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of the principality of Liechtenstein, a member of the EEA—belong. In accordance with Article 40, Clause 1 of the aforementioned bilateral agreement, Switzerland introduced a non-discriminatory, ‘performance-based charge on heavy goods vehicles’ crossing Switzerland on its roads in order to incentivise a modal shift of freight from road to rail. The charge is differentiated according to three categories of emission standards (EURO classes). Against the backdrop that vehicles increasingly comply with the most recent EURO standards, it turned out to be necessary for the respective Joint Committee of the Parties to the aforementioned Agreement—the Community/Switzerland Inland Transport Committee—to adapt the distribution of the EURO standard categories between the three categories of charge in its Decision 1/2016 of the Community/Switzerland Inland Transport Committee concerning the charging system applicable to vehicles in Switzerland as of 1 January 2017 (*Official Journal of the European Union*, L 186/36).

Finally, Switzerland and the EU both confirmed their willingness to link their emissions trading systems (ETS). This would, according to the Federal Council, allow the fifty-four major carbon dioxide emitters currently belonging to the Swiss ETS access to a bigger and more liquid market and provide for a level playing field for both Swiss and EU companies. As a consequence, not only domestic flights but also flights from Switzerland to EU and EEA countries would form part of the ETS regime. Such aviation emissions are currently not included in the Swiss ETS. The respective agreement, initialised by both parties in 2016, is subject to the approval of both the Swiss Federal Parliament and the European Parliament in order to be ratified (‘EU and Switzerland to link their Emissions Trading Systems,’ European Commission Press Release (16 August 2017) <http://europa.eu/rapid/press-release_MEX-17-2583_en.htm>).

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G. The Netherlands

(1) Introduction

This has been an important year for Dutch environmental law. On the one hand, the reform of the structure of Dutch environmental law is in progress. The Act on Nature Protection (*Wet Natuurbescherming*) discussed in the 2016 edition of this yearbook entered into force on 1 January 2017 and represents a concrete step in the direction of creating a fully integrated regulatory system on environmental protection. This reform will culminate in the entering into force of the Environment and Planning Act (*Omgevingswet*) discussed in the 2015 edition of

this yearbook, now expected for 2021. However, the perceived end of the economic crisis allows more room for discussion as to whether the proposed reform needs improvement to ensure a high level of protection of the environment, with particular focus on the use of plans and programs in this regard. Both these developments are discussed in this report, starting with the Act on Nature Protection and followed by the discussion on desired/needed improvements concerning the use of plans and programs to protect the environment.

(2) The Entry into Force of the Act on Nature Protection

Adopted in December 2016, the Act on Nature Protection entered into force on 1 January 2017, hereby repealing three acts: the 1998 Nature Protection Act, the Flora and Fauna Act, and the Forest Act. The provisions of the Act on Nature Protection follow closely those on EC Directive 2009/147 on the Conservation of Wild Birds (Birds Directive) and EEC Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive) as well as the Convention on International Trade in Endangered Species of Wild Fauna and Flora Regulation and, at the international level, those of the Convention on the Conservation of European Wildlife and Natural Habitats and the Convention on the Conservation of Migratory Species of Wild Animals. This means that Dutch nature conservation law has lost most, if not all, of its peculiarities. Most importantly, almost all cases in which Dutch nature conservation law went beyond the requirements coming from European Union (EU) and international nature conservation law have been eliminated (L. Squintani and J. Zijlmans, “Nationale koppen” en de Doorwerking van Natuurbeschermingsverdragen’ (2013) 3 Milieu en Recht 158).

Effectively, this means that the Act on Nature Protection deregulates nature conservation law in favour of economic development. Given the non-positive status of nature in this country, this development cannot be seen as positive. Actually, as further discussed in the next section, the manner in which the Netherlands intends to reduce the negative effects of nitrates deposition on Natura 2000 sites can be criticized from an EU law perspective. Future developments will clarify whether the Netherlands is going too far in its deregulation efforts.

(3) Judicial Review of Environmental Plans and Programs

(A) *The Urgenda Progeny: Air Quality Litigation in the Netherlands*

The readers of this yearbook are well acquainted with the *Urgenda Foundation v Kingdom of the Netherlands* case (*Urgenda*) and its meaning in the context of climate litigation (The Hague District Court (Rb. Den Haag) 24 Juni 2015, ECLI:NL:RBDHA:2015:7145. K.J. de Graaf and H. Tolsma, ‘The Netherlands’ (2015) 26 YIEL 368). This case gave bravery to Dutch environmental organizations to attack perceived governmental negligence also outside climate law. Air quality is seen as the next frontier of environmental litigation. This year, the

Netherlands witnessed the ‘rise and fall’ of Milieudefensie’s attempt to force the Dutch government to do more in this field. Air quality at several locations in the Netherlands does not fulfill EU standards under EC Directive 2008/50 on Ambient Air Quality and Cleaner Air for Europe (Air Quality Directive). The Dutch government aims to achieve these standards by means of the measures indicated under the so-called National Cooperation Programme for Air Quality (*Nationale Samenwerkingsprogramma Luchtkwaliteit* (NSL)). Yet, studies show that under the NSL air quality will still not be in line with EU standards for nitrogen dioxide in 2020. Milieudefensie and other interested parties, hence, started civil lawsuits on grounds similar to those in the *Urgenda* case but related to air quality, to force the Dutch state to take extra measures to improve air quality and stop taking measures worsening air quality. Actually, two proceedings were started: an interim proceeding (Hague Tribunal, ECLI:NL:RBDHA:2017:10171) and an ordinary proceeding (Hague Tribunal, ECLI:NL:RBDHA:2017:15380). Despite the fact that the legal grounds and the facts in these two procedures were the same, two very different outcomes were reached, leading to legal uncertainty.

In September, the Hague District Court, the same court that also decided the *Urgenda* case, reached a verdict in the interim procedure. It concluded that Milieudefensie had standing and its claims were well founded. Indeed, all parties agree that air quality standards are not met at certain locations in the Netherlands and that it will take a long time under the NSL to redress the exceedances. Accordingly, based on the arguments brought forwards by the parties, The Hague District Court ruled that the Dutch government committed a tort. As a consequence, it gave the Dutch government the order that it has to do more to redress exceedances. Also, the Dutch government has to refrain from taking measures leading to further deterioration of air quality. This latter finding is most relevant, as it goes a step further than in the *Urgenda* decision. A negative obligation restricting the government from adopting measures that would make the quality of the environment even worse can place severe restrictions on the freedom of public authorities. A positive obligation to do more, as occurred in *Urgenda*, leaves the state free to choose forms and methods of action. Such an obligation would have allowed room to balance measures that are detrimental to the air quality with measures improving it. It thus allows room for the so-called ‘net loss’ or ‘per balance’ approach (L. Squintani and H.F.M.W. van Rijswijk, ‘Improving Legal Certainty and Adaptability under the Programmatic Approach’ (2016) JEL 3; Marlon Boeve and Berthy van den Broek, ‘The Programmatic Approach: A Flexible and Complex Tool to Achieve Environmental Quality Standards’ (2012) 8 Utrecht Law Review 74). On the contrary, a negative obligation restricts the government to adopt any measure leading to further deterioration of air quality. No net loss approach is possible. This explains why the Dutch government reacted to the decision of the Hague District Court in the interim procedure by saying that they will comply with the first two parts of the judgment, but appealed against the negative obligation that was included in the verdict.

Whether the appeal is still relevant is somewhat unclear as the court, in December 2017, reached a verdict with a very different outcome in the regular procedure. The Hague court ruled that most of the claimants did not have standing. Only Milieudéfense had standing, at least in part. Moreover, all claims were rejected. The reasons for rejecting the claims are concerned with the finding that Milieudéfense has not provided enough evidence about the negative consequences of the state action or inaction on ongoing exceedances of air quality standards. This means that parties have to establish a causal link between specific actions or omissions and the worsening of air quality at specific locations. This requirement is not easy to fulfill. This also represents a contrast with the manner in which The Hague District Court handled the causal link requirement in the *Urgenda* case. Where in *Urgenda* a general appraisal was enough, in the regular procedure in *Milieudéfense* the causal link needs to be established for each action or omission in conjunction with specific exceedances.

Milieudéfense decided to appeal the judgment in the regular procedure, which means that the appeals in the interim procedure and the regular procedure will crisscross each other. Because of the contrasting outcomes of the *Milieudéfense* proceedings, there is great uncertainty in the Netherlands about judicial protection in environmental matters. This is fueling a discussion on the need of ad hoc procedures to review public plans and programs that allegedly fail to serve environmental goals, following the example of Germany (*Gesetz zur Anpassung des Umwelt-Rechtsbehelfsgesetzes und anderer Vorschriften an europa- und völkerrechtliche Vorgaben*, *Bundgesetzblatt Teil I*, 2017, no. 32 (1 June 2017) at 1298) as discussed in the next section.

(B) Judicial Protection against Plans and Programs

The net loss/per balance approach followed under the NSL discussed above is a governance instrument used in several fields of Dutch environmental law. It is an example of the so-called programmatic approach. The programmatic approach is used, for an important example, in the context of water management, and thus under water plans and water management plans serving to implement the Water Framework Directive (L. Squintani, E.J.H. Plambeek, and H.F.M.W. van Rijswijk, 'Strengths and Weaknesses of the Dutch Implementation of the Water Framework Directive' (2017) 3–4 JEEPL 269). Another important area in which the programmatic approach is used is in the context of the management of nitrates deposition under EEC Directive 91/676 Concerning the Protection of Waters against Pollution Caused by Nitrates from Agricultural Sources (Nitrates Directive) and the Habitats Directive (H. Schoukens, 'Habitats Restoration Measures as Facilitators for Economic Development within the Context of EU Habitats Directive: Balancing No Net Loss with the Preventive Approach?' (2017) 1 JEL 47). Under the adopted Environment and Planning Act, which has not yet entered into force, the programmatic approach will evolve to a generic instrument of environmental law and will play a central role in achieving the majority of environmental goals set by the Dutch government.

Yet, the programmatic approach is under pressure from both a substantive and a procedural perspective, making its future uncertain. From a substantive perspective, the Court of Justice of the EU has ruled in the *Weser* case (Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, [2015] ECR 433), in regard to water management, that any deterioration of a water body is prohibited under Article 4(1) of EC Directive 2000/60 Establishing a Framework for Community Action in the Field of Water Policy (Water Framework Directive), regardless of the long-term effects of water plans and programs of measures. This judgment led Dutch authors to the conclusion that the Dutch programmatic approach in water management and its net loss approach must be reconsidered (see Squintani, Plambeck, and Van Rijswick, 'Strengths and Weaknesses'). A similar position has been taken in regard to the Dutch Plan on Nitrogen Deposition (see Schoukens, 'Habitats Restoration'). Following the *Orleans* judgment (Joined Cases C-387/15 and 388/15, *Hilde Orleans and Others v Vlaams Gewest*, [2016] ECR 583), it has become clear that compensatory measures proposed in the context of (nature management) plans cannot be taken into account when assessing the negative impacts of specific projects on a nature reserve site under Article 6(3) of the Habitats Directive. This means that the negative effects of a specific project cannot be balanced with the positive ones brought about by (compensatory) measures suggested in a (nature management) plan, at least not in principle. Following these discussions, the Dutch Administrative Jurisdiction Division of the Council of State referred two preliminary questions to the Court of Justice of the European Union (Dutch Council of State, ECLI:NL:RVS:2017:1259 and Dutch Council of State, ECLI:NL:RVS:2017:1260) concerning, in essence, the validity of the PAS under EU law, as discussed in the 2016 volume of this yearbook.

If these developments concerning the room for relying on the programmatic approach, including the view of the Hague District Court in the *Milieudefensie* interim proceedings, are confirmed, the use of this approach under the Environmental and Planning Act could become problematic for water, nature, and air quality management. This would represent a severe drawback for the reform aimed at by the Dutch government.

From a procedural perspective, new insights in the meaning of Article 9(2) and (3) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in the context of plans and programs are putting pressure on the programmatic approach as well (L. Squintani and E.J.H. Plambeck, 'Judicial Protection against Plans and Programs Affecting the Environment: A Backdoor Solution to Get an Answer from Luxembourg' (2016) 3–4 JEEPL 294). Under the Aarhus Convention, there is an obligation to ensure judicial review of plans and programs affecting the environment (for example, Belgium, Doc. ACCC/C/2005/11 ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 31). The Aarhus Convention is an integral part of the EU environmental acquis. Indeed, the European Commission's paper on judicial protection in environmental matters

confirms the existence of such an obligation under EU law (EU Commission, *Commission Notice on Access to Justice in Environmental Matters*, Doc. C(2017) 2616 final). The *VLK II* and the *Protect* cases confirm that Article 19(1) of the Treaty on European Union and Article 47 of the EU Charter of Fundamental Rights give extra power to Article 9 of the Aarhus Convention in conjunction with the specific provisions of EU environmental law establishing substantial duties (see respectively, Case C-243/15, *Lesoochránárske zoskupenie VLK v Obvodný úrad Trenčín*, [2016] ECR 838 and Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, [2017] ECR 987). Accordingly, member states must ensure judicial protection against plans and programs affecting the environment.

In the Netherlands, these developments at EU level are leading to a discussion on how Dutch law offers judicial protection against plans and programs in environmental matters. The concept of plans and programs is not defined under Dutch law. There are several kinds of plans and programs. In some cases, Dutch law explicitly states that a plan or program cannot be directly subjected to judicial review by an administrative law court, as it is not intended to affect the legal position of third parties. This is, most notably, the case for the NSL and water (management) plans. Still, administrative law courts can review the validity of such plans and programs indirectly while reviewing the legality of a specific human activity authorized under the NSL or under a water (management) plan. Whether this option for judicial review is sufficient to ensure compliance with the Aarhus Convention and EU law is questionable (see Squintani and Plambeck 'Judicial Protection'). If this indirect judicial review is insufficient, the civil law court is still able to close the potential gap by means of applying tort law. Yet, as the *Milieudéfensie* cases discussed above show, it seems hard to undertake this route successfully. The uncertainty pervading this possibility opened the debate on the need of regulatory reforms.

In conclusion, the discussion concerning the substantive and procedural compatibility of the Dutch programmatic approach with EU law casts shadows on the future of one of the core aspects of the reform the Environment and Planning Act will introduce. If the allegations of non-compatibility of the programmatic approach in the context of water, nature, and air quality management are confirmed, the reform will have to take that into account and acknowledge that the generic instrument 'programmatic approach' shall not be applied in those fields of environmental law unless the problematic elements of the instrument are either removed or amended. These developments will undoubtedly be closely monitored and reported in the coming yearbooks.

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