative body according the procedures defined in the decision related to permit (Article 27). *(Draft By-law does not use the term public for the second and third options, instead it only states the terms “concerned private and legal persons”).* **Fourth**, public can bring a legal action before the administrative courts to annul the permit in accordance with the provisions of the Law on Administrative Judicial Procedure.

OPTIONAL:

Works including negotiations on the draft law on nature protection on the full transposition of Habitats Directive are still ongoing under several projects particularly supported by the EU.

Annex 1. The Special Circumstances of Turkey under the UNFCCC and the Kyoto Protocol

When the UNFCCC (the Convention) was adopted Turkey was included in both Annexes I and II of the Convention for being an OECD member and being classified among developed countries. Under this position, Turkey was required to commit not only to reduce emissions but also to assist developing countries some of which are wealthier than Turkey. Therefore Turkey did not ratify the Convention claiming that its economic situation is different than other countries listed in both Annexes as developed countries, and consequently resisted to being classified as a developed country.

During the following process, Turkey ratified the Convention after her name was removed from the Annex II through the amendment of Annexes by the decision (26/CP.7 2001) taken at COP7 in Marrakesh, and the Parties to the Convention were invited to “recognize the special circumstances of Turkey”. Turkey became a party to the Kyoto Protocol in 2009 without obligations because Turkey was not being a party to the Convention when the Kyoto Protocol was adopted. Therefore Turkey is not included in Annexes A and B of the Kyoto Protocol, and consequently she is unable to benefit both from the KP flexible mechanisms and receiving support under the Convention.

The special position of Turkey was reaffirmed in the subsequent COP decisions and it was noted that Turkey is in different situation than other Annex I countries without explicitly clarifying the meaning of the special circumstances. However due to blurring the distinction between developed and developing countries not explicitly referring to the Annexes during the following COP negotiations

(COP13 in Bali) Turkey had opportunity to renegotiate its status as a developing country to receive support under the Convention. Consequently the special position of Turkey was further clarified through the decisions taken in COP16 Cancun, COP17 Durban, COP20 Peru in terms of receiving support from the developed countries listed in Annex II.

Therefore currently Turkey enable to access the technology, capacity building and financial support to mitigate climate change and its adverse effects up to 2020. Under COP21 in Paris Turkey aimed a reduction of its greenhouse gas emissions of up to 21% during 2021 to 2030.