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FLEXIBILITIES WITH REGARD TO MEETING EU REGULATORY OBJECTIVES AND REQUIREMENTS

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 2000) is marked as 'optional' at the end of Part II.

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.

- No new such initiatives, to my knowledge. However, since long, the demands for "no gold plating" have dominated the public debate in the field of environmental law. Right now, the farmers and foresters are lobbying heavily to get rid of the "over-implementation" of Article 9 of the Birds Directive, today merged in a provision also implementing Article 16 of the Habitats Directive. There are also other examples, not least concerning the implementation of the WFD (see below). Moreover, there is a general requirement for any governmental commission to investigate their proposal's consequences for industry and business. There is also a strong drive for more "effective decision-making", meaning the weakening of the possibilities open for national agencies to defend their interests in court. For example, it has been questioned that the Environmental Protection Agency should have the possibility to appeal decisions made by the County Administrative Boards (the Regions).

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.

- First of all, a reservation is needed. I am more or less ignorant about the EU emission trading system, so my answers have been provided through others, more knowledgeable persons. The merit is theirs, the flaws rest with me. Furthermore, I cannot really reply to any additional questions on the Swedish system.

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

- The EU emission trading system is implemented by Act (2004:1199) on the trade of emission credits and the Ordinance (2004:1205) on the same subject. According to sections 56 and 56a-f of the Ordinance, an operator of a stationary installation covered by the legislation is entitled to use international emission reductions (CERs if they come from a

country which is not a Party to Kyoto, ERUs if originated in a Party country). For the second (2008-2012) and third (2013-2020) period, somewhat different rules apply.

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?

- My informer was puzzled by this question. Obviously, Sweden as a Member States has transposed this possibility, but as the participant in the trading system is not the country, but the operators of those about 770 installations and certain airline companies which are covered by the directive, "we" have obviously not made use of this possibility. However, it is probable that certain participants have done so. According to the National Energy Agency, Sweden has not made use of the possibility to use international credits. Instead, we have cancelled the whole surplus of emission allowances. For the third period (2013-2020), there is a possibility to switch CERs to ordinary emission allowances, which later can be used. The room for such an exchange is decided by the EPA and is thereafter endorsed in the Union registry.

According to my informer, one must however be aware that any figure in this context can be very misleading, as the participants are able to trade – buy, sell, exchange –both ordinary emission allowances and international reduction credits, something that makes the whole system non-transparent.

After 2020, the emissions reduction target will be a domestic one, thus the use of international credits in the next trading period of the EU ETS is not foreseen.

3. How is the change to a domestic emissions reduction target received in your country? Is this change expected to affect your country's abilities to comply with EU-ETS requirements? Are you aware that other possibilities are discussed to compensate the loss of the flexibility through international credits?

- No such critique has been voiced, as the basic reason for the reform is that the use of international reduction credits has created huge problems. It was the inflow of fake credits 2011-2012 which build up the surplus that dead-locked the whole system, in addition to the fact that many international credits were very "murky" (shady, suspicious, whatever).

Yes, obviously business will be affected and also the country's abilities to comply with the trading system, but this is how the legislation for 2021 and onwards looks like.

There is an ongoing discussion about similar credit systems within the Paris agreement on a general level, but mostly concerning for the new CORSIA system for international air traffic, where credits such as CERs and ERUs will play a very important role.

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

- My informer was uncertain about which proposal is meant here, as the discussion right now is on the international level only. He doesn't know if the EU is working with such a proposal, but the Swedish government is probably is hesitant ("not very enthusiastic"). However, it's a fact that the new climate framework is opening up for the use of flexibility mechanisms. Sweden is supposed to be climate neutral by 2045, but the goal is set to 85% only. As for the remaining 15%, the Government keeps it open whether to reach those either by way of flexibility mechanisms or carbon capture and storage (CCS).

Within this schedule, there is a requirement on Sweden to lower its emission outside the trading system with 17%, compared with 2005. However, a Party can also buy and sell allowances from/to other countries to meet their targets

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

- ESD is not a directive, but a decision and the actors are the member States. Thus, there is no need for any national implementation. My comment: *I don't have a clue whether this is correct or not…*

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

- No, quite the opposite. The Swedish discharges of ESD have been lower that what is required by law. After some political pressure, the Government instead cancelled those allowances, why they are no longer available for sale to any underachieving actors on the market.

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?

- Uncertain what proposal is meant here. *My comment: In the EU negotiations, the Swedish Government has backed the Finns on the use of LULUCF credits for forestry.*

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?
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 definition of "heavily modified water bodies" according to Article 4.3 WFD and the derogation possibilities in Article 4.5 WFD are implemented in the Ordinance on the administration of the quality of water (SFS 2004:660, RDV), Chapter 4. The transposition is verbatim, partly with direct references to the Annexes of WFD. As of today, 654 water bodies out of 24,000 designated water bodies are classified as HMW (out of 200,000 lakes in the country). These HMWs are classified for reasons of hydro power considerations. In addition, there are 7 HMWs due to irrigation, drink, recreation, water supply, etc.

Well, when Sweden classified those water bodies as HMW in 2016, we also adopted a very general description of the environmental objectives to be met in 2021 or 2017, basically mirroring the definition of GEP. Thus, the environmental objectives are more or less similar in all cases. Obviously, this is a major problem in the implementation. However, there is a proposal from the Regional Water Authorities about setting environmental objectives for the HMW on remit right now, although it has been heavily criticized by the farmers' organisations and from the owners of small scale hydro power plants and several other actors. There is also an ongoing work to classify more water bodies as HMW for reasons of transport (fairways), harbours, draining for farming purposes, etc).

It should be noted that the Commission has an ongoing infringement case against Sweden for poor implementation of WFD (2007/2239), although the case is focusing on Articles 4.1 and 4.7. Thus, the formal implementation of the provisions on HMW has not been an issue. Criticism has however been expressed from the Commission in the bilateral meetings with the Ministry of Energy and the Environmental, where Brussels among other issues are pointing at that Sweden is not given any reasons for the classification of HMW and also voices concerns

about the standardised way of setting the environmental objectives. However, we have not received any official feedback in the latest reporting circle.

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 is no such possibility under Swedish law.

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?

   - Verbatim implementation in the Ordinance (SFS 2013:250) about industrial emissions, Chapter 1, section 16.

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?

   - Very little information is available and it's not very systematic. I checked with the Ministry, as well as with the Land and Environmental Court of Appeal and they did not know about any such case. However, after some communication with the EPA, they informed about a report from DG ENVI in March 2018 – "Application of IED Article 15(4) derogations" –where two Swedish cases were mentioned in Appendix B. One concerned the SSAB steel plant in Northern Sweden and the application was successful in the Land and Environmental Court (2016) in that the company were granted temporarily alternative values until 1 July this year. The other case concerned a producer of stone wool in the South of Sweden. This time, the Court rejected the application (2016).

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?

   - All kinds of permits under the Environmental Code shall be reviewed regularly "if there is an environmental need" (Chapter 26, sections 1 and 2). As all the administrative resources are put to the permit procedures for large scale activities, wind farms, water operations, etc, this reviewing just does not happen. This is also the main reason for why we were found in breach of the updating requirement in the IPPC directive and

subsequently joined the small number of member States that actually have been fined by the CJEU (C-607/10 (2012) och C-243/13 (2014)).

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.

- Yes, the public concerned can appeal the decision to the Land and Environmental Court on the merits in a reformatory procedure. If the court finds that the administration has erred in its decision, it will simply set in place another condition in the permit…

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?

- As usual, by verbatim implementation, in this case in the Environmental Code.

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?

- Yes, of course. The need for an appropriate impact assessment (AIA) according to the first sentence of Article 6.3 is to be decided from an assessment of the impact of the operation at stake combined with those "normal" conditions which always are set in the permits for such activities. In the permit phase of the proceedings – Article 6.3 second sentence – those conditions are set that are required to avoid relevant damage to the protected interests within the site. If the permitting body then is assured that there will be no such impact, a permit will be issued. If not, the authority must decide whether the criteria according to Article 6.4 are met and – if so (rarely) – decide compensation measures.

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?

- Some years ago, we had a case in the Land and Environmental Court of Appeal where it was decided that the creation of meadows on behalf of two very rare butterflies (Parnassius apollo and Glaucopsyche arion) was considered to be "protective measures" (MÖD 2016:1 *Klinthagen*). Although one may sympathise with the outcome in that particular case, the Court's stance clearly was in breach of the CJEU's case-law on the matter (mentioned above).
- In Sweden, we also have quite a substantive experience in creating "new environments" (ponds, meadows, etc.) for the Great crested newt (Triturus cristatus), something which is mentioned in the Commissions guidance on Natura 2000 (2008). The experiments are however basically a failure, or at least very problematic, although this is not mentioned in the guidance…
- The general experience is also that there are a lot of promises on compensation measures in beforehand, but commonly very little evidence or even control about the actual outcome when the activity has started…

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?

- Nope…