AVOSETTA MEETING Vienna 2018 - QUESTIONNAIRE

FLEXIBILITIES WITH REGARD TO MEETING EU REGULATORY OBJECTIVES AND REQUIREMENTS

Report on the Netherlands (Kars de Graaf)

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.

I do not know of a similar (explicit) example of prioritising economic development/activities over environmental interests in the Netherlands. When thinking about this topic several (legislative) decisions come to mind.

Crisis and Recovery Act. In 2010 the Netherlands introduced the Crisis and Recovery Act (CRA) that aims to accelerate decision-making on a wide variety of activities, hoping that after the financial and economic crisis has passed, development projects can immediately be carried out without any delay caused by legal procedures in court or elsewhere. The Act has dealt with much criticism in the past for potentially curtailing citizen's procedural rights because it focuses almost exclusively on environmental standards as obstructing standards that need to be removed. The general idea is that environmental standards should not be a hindrance for economically relevant projects especially in the fields of sustainability and green energy. Therefore, the Dutch legislature introduced experimental instruments in the CRA to improve the flexible application of environmental standards. They did this by allowing competent authorities to deviate from these standards.[1] As an example I could point at article 2.4 CRA that allows competent authorities to deviate from certain environmental standards that create obstacles to implementing innovative projects that are mentioned on a list (annex). According to the CRA projects can be added to the list if they shall contribute to innovative developments, combat the economic crisis, and promote sustainability. Article 2.4 of the CRA contains a limited list of selected legislation from which deviations are allowed, such as the Water Act, the General Environmental Law Act, and the Spatial Planning Act. The Decree Implementing the CRA regulates what constitutes an allowable deviation, the maximum duration of the deviation, and the manner in which it is determined whether the deviation corresponds to its purpose or needs to be adjusted.

Programmatic approach. Another legal instrument that comes to mind is the so-called programmatic approach which can – in an optimistic view – be used to achieve environmental/sustainability goals but could also be used to make use of existing (legal) leeway for new economic development in the most effective manner. EU environmental directives provide more and more for a programmatic approach under which the Member States enjoy a great deal of flexibility with respect to the choice of measures adopted in order to achieve the environmental objectives of the directive. Examples are the methodology of the Water Framework Directive, the Noise Pollution Directive and the Air Quality Directive. These directives require the Member States to draw up (action) plans. For other EU

[1] See Tolsma, H.D. & de Graaf, K.J. (2016), Bending the Rules: A Dutch Approach to Improving the Flexible Application of Environmental Standards, *German Law Journal*, 17(4), 691-704.

Directives introducing a programmatic approach seems less appropriate (e.g. Habitats Directive). Public authorities in the Netherlands have been struggling to find an effective approach to achieve the (European and national) environmental quality standards. For a long time the focus was on the possibilities to deviate from limit values under strict conditions. Later, more integrated or programmatic approaches in which there is room for a 'per balance system' became popular. The central element of the Dutch integrated approach is the (policy) aim to make room for new spatial and economic developments, while at the same time the environmental quality will improve in order to attain the environmental quality standards. The background of this goal is to solve the conflict between environmental policy and economic and spatial planning ambitions. This conflict became visible in air quality regulation. In 2009 the National Co-operation Programme on Air Quality' (Nationaal Samenwerkingsprogramma Luchtkwaliteit, NSL) was introduced; postponing the achievement of the limit values for NO2 and the exemption for PM10 in the Netherlands were based on this air quality plan. The Dutch Programmatic Approach to Nitrogen (PAN) is to be seen as one of the most ambitious regulatory efforts in this regard. This integrated approach to nitrogen seeks to achieve the EU biodiversity goals (Habitats Directive) in the context of elevated levels of nitrogen deposition without fundamentally compromising the room for future economic development. The programmatic approach is based on principles such as adaptability and flexibility, aiming at achieving a fair balance between the adoption of preventative and restoration measures and allowing sufficient room for further economic development.[2] In the future Environment and Planning Act the legal instrument 'programmatic approach' will be a generic instrument to achieve (potentially) environmental goals.

No gold-plating. In order to both smoothly implement EU law and refrain from gold plating, The Netherlands has a rather strict legislative policy of 'no-gold-plating'.[3] Broadly speaking, goldplating in the Netherlands covers cases in which Dutch law establishes stricter standards than required by EU law, it does not take advantage of exceptions, it enlarges the field of application of a EU legal regime (so-called spill overs), or, more recently, regulates a subject matter which has not been regulated by Union law, but which is strictly related to a topic regulated by the Union legislator. A clear example of this policy is provided by the so-called Guidelines for General Binding Rules (a officially published set of policy guidelines by the prime minister). Chapter 9 of these guidelines is dedicated to implementing EU Law. Guideline 9.4 ('pure/clean implementation') states that 'no other rules are included in the implementing regulation than are necessary for the implementation'. In view of the need for timely implementation, it is avoided that the implementation of binding EU legal acts is 'included' in a broader review of the relevant legislation or that any 'extra' national goals are included in the implementing regulations. Furthermore Guideline 9.5 stipulates that 'the implementation method shall be based on the question which method imposes the lowest (administrative/bureaucratic) burdens on the companies affected by the regulation'. In view of the competitive position of the companies affected by an implementing regulation, implementation is in principle as cost-effective as possible.[4]

[2] See L. Squitani, H. van Rijswick, Improving legal certainty and adaptibility in the programmatic approach, *JEL*, 28 (2016), pp. 443-470. Also see H. Schoukens, Nitrogen deposition, habitat restoration and the EU Habitats Directive: moving beyond the deadlock with the Dutch programmatic nitrogen approach?, *Biological Conservation*, Vol. 212, Part B, August 2017, pp. 484-492.

[3] See J.H. Jans & L. Squintani with A. Aragão, R. Macrory and B.W. Wegener, 'Gold Plating' of European environmental measures?, in Journal of European environmental and Planning Law, 2009, vol. 6, issue 4, pp. 417-435.

[4] Parliamentary Documents II 2012/13, 29362, no. 224

Testing regulatory burdens. Not specific for environmental law but for all new legislative acts the Netherlands had an Advisory Board for Regulating Regulatory Pressure (Actal) that ceased to exist on 1 June 2017. However, the government has indicated that the external and independent review of legislative proposals is indispensable and has therefore decided that Actal will have a successor: the Advisory Board for the testing of regulatory pressure/burdens: ATR. A new name for the same test.

Flexibility. On the issue of flexibility I would like to point towards a recent phd thesis by M.M. Bogaart (*Flexible directives: Towards a better environment? An analysis of the balance between flexibility for Member States and harmonisation regarding the effective protection of European Union's waters and air*) that can be found on the internet.

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.

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

Article 16.35a and Article 16.35b of the Environmental Management Act (EMA; *Wet milieubeheer*) contain the implementing legislation for Article 11a EU-ETS Directive, which deals with the use of CERs and ERUs at the European level. The Dutch provisions contain an arrangement that is substantively equal to article 11a EU-ETS Directive.

> However, Article 16.35a (3) EMA deserves to be mentioned here. It provides that the first two paragraphs of Article 16.35a EMA do not apply to project activities for the generation of electricity by using nuclear energy, land use, change in land use and forestry activities. Article 16.35a(3) refers to the old Article 11 bis Directive 2004/101/EC and provided that CERs and ERUs obtained from such project activities could not be used in the ETS. Article 11bis Directive 2004/101/EC was applicable during the period 2008-2012 (phase II). The first two paragraphs of Article 16.35a EMA, where paragraph 3 applies, implement article 11a paragraphs 2-4. Only those CERs and ERUs can be exchanged for emission rights usable in phase III that could also be used in phase II.

Article 16.46b EMA stipulates that participating in a CDM of JI requires the consent of the Minister and sums up the grounds for refusal. Since 1 January 2013, the Dutch Emissions Authority (NEa) has been responsible for giving written consent to participate in CDM and JI projects on behalf of the minister (Netherlands). By way of subsidies the Ministry of Economic Affairs has in the past financed JI projects in Central and Eastern Europe, such as Bulgaria, Romania, Hungary, Slovakia, Estonia and Croatia. In addition, there are also Dutch JI projects in New Zealand. The projects are aimed at improving the energy efficiency of power plants and district heating installations, the production of renewable energy, waste processing, biomass and reforestation.

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?

As far as I know, The Netherlands has not used the possibility of using international credits in order to comply with EU-ETS requirements.

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?

I'm sorry to say that I don't know of any relevant discussion regarding this point in the Netherlands.

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?

According to the ESD, the Netherlands must achieve a reduction of 16% compared to 2005 levels. In june 2015 the Dutch district court in The Hague ruled that the Dutch policy wasn't contributing enough to avoiding dangerous climate change and ordered the Netherlands to do more (reduction of 25% compared to 1990). It appears that the measures taken in the Netherlands to implement the obligation to reduce 16% of greenhouse gas emissions by 2020 compared to 2005 (or 25% compared to 1990 as ordered in the Urgenda decision) are not fully anchored in a legal framework. There is no legal structure in the Netherlands for national decision-making for climate policy. 'Information on national policies and national estimates' should be included in reports that the Netherlands submit to the European Commission on the basis of Decision 280/2004/EC of the European Parliament and the Council. Member States should also report on the estimated progress in meeting the obligations under the ESD. In the Netherlands there are no specific rules that the government should comply with in the preparation and publication of (the reporting obligation on the proposed) policy for the reduction of greenhouse gases.

That being said, in 2013 the Netherlands negotiated a deal between more than forty organisations – including central, regional and local government, employers and unions, nature conservation and environmental organisations, and other civil-society organisations and financial institutions – that has been called: Energy Agreement for Sustainable Growth. The core feature of the Agreement is a set of broadly supported provisions regarding energy saving, clean technology, and climate policy. The parties to the Energy Agreement will strive to achieve the following four quantitative objectives: a saving in final energy consumption averaging 1.5% annually, meaning a 100-petajoule (PJ) saving in energy by 2020; an increase in the proportion of energy generated from renewable sources from 4% currently to 14% in 2020; and a further increase in that proportion to 16% in 2023; 15,000 jobs, a large share of which will be created in the next few years.

Since the new government coalition agreement there's is a focus on both a new Dutch Energy Agreement and even a first Dutch Climate Agreement. These agreements are all signs that the Dutch model of achieving environmental targets by negotiating contracts (gentlemen's agreement) with relevant stakeholders and civiel society are key (legal) tools.
The Netherlands is also contemplating in what manner a dedicated Climate (change) Act should be introduced in the near future and will be introducing a legislative act prohibiting the use of coal fort he production of electricity (from either 2025 or 2030 onward).

The flexibility mechanism are not transposed into Dutch law.

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

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 Dutch government believes that the LULUCF sector can play a full role in the EU climate policy, so that the European target of at least 40% greenhouse gas reduction can be achieved and sees an opportunity for a (market) incentive to realize greenhouse gas reductions in the land use sector. The government also indicates that it would still like to give its own national interpretation to climate policy. It focuses on the conservation and use of natural systems, such as forests and soils, so that use is made of the services (such as carbon storage) that they can supply. The Cabinet does, however, state that the reduction potential in the Netherlands for the LULUCF sector is small due to the large spatial pressure and therefore limited potential for expansion of forests and due to a large surface area of peat meadow with low reduction potential. This would mean that the Netherlands would at least be obliged to ensure that the balance of emissions in the LULUCF sector and the existing carbon reserves (both from nature and forests, as well as organic matter in the soil) does not decrease compared to previous years.

Looking at the way the Netherlands has 'implemented' the ESD so far, I would say that – to the best of my knowledge – the Netherlands has until now had no reason to rely on the flexibility mechanisms.

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 Dutch Water Act (*Waterwet*) is concerned with both the (ecological and chemical) quality of water and the water quantity. In the Netherlands, quality standards for surface water are established in accordance to Chapter 5 of the Environmental Management Act (EMA – *Wet milieubeheer*), as

referred to in Article 2.10 of the Water Act. Yet, only the quality standards for the chemical status of water surfaces have been established in accordance with an Governmental Decree based on Chapter 5 of the EMA (the so-called *Besluit kwaliteitseisen en monitoring water 2009* – Bkmw 2009). The chemical targets and the good ecological status of surface water types, and the chemical standards and quantitative status for groundwater are laid down in the decree as environmental quality standards based on chapter 5 EMA. This also applies to targets related to surface water used for the preparation of water intended for human consumption. Derived ecological goals are included in the water plans of the state and provinces. The decree establishes that the goals are bindings and the derogation in a water plan can occur only under specific circumstances. This circumstances are directly based on the text of article 4 of the WFD.
In article 2 of this decree it is stipulated that from a European environmental quality objective for water that shall be achieved pursuant to this decree deviation is only allowed in the cases under which this is permitted in accordance with the provisions of the Water Framework Directive, to which this decree refers. It also states: if for a water body there is more than one environmental objective under this decree or other regulations, the most stringent one applies. The conditions under which the environmental quality requirements may be deviated from, are taken one on one from the WFD.
Paragraph 4 of article 2 of the Governmental decree sets the requirements for deviation from EU environmental quality standards for water. They can be deviated from pursuant to the decree if a) the condition of the water body does not deteriorate in accordance with Article 16 (on monitoring), b) the water body in question has been affected to such an extent by human activities or its natural condition is such that the achievement of the guide value is not feasible or disproportionately expensive, c) all conditions of Article 4, paragraphs 5 and 8 of the Water Framework Directive are met, and d) the reason for the deviation for that water body is stated in the management plan for the national waters, if it concerns national waters, or the regional water plan, if it concerns regional waters or groundwater.

Review of the environmental quality standards is necessary after a certain period according to article 5.1 paragraph 5 EMA and article 17 of the Governmental Decree stipulates that this period is six years.

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?
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?

The ecological objectives also include standards for some chemicals that are not on the EU list of priority substances (the "other relevant substances"). These are determined by the individual member states. In the Netherlands these objectives are national objectives. On the basis of the river basin management plans for 2009, the Netherlands qualified a high percentage of water bodies as significantly changed and the percentage of artificial water bodies was the highest in Europe (see the European overview in 2012). In the plans for 2015-2021 once again, the percentages are high. This is understandable because the many ditches and canals in the Netherlands have been dug to make the land habitable and usable and because almost all streams and lakes have been 'changed' by man to limit nuisance and shortages. Assigning the status ‘changed significantly’ or ‘artificially’ has however no direct relationship with the ambition for quality in that waters (e.g. in the formulation of targets for very small streams, measurement data of those with the best quality is the starting point in the Netherlands).

The objectives were established for the first time in 2009, when establishing the first generation of river basin management plans in the Netherlands. The WFD has three six-year cycles, which is why the (changed) objectives have been re-established in 2015. In addition, some have changed, mainly where new data on the situation were available. The cooperating authorities have agreed to look again at the targets in the determination of the last river basin plans in 2021. Objectives can still be adjusted in 2021 (and 2027?), within the conditions of the WFD.

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.

No legal protection (judicial review) by an administrative law court is available against water plans, because these have been placed on the so-called 'negative list' in the General Administrative Law Act. The Dutch system implies that – of the administrative court is not competent – the civil law courts are competent to rule on the question whether adopting a water plan constitutes an unlawful act. On the basis of the Aarhus Convention the absence of judicial review has been challenged.[5]

An appeal procedure or the possibility of an administrative appeal against the drafting or modification of a water plan, is not aloud before the administrative courts. The uniform public preparation procedure of section 3.4 of the General Administrative Law Act, which applies to water plans, is used to implement Article 14 of the WFD, which regulates participation.

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?

If the installation does not comply with BAT, the competent authority may, in certain cases, set less strict emission limit values. Deviating from the BAT conclusions can, according to article 5.5 paragraph 7 of the Environmental Law Decree (based on the Environmental Licensing (General Provisions) Bill (*Wet algemene bepalingen omgevingsrecht*), involve excessively higher costs in relation to the environmental benefits by geographical location, local environmental conditions, technical characteristics of the installation. These conditions are copied out of the IED. If there is no BBT conclusion (emission limit values) available, the ministerial regulation stipulates that the competent authority shall ensure that the a level of environmental protection equivalent to that of the best available techniques as described in the BAT conclusions is guaranteed.

There is also at least one judgment (by a district court) that allowed a competent authority to set stricter emission limit values than those associated with BAT. This was allowed as long as the

[5] L. Squintani & E.J.H. Plambeck, Judicial Protection against Plans and Programmes Affecting the Environment: A Backdoor Solution to Get an Answer from Luxembourg, *JEEPL* 2016, p. 294-324.

competent authority could state grounds for prescribing the stricter emission limit values and if it could demonstrate that the emission requirement is feasible.[6]

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?

In most cases the BAT conclusion are the main reference for setting the emission limit values in the environmental permit. The geographical location offers the possibility to take into account differences in landscape, climate and soil types within the European Union. There will be few cases in the Netherlands where the geographical location of the establishment leads to a different level of BAT. Nevertheless, the availability of water and the possibility of discharging water can play a role in determining BAT and the associated emission limit value. The local environmental conditions can not be a reason in the Netherlands to impose less stringent emission limits. The competent authority can assess whether the emission limit values must be stricter in order to guarantee the local environmental quality. The competent authority needs to state the reasons why deviation is necessary. For example, the proximity of buildings or activities can lead to a stricter emission limit value, to protect people and the environment. About the technical characteristics of the installation: in the preparation of BAT conclusions, the economic review has already been done at sectoral level. The competent authority does not have to re-establish the economic feasibility of a best available technology in that case. Only in exceptional cases does the competent authority make an assessment of the economic feasibility of a technique. There is an exceptional case when the device is unique in its kind I such a way that an assessment at sectoral level is not possible, and there are no BAT conclusions or designated BAT documents for the activity concerned. In certain cases, it may be that a longer period than four years is required before the installation can comply with the BAT conclusions. In that case, the competent authority may, on the basis of the technical characteristics of the installation, justify why the installation can not comply within four years. The competent authority will include in the permit regulations when the installation will comply.

When setting emission limit values in an environmental permit, other technologies may also be considered than those mentioned in BAT conclusion or a Dutch information document on BAT as best available techniques. This was the opinion of the Council of State in a ruling of 7 February 2018 (ECLI: NL: RVS: 2018: 400). In determining the BAT eligible for an installation, the competent authority must take into account BAT conclusions (BREFs) and Dutch information documents on BAT. The term 'take into account' means that the competent authority may also designate other techniques as BAT than those mentioned. This does not detract from the fact that the competent authority can generally determine the BAT eligible for an establishment without further investigation and further justification on the basis of the information documents that have been laid down and legally designated for this purpose. If an installation wants to use other techniques, it is for the owner to demonstrate facts and circumstances which mean that the competent authority in this specific case should not be allowed to use the information document in reasonableness.

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 Environmental Licensing (General Provisions) Bill (*Wet algemene bepalingen omgevingsrecht*) stipulates two different kinds of obligations for competent authorities to keep permits for installations up to date. 1) Duty to update within 4 years after publication of a (new) BAT conclusion (Article 5.10 paragraph 1 Environmental law Decree). 2) Duty to update the permit conditions that must be performed regularly (Article 2.30 of the Act and Article 5.10 paragraph 2 of the Decree)

[6] See: ECLI:NL:RBMNE:2016:6478.

1) Duty to update after publication BAT conclusion. From 1 January 2013 an additional update obligation applies to IPPC installations (Article 5.10 paragraph 1 of the Environmental Law Decree). This obligation means that within a period of four years after publication of the BAT conclusions for the main activity of an IPPC installation: the licensing authority must test the requirements of the environmental permit in accordance with the best available techniques (BAT) that are contained in these (new) BAT conclusions (and all other BAT documents that are of importance). If the IPPC installation does not comply with these BAT conclusions, the licensing authority must update the permit conditions. The (core activity of the) installation must comply with these updated conditions within the four-year period.

2) The obligation to regularly update the permit (conditions) means that the competent authority must regularly assess whether the conditions of a permit are still adequate and appropriate. This in view of the developments in the field of technical possibilities for protecting the environment and the developments that improve the quality of the environment.

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.

If I understand this question correctly, the answer is relatively simple. The granting of a permit or changing a permit is prepared according to the preparation procedure regulated in section 3.4 of the General Administrative Law Act and starts with a draft decision and the possibility for anyone to participate. After a final decision about the permit has been taken, judicial review is allowed (administrative law court in two instances: district court and appeal at the Council of State) for any interested party. If the competent authority or the owner of the installation do not initiate this process, an interested party (stakeholder) may request that the permit be amended/changed in accordance with new developments / new BAT conclusions. Any refusal by the competent authority to do so can be challenged in court.

OPTIONAL:

Should you find the time, please feel free to answer the following optional questions on flexibility mechanisms in Natura 2000 management. Any answers will certainly enhance our discussions.

3. Exemptions and offsetting combined: the case of NATURA 2000.

1. How was the obligation to take compensatory measures in view of the coherence of the network as part of the appropriate assessment transposed into national law? Do the national rules go beyond the requirements of the Directive by, e.g. adding further requirements for compensatory measures?

To my knowledge there has been no case of gold plating concerning the compensatory measures.

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?

To my knowledge we call them mitigating measures (but you would consider them protective measures) and – as they are deemed to be / considered to be part of the planned activity – they can

be taken into account in the appropriate assessment and could possibly be helpful (and are meant to be) in avoiding a test set out in art 6(4).

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?

Yes. The Dutch programmatic approach to nitrogen.

- See http://ifro.ku.dk/english/events/pastevents/2017/ammoniakregulering-af-husdyrproduktionen/Comparative_report_legal_framework_16.11.17.pdf
- See H. Schoukens, Nitrogen deposition, habitat restoration and the EU Habitats Directive: moving beyond the deadlock with the Dutch programmatic nitrogen approach?, *Biological Conservation*, Vol. 212, Part B, August 2017, pp. 484-492.

The Netherlands has introduced the legal instrument of a 'programmatic approach' in several environmental policy areas to achieve environmental targets and at the same time create possibilities for economic development in areas where environmental standards will not facilitate such development. In the previously applicable Nature Conservation Act 1998 (*Natuurbeschermingswet 1998*) the Netherlands introduced in 2015 a specific form of a programmatic approach. The so-called Programmatic Approach to Nitrogen (*Programmatische Aanpak Stikstof*, PAS) aims to achieve nature protection goals through a coherent program. The PAS regulates the effects of nitrogen deposition on Natura2000 areas, which are the areas specifically protected by the EU Habitats Directive. Governments at national and provincial level have joined forces to cope with the problem of nitrogen deposition in the Netherlands. They have developed a coherent programmatic approach, which aims to reduce nitrogen deposition using both measures at the source of the deposition and measures for specific protected areas. The PAS aims for both ecological improvement and space to allow economic developments. To that end it provides a permitting system for activities that cause nitrogen deposition in Natura 2000 areas. Such permits are required for developments in the livestock sector, but also for new residential areas, the construction of roads and the expansion of industrial activities. The PAS however also stipulates what activities no longer require a permit. The government anticipates that such a programmatic approach could also be used for other goals in nature conservation. Therefore, the new NCA (article 1.13 NCA) contains a broad framework that provides a general basis for implementing a programmatic approach. It also stipulates monitoring obligations once a program is adopted, either by the national government or at the regional level. The NCA also grants governmental bodies the competence to adopt programs that provide for a programmatic approach for other elements that hamper the realization of conservation objectives, such as a programmatic approach aimed at achieving or improving the (favorable) state of conservation of species.

Although a programmatic approach is considered an innovative legal instrument to achieve nature protection targets in a flexible way, the lawfulness of the specific programmatic approach to nitrogen deposition under the EU Habitats Directive has been seriously questioned in 2016. In the beginning of 2017 the Administrative Jurisdiction Division of the Council of State was triggered by legal grounds brought forward in several appeal cases to ask the Court of Justice of the European Union (ECJ) for a preliminary ruling on PAS. According to the court the Dutch innovative approach could very well be lawful under the EU Habitats Directive (article 6) but it could not derive sufficient certainty from the applicable EU law or case-law of the ECJ for drawing that conclusion. Since the usefulness of the programmatic approach under the NCA – and possibly the EPA in the future – will at least partly depend on the ECJ's answers to the questions posed by the Dutch court, I will briefly discuss the questions raised.

The questions referred to the ECJ for a preliminary ruling concern two kinds of cases. Until the questions are answered and the Dutch court has subsequently reached a final judgment the (permitted) activities are deemed to be legal. The first kind of cases concerns cattle farmers that were granted a permit to expand on the basis of the PAS. The main question is whether this programmatic approach may be used for granting permits under the EU Habitats Directive. The court has five questions concerning the conformity of Dutch law with EU legislation. Is it lawful under the Habitats Directive to exclude certain activities from the permitting system because they will cause nitrogen deposition below a certain threshold? A related question concerns the requirement to perform an appropriate assessment of the effects on the Natura 2000 area for individual plans or projects. The question here is whether the appropriate assessment for the entire PAS can be used as a basis for granting individual permits for individual projects. Questions three and four concern the elements that may be taken into account in the required appropriate assessment. May the positive effects of conservation measures be taken into account in the appropriate assessment of the PAS if these measures have not yet been implemented at the time of the assessment and if the positive effects of the measures have not yet been realized? And what about the positive effects of the anticipated autonomous decline of nitrogen deposition in a program period? The fifth question relates to the measures stipulated in the program that anticipate a reduction in nitrogen deposition. Are these measures to be considered mitigating measures that can be taken into account in the appropriate assessment even if they have not yet been carried out at the time of the appropriate assessment and the anticipated reduction has not yet been realized? In answering all these questions the court also wants to know whether the existence of monitoring requirement and the competence to adjust the program could be relevant.

The second kind of cases concerns both grazing cattle and spreading manure on the land. Under the right circumstances a permit is no longer required for these activities. Several interested parties have however demanded enforcement action against such activities, claiming that it is unlawful to allow cattle to graze and to spread manure on the land without an appropriate assessment of the effects and a permit. Applications by the interested parties to apply administrative enforcement action were refused on the basis of the PAS. The Dutch court asks the ECJ whether these activities may be authorized in this manner under the EU Habitats Directive. The court formulated seven questions. The first three questions are all concerned with the interpretation of the term ‘project’ in article 6(3) Habitats Directive. May an activity that does not qualify as a project as referred to in Article 1(2)(a) of the EIA Directive (2011/92/EU), still be considered a project as referred to in article 6(3) of the Habitats Directive because the activity may have a significant effect for a Natura 2000 area? If these activities are considered projects and were legal before the Habitats Directive was applicable to the relevant Natura 2000 area and are still taking place, may they be considered one and the same project even if the grazing or the spreading of manure has not always been carried out on the same parcels in the same quantities and with the same techniques? Yet another question concerns activities that are inextricably linked to a project. Should they therefore be considered as a project that needs an individual appropriate assessment of the effects on the Natura 2000 area? In addition, the Dutch court would like to know if legislation could effectively exclude a particular category of projects from the permit requirement and therefore allow these project without individual permission when assuming that the consequences of those activities have been appropriately assessed before the legislation was implemented. Fourthly, the court asks whether the appropriate assessment underlying the exception to the permit requirement for grazing cattle and spreading manure is in accordance with article 6(3) Habitats Directive. Specifically because the assessments has taken into account the PAS which assumes a decrease of the total nitrogen deposition in the Natura 2000 areas. The fifth question of the Dutch court is whether an appropriate assessment for a program such as the Programmatic Approach to Nitrogen (for the years 2015-2021), may take the

positive effects of conservation measures for existing nature protection areas (article 6(1-2) Habitats Directive) into account? Even if these measures have not yet been implemented at the time of the appropriate assessment and the positive effect of this has not yet been realized? The court's next question concerns the anticipated autonomous decline of nitrogen deposition and its relation to the appropriate assessment of the effects thereof on the Natura 2000 areas. The seventh and last question is whether restorative measures that are included in a program such as the PAS that serve to prevent nitrogen deposition, may qualify as mitigating measures which may be included in an appropriate assessment?

All in all these questions are of a rather technical nature and the Netherlands will have to wait for an answer for quite some time. The referring judgment of the Dutch Council of State explicitly states the desire to receive answers before 1 July 2018 but it is not sure whether the ECJ will grant this wish. The answers provided by the ECJ in the future potentially have a huge impact on the efforts of the Dutch legislator for trying to introduce a new and flexible legal instrument to achieve the nature protection goals. The NCA will be replaced by the EPA and the latter will introduce provisions allowing for a programmatic approach that is even more general in nature than the provisions in the NCA. The Netherlands may than have introduced an important and innovative legal instrument to achieve environmental goals and targets but must remain aware that the application of any legal instrument of Dutch environmental law must be in accordance with European and international environmental 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?

Perhaps on paper, but to my knowledge not in practise. And perhaps by some academics.