AVOSETTA MEETING Vienna 2018 - QUESTIONNAIRE

FLEXIBILITIES WITH REGARD TO MEETING EU REGULATORY OBJECTIVES AND REQUIREMENTS

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Regulation has often been criticised as being too rigid, particularly with regard to the needs of businesses. As a way out, well designed exemptions have been considered a proper tool for making regulation more flexible. However, it appears that over the years, flexibility mechanisms have become ever stronger, possibly to an extent that they undermine regulatory objectives; the concept of regulation thus needs to be more thoroughly reconsidered. This is proposed as the subject of our next meeting. We will start with more general policies of prioritising economy and ecology, and then discuss various more specific instruments of regulatory flexibilities, looking at different sectors where they appear to provide illustrative examples. Accordingly, the following questionnaire is divided into two parts: Part I includes an introductory question on policies of prioritising economy and ecology in your country. Within Part II, you are asked to answer the questions on exemplary flexibility mechanisms in the field of climate change, industrial emissions and water management. For those who feel they are in a position to spend time on top of that on the questionnaire, a set of questions on flexibility mechanisms in biodiversity management (Natura) is marked as optional at the end of Part II.

Preliminary remarks

The guiding principle of our meeting is to reflect upon the concept of regulation and its adequacy with the urgency and complexity of environmental issues. This is therefore an opportunity for analysing the current design of regulation in the face of the flexibility imperative. Before answering to all the precise questions of the following questionnaire, I think it will be important, in introduction, to clarify together the definition of the word "flexibility", its ideological foundations and its main characteristics to better identify its multiple impacts on the legal design and legal normativity, not only its undesirable consequences. According the dictionary, Flexibility is defined as "*the capacity to bent without breaking*" and therefore, the ability to adapt to changes and diverse challenges. This concept of flexibility resonates closely with the concept of resilience defined as the ability, for example of an ecosystem "*to return to its original state after being disturbed*". Such buzz and ambivalent concepts invite us to analyse the key objectives which pushed the public authorities and the economics actors to facilitate their appropriation and dissemination in different domains of Law. The concept of flexibility is not extraneous to Law and could be an essential and useful quality (see famous French book "*Flexible droit*" by Jean Carbonnier, first edition 1969) and is not completely the opposite of rigid regulation. The analysis of the concept needs a more nuanced understanding. Throughout the legal design, flexibility could facilitate the adaptation or appropriation of law requirements by for example: the introduction of margin of discretion allowed to Member states or others actors (in spatiotemporal terms for instance) and timetable adapted to meet environmental obligations, the promotion of legal pluralism and appropriate mix of legal instruments, the promotion of regulatory experimentation, the use of differentiated responsibilities mechanisms, a sparing use of exemptions, the strengthening of inclusive democratization process (…). Notwithstanding the positive potential use of legal flexibility for protecting general environmental interests, it's absolutely necessary to respect the fundamental requirements of the legal system and the guarantee of a high level of environmental protection. Unfortunately, it is clear that this concept of flexibility is subject to divergent and ideological interpretations *in fine* for the benefit of short-term economic profit contrary to socio-ecological sustainability. The last decades, the development of labour law has demonstrated these drifts and the difficult efforts to counter the negative impacts for employees (concept of flexicurity model).

In the environmental field, flexibility has clearly become a watchword. This flexibility imperative is necessary for some to adapt the regulation and law to the new scientific knowledge, to take into account the environmental diversity in various areas, for others to offer to economic stakeholders greater latitude to manoeuvre and to take account the differences between States (…). In the name of the modernization of public action and the administrative simplification, the concept of flexibility could be a potential Trojan horse against environmental legal acquis and the objective of continual improvement of environmental protection. Like the UE and others countries, France is faced to this complex

confrontation and research of appropriate articulation of flexibility, legal security and non-environmental regression. The legal analysis needs to go beyond the political speeches and detect news forms of primacy of economics interests despite the first sight laudable intentions of the French legislator and the stakeholders. More generally, it invites us to assess the transformations of public action and the diversification of the regulation methods which are more and more interrelated with private regulation on behalf of the flexibility imperative.
To answer to the first part of the questionnaire, I will give some examples which reflect the French environmental legal news (which could also serve as the French report 2017).

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 your country which result in prioritising economic activities over environmental interests? If so, please provide examples.

It's difficult to sum up an overview of the current French situation through one or even more examples. It may bias the analysis. It shows that it's more complex even if we need to be aware of the persuasive and influential force of economics actors on the design and the implementation of environmental law and the process of environmental integration in the various branches of the Law.
To overcome the impasse of the old airport project of Notre Dame des Landes (between Nantes and Rennes), the newly elected French President Macron requested a new expertise and the results were presented in December. On January 2018, the French government decided to abandon the project despite the local referendum in June 2016 (55,17% for the transfer of the Nantes Airport to Notre Dame des Landes) and announce the decision to expulse the illegal occupants of the expropriated lands in this zone (1650 hectares agricultural land and Wetlands). Such decision was based on the complex web of ecological, economic and political reasons.
Two others examples could show the ambivalent balance of economic and ecological interests in legal decision-making. Adopted in December 2017 and connected to the climate French action plan, the law 2017/1839 decided to stop the research and exploitation of hydrocarbon (the term of the current operating concessions cannot exceed 2040 and the hydrocarbon exporting companies shall publish every year from 1/1/2019 the carbon intensities). In the meantime, the French government is organizing a public consultation (7 march to 7 july 2018) under the supervision of the National Commission for Public Debate regarding the project of a large open-pit gold mine in the French department of Guyana. This project driven by a russo-canadian consortium Nordgold Columbus Gold forecasts a production of 6,7 million tonnes from 2022 to 2034 and promises the creation of 750 direct jobs and 3000 indirect jobs of which 90% for local population. Such promises will have a significant impact on the local population faced to high rates of young unemployment (more 40%). On 800 hectares, this controversial mine project, supported by the French President during his visit in Guyana last year, will situated close

two integral biological reserves and 374 hectares of primary forest should be destroyed plus the import risks of pollution by cyanide generated by such mine project. This project shows the difficulties of conciliating the socio-economic and environmental interests and the complex challenge of building a socio-ecological sustainability in such context.

Beyond these examples, in line with the process of modernizing environmental law (launched in 2013) closely connected to the "shock of administrative simplification" (launched in 2014), major reforms have been taken in the field of environmental Law. Those major reforms clearly illustrate the tensions between the necessity to streamline the legal procedure without prejudicing the level of environmental protection and the reduction of administrative burdens and regulatory constraints strongly supported by the compagnies. The White Paper of the French employers' organization on *40 proposals for the modernisation and the simplification of the environmental Law: in the common interest of environmental protection and the competitiveness of Business (2017)* is really enlightening. The authors of the White paper indicate that the objective *is not to deplete or denature the environmental Law*; they also stresse the necessity *to avoid the gold plating* and invite *to take a break from introducing new legislation* or even propose a regulation reduction plan.

Without going into too much detail of the current environmental reforms, we could give a brief overview of the implementation of the reform of the environmental assessment and the legislation on classified installations. Such reforms aimed at rationalising the legal framework and reducing the different procedures. Before generalizing the single authorisation for classified installations with effect from 1 march 2017, an implementation took place on experimental basis for three years from 2014 (single authorisation for wind turbine and biogas plants in seven French regions, single authorisation for all classified installations in the Champagne Ardennes Region). This experimental legislative framework constituted a useful form of flexibility and introduced two new simplification tools : the first one is the *preliminary framing* (cadrage préalable) : before submitting a request fo authorisation for a project, an an operator has the possibility to ask the competent public authority for more informations to prepare the environmental impact assessment (L 122-1.2 Environmental code); the second one is the *certificat project* (on the basis of the informations presented by the industrial operator, the prefect of the department has to deliver a document which identify the legal framework related to the project and the different procedural stages and precise the maximum period the instruction of the project. Such tools are supposed to improve the understanding of legal requirements and to increase the transparency and a positive dialogue between the operator and the public authorities (in the White Paper of the French employers' organization (cited above), it is stated that the compagnies "*have the right to expect greater transparency " ("a right to information*") prior to the start of the project submitted to authorisation procedure.

The assessment of the impact of the introduction of such single authorisation needs to analyse the reform of the classified installations; as usual *the devil is in the detail* and the ongoing simplification public action process raised significant concerns and criticisms. This major reform of Industrial installations, initiated in 2009 with the introduction of the prior registration system (sort of simplified prior authorization with specific conditions: see the french report Avosetta Meeting in Riga 2016 for more details), was continued though reducing regulatory constraints). Now, many industrial operators préviously subject to authorisation regime are subject to the registration system (as a reminder, the registration system cannot cover the industrial installations which are subjected to the Directive IPPC/IED or subjected to the directive Environmental impacts assessment for certain projects). Consequently, the nomenclature of classified installations has been amended and made more flexible progressively raising important criticism from the NGO in particular. The new environmental permit regime (with the single authorisation procedure for industrial plants) (into force on march 2017) accentuate the trend toward speedy, simplified and streamlined procedures). The presentation (on the web site of the Ministery of ecology) of the context of the public consultation for the recent draft decree amending the nomenclature of classified industrial installations is illustrative: "*the authorisation procedure is replaced by the registration procedure or declaration procedure when the authorisation procedure is not required by european Directive*"). In parallel, the regime of environmental assessment has also been modified in 2016 (Ordinance 2016/1058, and Decree 2016/1110). This new regime lists the projects which are submitted to a systematic environmental impact assessment and the projects which are examined on a case by case

basis in order to determine if a environmental impact assessment is needed (the public environmental authority shall have 35 days from receiving the complete file to inform the operator giving its reasons. No reply shall fulfil the obligation to do the environmental impact " R 122-3 Environmental code). Clearly, such reform will give rise to disputes related to the risk of environmental regression.
The recent legal recognition of the principle of non-regression by the Law on Biodiversity (2016) is very timely (now, the principle is one of the general principles of environmental Law : L 110.1 Environmental code "*the principle of non-regression that the environmental protection ensured by the legislative and regulatory provision related to environment, may only be subject to continuous improvement taking into account current scientific and technical knowledge*") . If the Constitutional Council concluded that the regulatory power is obliged to respect this principle (contrary to the legislator, Decision 2016/737), a recent judgment of the French Council of State (December 2017 Fédération Allier Nature) cancelled a provision of the decree 2016/110 for non-compliance with the principle of non-regression.
To conclude very briefly on the legal news, the French government has just published its road map for circular economy (2018) with the central objective to reduce by 30% natural resources consumption in 2030 as compared with 2010, in line with the French strategy for Ecological Transition and sustainable Development (2015-2020) implemented for instance by the French Law on Energy Transition for Green Growth (2015/992), the Law 2016/138 against Food Waste and the new Action Plan for Climate (2017) and its ambitious objective of carbon neutrality and of being the capital for green finance). Parallel to the request for flexibility and legislative or regulatory simplification, new reporting extra-financial informations are imposed on several compagnies related their investment policy (art 173 of French Law on Energy Transition amending L 533-22-1 Monetary and Financial Code: business insurance and reinsurance, mutual associations and unions, investment compagnies, pension complementary institutions (…), Introduction in the management report of large corporations and groups a new obligation related extra-financial performance declaration in line of the Directive 2014/95/CE : ordinance 2017/1180 (amending L 225-102-1 code du commerce and its decree 2017/1265)[1] .

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 30/4/2016 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?

Yes – see below

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?

In April 2014, European Commission has approved a third batch of international credit entitlement tables covering Belgium, Denmark, France and Italy.
According to the article L 229-7 of environmental code, "*the operator could fulfill its obligations through some units of its account emissions allowances in the European register*, up to a certain percentage imposed by directive 2003/87 amending by directive 2009/29/EC (art. 11). Those units cover:

[1] Guide of the French employers' organization related to extra-financial performance declaration, September 2017. See also: Law 2017/399 related to the duty of care for parent compagnies and sub-contractors and the law project on the business secret designed to transpose the directive 2016/943/UE.

- Units resulting from projects activities referred to article L 229-22 (Kyoto Protocol)
- Units resulting from others projects activities aimed at reducing greenhouse gas emissions in accordance with multilateral or bilateral agreements concluded by Union with third country
- Units resulting from others greenhouse gas emissions trading scheme accredited by an agreement between European Union and the national, infra or supranational entity in charge of this scheme.
- The Units resulting from reduction greenhouse gas projects outside the European trading scheme which are implemented on the territory of a member State".
In accordance with article L 229-23 of Environmental Code, "*the projects activities covered by the Protocol which are implemented on the national territory may not give rise to certified emission reduction only after the cancellation of an equivalent quantity of greenhouse gas allowance in the account of the operator's installation concerned by the European register*".

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.

2. 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?

Regrettably, it is very difficult to find precise informations on the use of international credits connected to ETS and the future after 2020 equally on the web site of the Ministry of Ecology or the "Caisse des dépôts et consignations", except the recall of the respect of the UE legislation.

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 France aims to reduce greenhouse (ESD) for 37% by 2030 as compared to 2005. The Climate Action Network considers that France have to refuse or limit the use of flexibility mechanism provided by the European regulation.
As reminder, in 2006, the French government decided to implement the Joint implementation mechanism (decree 2006/622 and order 2/3/2007) for projects conducted, for instance in France (domestic projects) in sectors which are not cover by the emission trading scheme. According the article R 229-38 (Environmental Code), the greenhouse reduction units and the certified emission reduction units resulting from nuclear activities or land-use activities, land-use change and forestry (LULUCF) cannot be used to meet the obligation of L 229-4.
According article R 229-40, the activities projects (abroad or on the national territory) have to respect several conditions before being approved by the public authority. The greenhouse emissions reduction resulting from such domestic activities projects needs to be recorded in the national register in the respect of the international and European commitments. If the domestic project is related to land-use, land-use change or forestry, it has to fulfil others conditions according the European regulation 529/13/UE (ministerial order 27/12/2012, ministerial order 26/2/2018 on national strategy on biomass).
According a French document annexed to the ongoing French Strategy Low Carbon[2], the French forest

[2] (https://www.ecologique-solidaire.gouv.fr/sites/default/files/Informations%20sur%20les%20actions%20prévues%20dans%20le%20domaine%20de%20l%27utilisation%20des%20terres%20%28UTCATF%29.pdf

sink is one the most important of EU and the Law on agriculture and forest 2014 recognized that the carbon storage by forest is a matter of general interest. The implementation of the agroecology national project will contribute to reduce the greenhouse emissions and the carbon storage in agricultural soils (the agriculture accounts for 21% French greenhouse gas emissions, Inra report towards friendly agriculture practises 2013).

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

In 2015, a report on 20 activities projects (2008-2012) was published and explained the main difficulties to obtain precise informations related to the monitoring and the redistribution of the Units or the revenue from sales of the units. The report underlined the situation of uncertainty about the future of the projects which are not in the field of ETS, plus the drop in the carbon price. The authors stressed the very unequal results and the limited level of the reduction of greenhouse gas. They identified the different difficulties of this mechanism in particular the complex methodological difficulties to demonstrate the additionality of the project. One other problem of the domestic project mechanism is also the complicated combination of tools (regulatory, taxation, funding through tenders, public subsidies, public procurement …) used in different public policies without real consistency of the whole.

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 new regulation adopted in may 2018 aims to ensure the greenhouse gas emissions reduction from non-ETS Sector by 30% in 2030 compared to 2005 levels. The regulation provides a differential access to the new flexibilities (France max 1,5% related to the flexibility mechanism from land use sector) and differential obligations for member States (0% for Bulgaria to -39% for Denmark).
In the report cited above related to the domestic activities projects, the authors envisage two approaches: Kyoto projects with the corresponding credits cancelled (assigned Amount Units) and domestic voluntary projects labelled by the French authorities (without credits transfers).

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 Ministry of ecology adopted in 2014 a guide related the exemptions from the Water Framework Directive:

- Extension of the deadline - Less stringent objective – Event of force majeure – Projects of major general interest. This guide clarified the definition and the methodology for assessing the technical feasibility, the natural conditions and the disproportionate costs.
See Article L 212 and R 212 Environmental Code which sets all the conditions and indicates that the extension of deadlines is implemented in protected areas mentioned in article R 212-4 only in the respect of specific provisions and norms for those areas. The use of exemptions is strictly limited and only required by the nature of the human activities or the pollution. Such exemptions do not affect no further deterioration in the status of bodies of water.
In accordance to R 122 of the Environmental Code, in order to reduce the necessary treatment for drinking water production, the Water Development and Management Master Plan (River Basin Management Plan WFD) sets strict targets in the zone of protection of water intakes and if so, in the others protected areas, in order to prevent pollution, in particular by pesticides and nitrates.

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?

Yes. Every Water Development and Management Master Plan (River Basin Management Plan WFD, 12 in France) has to identify all the extension of the deadline (2021, 2027) for each water body and explained the reasons (technical feasibility, natural conditions, disproportionate costs). For instance, the River Basin Management Plan of the Loire-Brittany (2016-2021) was obliged to postpone the deadline until 2021 for 61% of water bodies (the last River Basin 2010-2015 has set the same target for 2015): the technical feasibility criteria were the most (56%) invoked by the public authorities face to diffuse pollution and time needed to implement measures and obtain results, after disproportionate costs (24%) and natural conditions (20%).
As reminder, the European Commission underlined in its report on WFD (2015) that some Member States have used exemptions too widely and without appropriate justification.
According to article L 212-1, the Water Development and Management Master Plan could provide longer delays and indicate the reasons; however, those reports may not exceed the period covered by two updates of the river basin management plan.

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?

Yes. According to the UE obligations of the Water Framework Directive. See 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.

Yes. As the public needs to be consulted before the adoption of the river management plans and the monitoring program and programme of measures. According to article L 122, the public authority draw up the list of the exemptions after being available to the public for a minimal period of 6 months in order to collect its comments.

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 article R 515-69 of the Environmental code allows to derogate to the principle of emissions limited values VLE based on the Best Available Technology and also to the BATELS under the condition to experiment emerging technologies (the order of 2/5/2013 stipulates that such emerging technologies are new for the industrial installation, that is notably not yet exploited commercially and that they bring an environmental benefit (an equivalent level of environmental protection at lower costs).

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 conclusions adopted by the European Commission on the Best Available Technologies serve as reference for setting permit conditions imposed in the Prefectoral decrees. At the request of the industrial operator and by way of derogation, the emission limits values could exceed, in normal conditions, the emissions levels associated with the conclusions on the best available technologies. The operator has to demonstrate "*the disproportionate increase of costs with the regard to the environmental benefits, because of a) the geographical location or the local environmental conditions for the installation concerned, b) the technical characteristics of the installation concerned*" (Directive).
In the authorisation permit, the Prefect indicates in his decree his assessment of the reasons demonstrated by the industrial operator to obtain less strict emissions values; The Prefect requests the advice of the departmental Council for the Environmental and Health and technological Risks.
In the case of testing and use of emerging techniques, the authorisation prefectoral order could derogate for a period not exceeding 9 months (Art 515-69 Environmental Code) .

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?

Yes. The article L 515-20 of the Environmental code indicates that a regular periodic review and if necessary updating of permit conditions for taking into account the evolution of the best technologies. On this occasion, the operator may request derogations for emissions limits values which exceed the emissions levels associated with the conclusions on the best available technologies.

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.

In accordance to the article L 515-29 of the Environmental Code, the informations given by the industrial operator for the re-examination of authorisation conditions of the installation are subject to public enquiry. Until January 2019, the informations shall be available to the public in place of public enquiry. The public could submit comments before the adoption of the decision.
If an exemption is granted, the public authority makes available to the public the decision which specifies reasons of such exemption and its conditions.
In regard with judicial appeal, the administrative jurisdiction accepts that the interested third parties could request to the Prefect to aggravate the obligations imposed to the operator and in case of the prefect's refusal, they could to the court. As reminder, the powers of the administrative court (full remedy actions in the field of classified installations regime) are important (cancel, amend, establish new requirements, L 181-18 Environmental Code) in the same time, we could underline a strong tendency to reduce the appeal deadline (Ordinance 26/1.2017)

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?