



EU PILOT 8540/16/ENVI

Subject: **Implementation in Denmark of Directives 91/676/EEC, 2000/60/EC, 92/43/EEC, in relation to the recently adopted agricultural package**

On 22 December 2015, the Danish government and supporting political parties in the Danish Parliament reached an agreement on a Food and Agriculture package, the so-called "agricultural package"¹. Based on the "agricultural package", the national system regulating nutrients emissions from agriculture is being modified. Some of the changes introduced were implemented immediately, while for others the implementation will take place progressively.

In light of the assessment of the information submitted by Denmark² on the national system regulating nutrients emissions, and on the basis of the bilateral exchanges held since autumn 2015, as well as written questions³ and complaints⁴ received on this issue, the Commission services have decided to initiate the present investigation on their own initiative.

The Commission services consider that the measures taken by Denmark could breach the following EU Directives:

- Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (the Nitrates Directive)⁵.
- European Parliament and Council Directive 2000/60/EC of 23 October 2000 establishing a framework for water policy (WFD)⁶.
- Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora (the Habitats Directive)⁷.

Should your authorities agree that there are deficiencies in the application of these Directives in Denmark, the Commission would be grateful to be informed of the measures taken to ensure full compliance. If these measures have not yet been adopted, your authorities are invited to submit a draft of the proposed measures and a feasible timetable (including milestones) for their adoption.

The Danish authorities are invited to provide the necessary clarifications on the issues raised in this EU Pilot within **ten weeks** following the submission of this request.

¹ <http://mfvm.dk/landbrug/vaekst-eksport-og-arbejdspladser/foedevare-og-landbrugspakke/>

² Ares(2015)5889993; Ares(2015)5919478; Ares(2016)742596; Ares(2016)742771; Ares(2016)742836; Ares(2016)74286; Ares(2016)1403517; Ares(2016)1079394; Ares(2016)743015; Ares(2016)742861; Ares(2016)742836; Ares(2016)742771; Ares(2016)742596; and Ares(2016)1820969.

³ Question for written answer E-001757-16

⁴ CHAP(2016)00940

⁵ <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex:31991L0676>

⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0060>

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0043>

ANNEX I

New system's implementation timeline

In the notes to the Commission⁸, the Danish authorities described the new system's implementation timeline as follows:

- 2016 - 2018: short term changes of the nitrates regulation⁹
- 2017 - onwards: new regulation of livestock holdings¹⁰
- 2018 - onwards: targeted regulation of nitrogen leaching at farm level

As part of the short term changes the Danish authorities:

- Repealed the rule on 9 metre buffer strips along lakes and watercourses¹¹:

On 21 January 2016, the Danish Parliament abolished the rule requiring 9 meter buffer strips along lakes and watercourses with a surface area larger than 100 m², previously established by amended Act 591 of 14 June 2011.

- Are lifting the national fertilization application standards for nitrogen below the economic optimum rule¹²:

The Danish Nitrates Action Programme establishes that, to reduce the risk of leaching, the yearly amount of nitrogen applied is initially calculated as 10 % below the economic optimum. Further, it is ensured that the total potential amount of nitrogen that is applied by using the nitrogen standards does not exceed the total amount in 2003/04. However, with Order no 280 of 16 March 2016, the Danish authorities removed the reduction of the nitrogen application standards by two thirds for the period 2015-2016, and plan to remove the remaining one third in the following crop season 2016/17.

- Plan to make adjustments to the rule concerning the prohibition on soil tillage in the autumn¹³:

Order no 928 of 16/07/2010 on the agricultural use of fertilizer and on plant cover establishes the prohibition on soil tillage from harvest until either 1 November or 1

⁸ Ministry of Environment and Food of Denmark, Danish EPA Commerce, Industry and Agriculture, J.nr. 001-13962, Ref. lidbj, 10 December 2015. Ares(2015)5889993, and Ministry of Environment and Food of Denmark, Danish AgriFish Agency, Nature Agency, Environmental Protection Agency, J.nr. 2015-6878, 5 January 2016. Ares(2015)5889993.

⁹ <http://eng.mst.dk/media/mst/Attachments/DanishNitrateActionProgramme2008201507092012.pdf>

¹⁰ The regulation of livestock holdings (i.e. "harmony rules") set requirements for the minimum size of the area a livestock holding must have available for spreading livestock manure from the respective livestock production. Since 2002, Denmark has imposed a requirement for holdings producing pigs, poultry and fur bearing animals limiting limit the amount of manure per hectare to 1.4 LU/ha. Danish authorities plan to modify the "harmony rules" for growers and finishers * I'm not able to add a note to footnotes, but I would question whether this is the correct terminology? When referring to animal farming we usually say "producers" or "farmers" rather than "growers" (growers implies plants). I'm not sure what is meant by "finishers" but again it's not a term we would use in English* (pigs for slaughter) to 1.7 LU/ha from the current 1.4 LU/ha. The Danish authorities mentioned that, due to the changes of the harmony rules, a new regulation addressing phosphorous will be introduced. Danish EPA Commerce, Industry and Agriculture, MST-001-14020, 8 January 2016. Ares(2016)742771.

¹¹ <http://naturerhverv.dk/landbrug/natur-og-miljoe/randzoner/>

¹² Ministry of Environment and Food of Denmark, Environmental Protection Agency, Industry and Agriculture, J.nr. 001-14111, Ref. lidbj/phof (NAER), 18 January 2016. Ares(2016)743015.

¹³ Ministry of Environment and Food of Denmark The Danish AgriFish Agency, J.nr.: 15-8097-000137, 13 January 2016. Ares(2016)742771.

February depending on the soil type (clay/sand). The Danish authorities plan to include in the already existing list of exceptions (e.g. areas with winter crops and catch crops, areas with perennial woody plants and organically farmed areas) areas fulfilling the following criteria: 1. Preceding the establishment of sugar beets; 2. On soil types with a high relative content of clay; 3. Following harvest of maize on sandy soils.

Implementation issues in relation to the Nitrates and Water Framework Directives

It should be recalled that, as stated by Article 1 of the Nitrates Directive, measures established in Nitrates Action Programmes should be aimed at preventing and reducing nitrate pollution, including eutrophication, from agricultural sources. According to Article 5(5), of the Nitrates Directive, Member States are obliged to take additional measures or reinforced actions in the framework of their action programmes if it becomes apparent that those mandatory measures referred to in Annex II, point A, and Annex III of the Directive are not sufficient to reduce pollution caused by nitrates and to prevent further such pollution.

Article 4 of the WFD sets binding environmental objectives,¹⁴ notably the achievement of good status (including nutrient conditions consistent with good ecological status) for water bodies and a prohibition on deterioration of the status of water bodies. The WFD also requires a gap analysis of the reduction in pressures necessary to achieve good status to be prepared and used to determine a programme of measures that complies with the requirements of Article 11 of the WFD (for diffuse pollution the most relevant requirements are Article 11.3(a), (d), (h) and if necessary 11(4)) and which allows for the pressures to be reduced to the level that allows good status to be achieved. The programme of measures and river basin management plans should be presented and consulted upon with stakeholders and the measures contained therein should be implemented at the latest 3 years after the adoption of the river basin management plans (RBMPs).

The 1st RBMPs in Denmark included a number of measures to reduce agricultural nutrient pollution, however these plans were retracted and revised and the measures within them were considerably reduced. As a result DK has reported that the total reduction of emissions obtained at the national scale by the programme of measures was reduced by approx. 27% for nitrogen and approx. 73% for phosphorus.

Denmark missed a number of the deadlines established in the WFD for the development and implementation of the first RBMPs¹⁵ and the programme of measures now included in the revised first RBMPs are not at the level necessary to secure good status for WFD by the deadline established by the WFD, which has already expired. This means that further strengthening of the measures is required in the second RBMPs (which Denmark is also late in adopting) rather than the removal of measures as proposed by the agricultural package.

In this context, although the WFD allows for a progressive and phased implementation of the programme of measures (as long as the specific criteria for exemptions are fulfilled), it does not envisage a weakening of the initial programme of measures set. In the WFD there are obligations to restore water bodies in Article 4(1)(a)(ii) and Article 4(1)(b)(ii) and, in the context of measures to reverse significant and sustained upward trends in the concentration of pollutants under Article 4(1)(b)(iii), to progressively reduce pollution of groundwater. If the environmental objectives set as a result of the original programme of measures are shown to be unlikely to be achieved, Article 11(5) requires a number of additional measures to be taken

¹⁴ On the binding nature of the environmental objectives in Article 4, see the recent preliminary ruling of the CJEU in case C-461/13.

¹⁵ It is noted that the first RBMPs have still not been finally adopted as, according to available information from Denmark, judicial proceedings are still pending. Denmark has been condemned by the Court of Justice for failure to adopt the RBMPs on time and the Commission still has an open infringement case on the issue.

to achieve these objectives. Pursuant to Annex VIII, an explanation of these measures has to be provided in the river basin management plan.

The short term changes described above represent a weakening of the mandatory rules to regulate nitrogen losses. The Danish authorities acknowledged that the annulment of the requirement for additional buffer strips, lifting the reduced standards to the economic optimum level and planned changes in the prohibition on soil tillage in the autumn will result in an increased loss of nitrogen to the aquatic environment¹⁶.

The Danish authorities acknowledged that with the short term changes, the legislation does not ensure the achievement of the objectives of the Nitrates Directive and the Water Framework Directive. Therefore, they explained that the increased loss of nitrogen to the aquatic environment will be countered by additional measures in order to ensure an adequate implementation of these Directives¹⁷.

The Danish authorities assessed the need for further measures based on the calculation of nitrogen loads leached to the marine environment, including the contribution of the so called "baseline" (accumulation of effect of measures already in place and structural developments in Denmark) to the reduction of nitrogen leaching¹⁸. However, according to the understanding of the Commission services, it appears that the additional measures described by the Danish authorities:

a) are partly voluntary

The Danish authorities aim to offset part of the estimated additional nitrogen leaching through the implementation of a set of voluntary measures, such as a catch crop scheme for vulnerable groundwater to be implemented in the period 2017-2018¹⁹. In particular, the Danish authorities foresee that certain measures (e.g. mini-wetlands) for the reduction of the additional nitrogen leaching due to the lifting of previous measures under the Nitrates Directive will be compensated through Rural Development Programme funds²⁰.

b) do not take into account all water bodies and all forms of pollution

The Danish authorities have devised the new measures based on nitrogen leaching to marine waters and without any information on the consequences for other water bodies, in particular for groundwater. In fact, the Danish authorities have informed the Commission that the Geological survey of Denmark and Greenland is currently evaluating groundwater status and the possible geographical distribution of additional measures in relation to groundwater. The full evaluation is expected to be completed only in June 2016²¹. It is therefore undisputed that the consequences for groundwater have not been taken into account, as those consequences are as yet unknown.

¹⁶ Ministry of Environment and Food of Denmark, Danish AgriFish Agency/Nature Agency/Environmental Protection Agency, J.nr. 2015-6878, 10 December 2015. Ares(2015)5889993.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ministry of Environment and Food of Denmark, The Danish AgriFish Agency, J.nr. 16-8097-000065 Date: 6 April 2016. Ares(2016)1820969.

²⁰ Ministry of Environment and Food of Denmark, The Danish AgriFish Agency and The Danish Nature Agency, Follow-up note. Prospects of ensuring the expected nitrogen effects from extra RDP funds for the period 2017-2021 to additional collective Nitrogen-reducing measures 27 January 2016. Ares(2016)743015.

²¹ Ministry of Environment and Food of Denmark, Danish AgriFish Agency, Nature Agency, Environmental Protection Agency, J.nr. 2015-6878, 5 January 2016. Ares(2015)5889993.

- c) are not currently in place even though in 2016 there has already been an increase in the national fertilization application standards for nitrogen due to the partial lifting of nitrogen standards reductions²², which has inevitably caused increased risk of nitrogen leaching and run off.
- d) are aimed at maintaining the status quo (replacing the effect of previous measures) rather than aiming for a reduction in the existing level of pollution urgently needed to achieve the objectives set out in environmental legislation.

On the basis of the information submitted by Denmark, the Commission services consider that the revised Danish agricultural nutrient regulation appears to run contrary to the objectives and provisions of Articles 1 and 5(5) of the Nitrates Directive as well as Articles 4(1)(a)(i), 4(1)(b) (i)(ii) + (iii), 4.4, Article 11(3)(a), (d) and (h), 11(5) of the Water Framework Directive:

- The fact that short term changes have already taken place without implementation of counteracting measures has increased the risk of nitrogen pollution to already heavily polluted water bodies and has increased the risk of nitrogen load to habitats which are in poor conservation status. This goes against the principles established in EU law. The preparation of a more targeted system in the future to tackle agricultural nutrient emissions to water does not alleviate the need to comply with the existing environmental acquis in the short term.
- The structural changes²³ potentially delivering the offset of a large amount of nutrient losses due to the lifting of existing measures, do not provide the necessary safeguards in terms of water quality protection, especially in the short term. Potential effects of structural changes cannot be ensured and, even if they are effective, they might deliver nutrient loss reductions only years after the increased nutrient leaching generated by lifting the existing measures. The possibility that structural changes will deliver positive effects on water quality cannot be a valid argument for not implementing proper legislation from the outset.
- Voluntary measures, including the use of Rural Development Funds, replacing compulsory measures which were previously recognised as basic measures to achieve the objectives of the Nitrates Directive, cannot ensure that water quality issues are adequately tackled in specific areas affected by nitrogen pollution. The use of voluntary measures for meeting the Nitrates Directive's obligations in place of compulsory measures is incompatible with the Nitrates Directive.
- The removal of compulsory measures under the Nitrates Directive, also raises questions over how Denmark can comply with the WFD in terms of basic measures under Article 11(3)(d) and (h) which require controls.
- Despite the absence of information on the extent and location of possible increased nitrogen leaching to groundwater, and despite the existing water quality problems, the

²² The Danish Minister of Environment and Food has issued a revised Order no 280 of March 16 2016 on agricultural use of fertilizer in the planning period 2015/2016, in which nitrogen standards reductions are decreased by 2/3 as compared to the of the reductions imposed prior to the present revision of the Order. *Ministry of Environment and Food of Denmark, Environmental Protection Agency, Industry and Agriculture, Ref. LIDBJ, March 18, 2016.* Ares(2016)1403517.

²³The so called "baseline" referred to in: Ares(2016)1079394; Ares(2016)742861; Ares(2016)742836; Ares(2016)742771; Ares(2016)742596 and Ares(2015)5889993

Danish authorities have decided to take short term measures increasing nutrient inputs on agricultural land. This is incompatible with Article 1 of the Nitrates Directive and Article 11(3)(a) (and Annex VI, Part A, point (ix) of the Water Framework Directive) and of Article 4(1)(b)(i) if these measures result in the deterioration of status and of Article 4(1)(b)(iii) if there is a significant and sustained upward trend in the concentration of pollutants. In addition, it appears that Denmark is not taking adequate measures to address diffuse pollution as required under Article 11(3)(d) and (h) of the WFD.

Implementation issues in relation to the Habitats Directive

According to Article 6(1) of the Habitats Directive, the Danish government has an obligation to establish the necessary conservation measures for each Natura 2000 site, in order to maintain or restore, at favourable conservation status, the natural habitats and species of wild fauna and flora of Community interest for which each site has been designated.

According to Article 6(2) of the Habitats Directive, the Danish government has the obligation to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the Natura 2000 sites have been designated, in so far as such disturbance could be significant. This provision covers the so-called "agricultural package".

According to Article 6(3) of the Habitats Directive, the Danish government has the obligation to make any plan or project not directly connected with or necessary to the management of the Natura 2000 sites but likely to have a significant effect thereon, either individually or in combination with other plans or projects, subject to appropriate assessment of its implications for the sites in view of the sites' conservation objectives and to agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the sites concerned. This provision covers the "agricultural package", which should therefore have been subject to appropriate assessment under Article 6(3).

Denmark has reported in its Article 17 report under the Habitats Directive that all habitat types of Community interest are at unfavourable conservation status and most of them, including coastal habitat types²⁴ and almost all grassland habitat types²⁵, are at unfavourable-bad status²⁶. Denmark has reported that 'agricultural intensification', 'fertilisation', nitrogen input and 'diffuse pollution to surface waters due to agricultural and forestry activities' are pressures of high importance for most of these habitat types.

The "agricultural package" is very likely to exert an increased pressure on certain habitat types, such as coastal habitats²⁷ and grassland habitats, which are already in bad conservation status due to 'agricultural intensification', 'fertilisation', nitrogen input and 'diffuse pollution to surface waters due to agricultural and forestry activities', as reported by the Danish authorities. This increased pressure might lead to deterioration of these habitats within Natura 2000 sites, which is contrary to Article 6(2) of the Habitats Directive. Further, it appears that the Danish Government has not assessed the "agricultural package" as regards its implications for all designated Natura 2000 sites in view of the sites' conservation objectives, according to Article 6(3) of the Habitats Directive. Finally, it is unclear if and how the Danish Government

²⁴<http://bd.eionet.europa.eu/article17/reports2012/habitat/report/?period=3&group=Coastal+habitats&country=DK®ion=>

²⁵<http://bd.eionet.europa.eu/article17/reports2012/habitat/report/?period=3&group=Grasslands&country=DK®ion=>

²⁶<http://bd.eionet.europa.eu/article17/reports2012/habitat/report/?period=3&group=Freshwater+habitats&country=DK®ion=>

²⁷<http://bd.eionet.europa.eu/article17/reports2012/habitat/report/?period=3&group=Coastal+habitats&country=DK®ion=>

has assessed the impact of the "agricultural package" on the conservation measures already established under Article 6(1) of the Habitats Directive for Natura 2000 sites as well as on the measures established for the wider landscape. In other words, whether or not the implementation of the "agricultural package" will reduce the effectiveness of established conservation measures.

Questions

In light of the above, the Danish government is invited to reply to the following questions:

1. *Do the Danish authorities share the assessment of the Commission services on the ineffective character of the measures taken and the potential breach of Articles 1 and 5(5) of the Nitrates Directive?*
2. *What additional compulsory measures will the Danish authorities introduce in the framework of the Danish Nitrates Action Programme to ensure compliance with Article 5(5) of the Nitrates Directive in the short, medium and long period? Please provide a detailed time line for the adoption of such measures.*
3. *Do the Danish authorities share the assessment of the Commission services on the ineffective character of the measures taken and the potential breach of Articles 4(1)(a)(i), 4(1)(b) (i),(ii) and (iii), 4.4, Article 11(3)(a), (d) and (h), 11(5) of the Water Framework Directive?*
4. *What additional measures and reinforced actions will the Danish Authorities take to address agricultural nutrients (both nitrate and phosphate) to ensure there is no deterioration in water quality (in respect of all water bodies) also in the short term, to address existing negative water quality trends and ensure improvement of water quality (groundwater, fresh and saline surface waters) to ensure good status is reached in the shortest possible timescale (in view of the fact that the default deadline of 2015 to achieve these objectives has already expired)? Please provide a detailed time line for the adoption of such measures and by when good status will be achieved.*
5. *In view of the previous question, will the Danish authorities undertake to reintroduce the measures necessary to achieve the environmental objectives as envisaged pursuant to the first programme of measures under the WFD in order that implementation is progressive, not regressive?*
6. *What conservation measures under Article 6(1) of the Habitats Directive have the Danish authorities taken to address the existing nitrogen pressures from agriculture on habitat types or species (e.g. lake, coastal and grassland habitat types) in Natura 2000 sites in view of the obligation to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest, also taking into account the results presented by Denmark in the Article 17 report under the Habitats Directive? Will the effectiveness of these measures be reduced due to the "agricultural package"? If so, will the Danish authorities implement new conservation measures under Article 6(1) of the Habitats Directive to counteract the effects of the "agricultural package"?*
7. *Have the "agricultural package" and its implementing acts been subject to an appropriate assessment required by Article 6(3) of the Habitats Directive in view of assessing its implications for all the Natura 2000 sites in Denmark and/or to an assessment in accordance with Directive 2001/42/EC? What are the results of such assessments?*
8. *How is Denmark planning to ensure that deterioration of natural habitats and the habitats of species for which all the Natura 2000 sites have been designated is avoided in relation to the envisaged increased use of nitrogen applications in agricultural areas and the "agricultural package" in general?*