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## **Commission II**

Cadre juridique du droit de l'environnement pour la production agricole  
– **Legal framework of environmental Law for agricultural production** – Umweltrechtliche Rahmenbedingungen für die landwirtschaftliche Produktion

**National report for Netherlands**

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## **THE NETHERLANDS AND ITS FERTILISER POLICY IN VIEW OF THE NITRATES DIRECTIVE**

The livestock sector in the Netherlands has traditionally been a highly developed sector. That sector has particularly taken off since the 1970s, specifically with regard to intensive stock farming. Actually there has been a tendency toward scale enlargement since the 1970s that continues to this day. One of the consequences of this is that the Netherlands maintains fertiliser policy and fertiliser legislation in this context that is older than European regulations in the field, whereby of course I refer particularly to the nitrates directive.

Fertiliser legislation in the Netherlands has always consisted of two tracks. One track has always concerned, and continues to involve, the regulation of the application of fertiliser to agricultural land; the other track basically serves as a guarantee of the fulfilment of the first track and applies to a limitation of fertiliser production. Actually the first track involves the so-called usage track. Through a system of prohibitions and administrative obligations, the goal is that no more than a certain quantity of minerals, expressed in phosphates and nitrogen, is utilised per hectare of agricultural ground used for agrarian operations. In this context there are differentiations in many areas, such as with regard to the crops, the condition of the land and the nitrogen coefficient. These standards of use are constantly being fine-tuned. To put it simply, what it comes down to is that over the course of the years smaller quantities of fertiliser have been allowed to be used on agricultural land. This entire matter is controlled by means of an extensive administration that applies to agrarians whereby they are required to precisely specify how many animals they are raising, how much manure is produced, how much agricultural land they have, how much manure they bring in and send out et cetera. By mapping the manure flows per enterprise and registering the surface agrarian land, it can be exactly determined whether or not too much animal manure is being used on agrarian land belonging to an agricultural enterprise.

In addition there are the bans on production. These bans regulate that within the Netherlands only a certain quantity of animal manure may be produced. The reason for this ban is to limit the pressure on the fertiliser market. After all, if manure production is too high in proportion to the

available agricultural land, it stands to reason that such pressure occurs on the fertiliser market and the companies and that there is a greater tendency toward fraud. To reduce this pressure toward fraud, production bans have been established. In the context of these bans, one may not produce more pig and/or chicken manure than on the basis for pig and/or poultry manure applicable to a business.

Most fertiliser legislation in the Netherlands dates back to 1984. This was the so-called Interim Restriction Pigs and Poultry Farms. On the basis of this, as a rule one may not keep more pigs and chickens than one had specified in response to the *meitelling* (agricultural survey). So the agricultural survey of 1984 determined the scale of national pig and poultry production. The name *Interim Act* states it clearly. This was only an emergency stop in anticipation of a more comprehensive fertiliser law whereby measures for protecting land were also taken. The situation in 1984 was considered sufficiently urgent, however, that a decision was made not to wait for fertiliser legislation. As of 1 January 1987 the Fertiliser Act went into effect on the basis of which the production bans of the Interim Act were actually extended and on the basis of this, in association with the soil protection act, regulations were established to insure that people would use no more fertiliser on land than is considered responsible in the context of soil protection.

To begin with this applied ‘only’ to pigs and chickens, but as of 1 January 1982 other animals were added to the list such as sheep, goats, ducks, minks, foxes and rabbits. The Nitrates Directive appeared on 12 December 1991. The Nitrates Directive focuses on preventing and decreasing water pollution that is caused or brought about by nitrates from agricultural sources. So the directive focuses on the component nitrogen. Member states must specify vulnerable areas within their territory for which the criterion applies that groundwater contains more than 50 milligrams of nitrates per litre or could contain this if the measures according to article 5 of the directive were not enforced. For the Netherlands, it is important that it has identified its entire territory as a vulnerable zone.

**Elaboration: page 51 ff thesis**

More than twenty years have now passed since the introduction of the Nitrates Directive. The Netherlands is currently working on its fourth

campaign. Dutch fertiliser policy has in principle not changed. There is still a system of usage standards that regulates the quantity of minerals in the form of nitrogen and/or phosphate to be administered to soil. In addition to the system of usage standards there are also production bans. As had been the case in 1984, on 1 January 2006 only pigs and poultry remained in such a situation. The assessment was and is that with regard to other types of animals there is no situation where there is such an increase in the number of livestock that the Fertiliser Act must continue to be applied.

In the intervening years, various attempts have been made to give slightly different form to the fertiliser policy or to establish additional measures as meant in article 5 of the Nitrates Directive, such as the act on restructuring pig farming and the associated decrease by 25% of the number of animals, the 30% decrease of 1985 in production rights and the introduction of so-called fertiliser distribution contracts. Although a portion of these measures was successful, most of them were not. On balance, however, the core of fertiliser legislation was not unsuccessful, so it continues to apply.

Plans are for a new major change to be made in the Fertiliser Law as per 1 January 2014. This change concerns an obligation for manure producers to process or utilise a portion of their animal manures. This concerns a measure in the sphere of the abovementioned production bans. This measure is intended to regulate the total production of animal manure that becomes available on the market and is to be decreased with a view to the prevention of possible fraud. The more fertilizers are processed or utilised in such a manner that they no longer make their way to the fertiliser market, the better supply and demand on the fertiliser market will be coordinated and the lower the fraud pressure. This concerns a measure as referred to in article 5 of the Nitrates Directive which is considered necessary in order to fulfil the objectives of the Nitrates Directive, specifically a decrease in the minerals to be added to the soil, with these being decreased to a point that is considered acceptable from an environmental hygiene point of view. This point is that of so-called balanced fertilisation. Considering the scope of animal husbandry, however, in the Netherlands so much manure is produced that a fine-tuning of the usage standards will of necessity lead to a surplus of fertiliser and thus an increase in the pressure on the fertiliser market.

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In addition, attempts have been made to introduce a so-called mineral reporting system, abbreviated as Minas. What this system comes down to is that the agrarian makes a settlement in fiscal terms concerning a surplus in fertilisers at his company each calendar year. If he did not accomplish a suitable balance in his supply and discharge of fertilisers, he must pay a certain fee on the surplus. On 2 October 2003 the Court of Justice of the European Communities ruled that with this fertiliser legislation the Netherlands had violated its contractual obligations, because several obligations in the context of the Nitrates Directive were not properly met. After all, the Nitrates Directive states that it is simply forbidden and therefore criminally sanctioned to utilise more than 170 kilograms of animal fertiliser per hectare per year. There were indeed similar bans in the Netherlands, but these were not criminally sanctioned.

One could, as it were, ‘buy off’ these standards and excesses by paying a fee. The core of the judgment is that the court considers such a manner of sanctioning to be in conflict with the Nitrates Directive.

The fertiliser processing obligation was to begin with part of a draft law that included more components. In addition to the fertiliser processing obligation, legislators also wanted to replace the aforementioned production bans with a so-called system of fertiliser distribution contracts. What this system came down to was that one must not produce more animal fertiliser than one had guaranteed prior to production one could distribute by means of such steps as concluding distribution contracts. In other words: I may only produce fertiliser if I am certain that I can use this fertiliser either on my own land or on the land of another party through a legal contract, in a responsible manner and thus with fulfilment of the usage standards. Such a system had already been in force in the past, specifically 2002 and 2005. However, this system was done away with in 2005 because it failed to meet the relevant requirements. To put it simply it had too little regulatory force, it cost too much and did not lead to the desired results. For this reason, in 2005 we adhered to the system of production bans that was then still simply in effect in addition to fertiliser distribution contracts. The bill that is in process at the moment originally included this system of fertiliser distribution contracts, but this was also done away with by the Memorandum of Change of 10 July 2013. The

reason for this was that doubt had arisen concerning the added value of the regulation in addition to the introduction of the fertiliser processing obligation and the fact that it only continued to apply for the system concerning pigs and poultry. In my opinion this is an incorrect conclusion. After all, in 2005 several legal systems coexisted, such as the system of production bans, Minas and the fertiliser distribution contracts. This was simply too much of a good thing. In my opinion, therefore, the government correctly opted to once again do away with a system of fertiliser distribution contracts that were to be introduced in 2013.

What remains in effect without abridgement, however, is the fertiliser processing obligation.

In essence, this fertiliser processing obligation comes down to the following. It will be prohibited to produce animal fertilizers unless one a) produces no company surplus or b) has a certain percentage of that company surplus processed, transfers it to another party that has it processed or transports it to agrarian land that is across the border. Only companies that produce a very small amount of fertiliser are exempt from this.

Animal fertilisers are understood to mean the following:

- ‘Treatment of animal manure or an end product that fulfils the specifications to be set by our minister; or
2. The export of animal fertilisers’.

The parliamentary documents show that said processing must involve incineration and gasification. As we have stated, the other option is export, but it goes without saying that the manner of processing must be such that in reality no recognisable animal fertiliser must remain. With gasification or combustion this no longer remains as such. All other forms of processing can only count if the resultant product is then exported. One has fertiliser processed in a sound manner if this takes place on the basis of a contract with a manure processor recognised by the Minister. Of course this contract must be in writing, must fulfil the stipu-

lations set by the Minister and must be sent in to the competent authorities. The processor of animal fertiliser is then also legally required to actually process the fertilisers. The percentage that one must process may be set by the Minister by subordinate legislation, but for example for the south of the Netherlands this can go as high as 50% of the fertilisers produced.

That is it concerning the draft law in general terms. Plans are for the change to go into effect on 1 January 2014, incidentally one calendar year later than had originally been planned.

The reason why fertiliser processing was chosen is that the government feels that the pressure on the fertiliser market is becoming too high and that intervention is called for. However, there is no desire yet to intervene in terms of the size of the amount of livestock, so the decision is to give the sector another option than a decrease in the number of animals. It is important that this bill also came about in cooperation between the Ministry, the Dutch union for pig farmers and the agricultural and horticultural organization (NVV and LTO). In addition the government has emphasised that this fertiliser processing will also involve some technologically innovative development. Also envisaged, in particular in terms of high quality technology, is a new opportunity for the sector. It is clear, however, and this also serves as substantiation for the draft law, that in view of the ever increasing friction between the production of fertiliser on the one hand and on the other hand the decreasing demand for fertiliser as a consequence of the fine-tuning of the usage standards, a certain change is called for. It is important that such initiatives for fertiliser processing have already been developed earlier, but have not been and are not always applied on a large scale. Among other things this has to do with the financial aspects: ultimately the processing of fertiliser is thus far much more expensive than its use on agricultural land.

However, the government also sees the lack of large-scale initiatives as the reason why this has thus far not been a success. For this reason there is a desire to make fertiliser processing obligatory: if farmers are required to have fertiliser processed, this will of necessity lead to great demand for fertiliser processing, so that the initiative and thus the market development would get off the ground on their own. Where until now there have only been a few pioneers that stuck their necks out without much success,

it is assumed that an obligation must lead to the success of large-scale fertiliser processing.

I think that the criticism that the Council of State has concerning the draft law is significant, particularly for this conference. A brief explanation: the Council of State is the statutory advisory body to the government that advises on all bills. This advice applies to various aspects, and in any case also to the relationship with European law.

### *Elaborating the first advice of the Council of State*

With the change in the bill in the sense that fertiliser distribution contracts have been done away with, recently the Council of State issued new advice. One of the points for criticism of the Council of State is that through the disposal of fertiliser distribution contracts risks are taken in terms of the execution of the Nitrates Directive. The distribution of that part of the fertiliser surplus that does not fall under the fertiliser processing obligation will have to be justified by the fertiliser producer with the fulfilment of the already existing usage regulations on the basis of the Fertiliser Act. The Council of State considers that with this restriction of the instruments for the implementation of the Nitrates Directive, execution will become more vulnerable. In addition, a number of administrative changes are taking place in the fertiliser processing obligation, specifically in the sense that a transport document of animal fertilisers can as such also be considered evidence of a concluded fertiliser contract. Other parties can also be added, which in the opinion of the Council of State represents a chance of fraudulent behaviour. Thirdly, the Council of State has stated that the economic conditions for fertiliser processing continue to be unclear. Fertiliser processing, after all, is becoming obligatory, so that it must be clear that there is sufficient fertiliser processing capacity available. This has thus far been insufficiently demonstrated. Furthermore, the Council of State states that it is important for the fertiliser distribution contracts to remain part of legislation, with the condition that they may, for example, go into effect at a later time. In this way, it can be prevented that long-term and expensive legislative processes must take place in the course of time.

With regard to the first point for criticism of the Council of State, the government is considering that this may be a limited risk. Firstly there

are already regulations in effect at present, while secondly what is concerned here is fertiliser that in principle can indeed be relocated. After all, in reality only the surplus fertiliser must be discharged to the fertiliser processing facility.

In view of this, it is believed that the existing instruments represent sufficient guarantee that the Nitrates Directive can be complied with. With regard to the role of the contract, the government states that the transport document is in principle such a document to which sufficient significance accrues. It is also important that fraudulent conduct in principle concerns manure, for which indeed no transport documents are prepared. Indeed, one attempts to keep these transactions out of the fertiliser accounts. The manner in which the transport document is now to be given form is not relevant, in view of the fact that people that wish to perpetrate fraud do not wish to and will not prepare any transport document, irrespective of the form in which it is to be made.

With regard to the fear of the Council of State the sector cannot execute the plans in a timely and correct manner, the government also states that it does not share this fear of the Council of State. The government clearly states that the plans in question give the sector the opportunity to develop in a responsible manner wherever possible, as long as there is responsible distribution of the fertilisers, so that the government also assumes that the sector will grasp this possibility with both hands. As an extra impetus there is also always the continuation of production rights, whereby in addition it is remarked that in case the measures yield insufficient effect in the light of the Nitrates Directive, an introduction of production rights for dairy cattle is envisaged. At the moment, in order to be ready in a timely manner for a possible introduction of this policy commencing in 2015, a draft law on the introduction of a system of production rights for dairy cattle is being prepared. However, this concerns measures that are being prepared in case fertiliser processing proves insufficiently successful: the government specifically and repeatedly stipulates that it must be assumed that this system will indeed function.

However, it is very doubtful whether this will indeed be the case. In my opinion, the available capacity for fertiliser processing represents the greatest problem. Fertiliser processing is a complex process for which similarly complex permits must be prepared, applied for and issued. Ex-

perience has shown that such permit procedures can be time consuming and costly in the Netherlands. Indeed with the introduction of the General Provisions Law Environmental Law as per 1 October 2010 the system of different licenses has been replaced by one license, a so-called environmental permit, but this does not take away from the fact that the process of arriving at such a permit is similarly cumbersome. Both in terms of the environment and that of spatial planning, what is concerned are complex issues and, in addition, often projects, which the various governments, such as the municipal and/or provincial governments would often prefer not to see appearing, whether or not under pressure from social organisations and local residents, in their territory. There are indeed opportunities; but these are limited.

To give an example, in the province of North Brabant we have a so-called three-way split in the countryside: the extensification areas (nature), the interweaving areas (interweaving of different functions, such as agriculture, housing, recreation and nature) and agricultural development areas (space for establishment and development of farms). The policy of the province of North Brabant has been fine-tuned, and starting in 2010 it was stipulated that no new establishment of fertiliser processing can take place within agricultural development areas. Additionally, by the way, the policy is that fertiliser processing must take place, in any case if this is on a larger scale, on regional business premises, but one can also imagine that also on such premises, due to social resistance and/or problems associated with such factors as odour, the establishment of such a company would encounter scores of problems and/or objections. Finally, there are the issues concerning the assessment of environmental effects, whereby one must think in particular of the emission of nitrogen, for example, as well as methane gas, particulate matter and odour. The Netherlands is a densely populated country and the emission from such processes, that is certainly not always certain and predictable, will quickly encounter bottlenecks in the sense of surrounding sensitive objects such as civilian homes. Experience has taught us that it often takes at least one to two years before a complete permit is issued for such a fertiliser processing installation of any size. In addition, for such installations there are also problems associated with the Nature Conservation Act, also based on European law, namely the Birds and Habitats Directives. Finally, once a license has been issued, it is possible that there may be appeals and higher appeals by local residents and environmental organizations. This possibility is often utilised. If no interim relief is requested, it is pos-

sible to build, whereby one builds at his own expense and risk: if the permit is finally refused after all, one may be forced to demolish what has been built. In view of such points as the tremendous financial interests in such projects and the uncertainty of the outcome of a procedure, it is clear that it will still be years before large-scale fertiliser processing in the sense proposed by the government gets off the ground. In this context it should also be mentioned that the various points are surrounded by great financial uncertainty, because fertiliser processing is simply a particularly costly and above all uncertain process: scores of initiatives that have been developed have encountered problems of a technical nature, such that in financial terms it is still always much more attractive to discharge the fertiliser than to process it or have it processed. The lack of financial incentives, as well, especially in these times of crisis, can in my opinion be listed as a circumstance that may stand in the way of large-scale initiatives getting off the ground and becoming operational within the near future.

In the light of this among other facts, the question arises of whether, as the Council of State has brought up as a point for criticism, with the doing away with fertiliser distribution contracts there is still indeed sufficient guarantee that the Netherlands will comply with the Nitrates Directive. I also disagree with the Council of State on this point.

After all, as I stated at the beginning of my speech, since 1984 the Netherlands has had a system focused on limiting the production of animal fertilisers by means of so-called production bans. This system has always functioned correctly. Indeed the pressure on the fertiliser market is increasing, but this certainly does not say, differently than the Council of State argues, that this pressure will be taken away by means of another instrument, specifically the system of fertiliser distribution contracts. The pressure will remain the same, since the pressure is the consequence of excessive production in proportion to an insufficient amount of available agricultural land. The system of fertiliser distribution contracts does not take away this pressure, since this as such does not change the production side. While it is indeed true that this system assumes that one may not produce more than one can responsibly dispose of, in my opinion that will call up equally great pressure with respect to fraud as the system of production rights does. It is difficult to imagine that farmers who have invested in large expensive barns will let these stand empty because they are unable to conclude sufficient fertiliser contracts. I assume that they

will then proceed to additional processing capacity or simply offering more than fellow farmers. Of course what will also happen is that a number of them will commence fraudulent roads. These roads will, however, also be taken if one only maintains the system of production rights. After all, in that case as well one must always fulfil the usage standards for which in fact the same applies as with the fertiliser distribution contracts: all fertiliser must be discharged in the core or responsible manner. If, then, fraud nonetheless takes place, things can go wrong on the production side as well as the application side. In my view no fundamental difference exists.

All in all, we can assume that on 1 January 2014 the fertiliser processing obligation will indeed become a fact in the Netherlands. I also think in the long term it may well happen that this fertiliser processing indeed will take the pressure off the fertiliser market. This, however, is also dependent on the developments at an international level. In view of the current cost price and market developments, it is simply a fact that the margins are so small that agrarians will not quickly tend to seek such costly alternatives as fertiliser processing. There is simply not financial leeway for this. If prices are as bad as they are at present and no significant change occurs in that regard, I believe that fertiliser processing as a result of these market developments may at some point become stuck at a limited level. Assuming, however, that at some point there will be light at the end of the tunnel and that today's economic crisis is indeed solved, in the long term fertiliser processing may be a realistic solution to the fertiliser problem currently present in the Netherlands.