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Integrated permit regimes in conflicting times

Questionnaire for the Avosetta meeting in Uppsala on 27-28 May 2022

Introduction

Last year, we decided the following about the Avosetta meeting in 2022:

"The focus of the Friday's discussion (27 May) will be on integrated permit procedure and conflicting environmental interests taking the example of conflicts in green energy transition (wind power, hydro etc.). There will be opportunity to discuss how they could be more effectively handled in the future, and the role of ecosystems approach.

On Saturday (28 May) the main focus will be on existing and emerging Climate Change Law at national and EU level - this will complement the discussion in Cork on climate change litigation, and may also impact on the conflicts discussion on the Friday.

It was also felt useful if we could accommodate in the programme a general discussion on subject areas for future work by Avosetta."

Thus, for the discussion on Friday, Professor David Langlet and I have prepared not an ordinary, very detailed questionnaire, but three scenarios with follow-up questions. Our ambition has been to cover different activities where conflicting environmental interests commonly collide; on wind farming, forestry or agriculture and aquaculture in transition towards a green economy. Thereby, the challenge in the questionnaire lies in describing the law and procedure in your country in order to:

- Give a general description of the decision-making process and how the conflicting environmental interests may be handled in each of these scenarios, including the EIA procedure, where relevant;
- Illustrate this by way of examples (see also point D below)

Also, it would be highly appreciated if you can elaborate on how the concept of ecosystem services can play an additional role in the weighing of interests in environmental decision-making in these four scenarios.

- Are ecosystem services analysis used in this context?
- How do you think it could be used more extensively and with stronger utility?

For those of you who are unfamiliar with the concept "ecosystem services", the popular definition in Wikipedia reads as follows:

Ecosystem services *are the many and varied benefits to humans provided by the natural environment and from healthy ecosystems. Such ecosystems include, for example, agroecosystems, forest ecosystems, grassland ecosystems and aquatic ecosystems. These ecosystems, functioning in healthy relationship, offer such things like natural pollination of crops, clean air, extreme weather mitigation, and human mental and physical well-being. Collectively, these benefits are becoming known as "ecosystem services", and are often integral to the provisioning of clean drinking water, the decomposition of wastes, and resilience and productivity of food ecosystems.*

While scientists and environmentalists have discussed ecosystem services implicitly for decades, the Millennium Ecosystem Assessment (MA) in the early 2000s popularized this

concept. There, ecosystem services are grouped into four broad categories: provisioning, such as the production of food and water; regulating, such as the control of climate and disease; supporting, such as nutrient cycles and oxygen production; and cultural, such as spiritual and recreational benefits. To help inform decision-makers, many ecosystem services are being evaluated in order to draw equivalent comparisons to human engineered infrastructure and services.

Estuarine and coastal ecosystems are both marine ecosystems. Together, these ecosystems perform the four categories of ecosystem services in a variety of ways: "Regulating services" include climate regulation as well as waste treatment and disease regulation and buffer zones. The "provisioning services" include forest products, marine products, fresh water, raw materials, biochemical and genetic resources. "Cultural services" of coastal ecosystems include inspirational aspects, recreation and tourism, science and education. "Supporting services" of coastal ecosystems include nutrient cycling, biologically mediated habitats and primary production.

For a deeper analysis, see European Commission: *Measuring what ecosystems do for us: new report on ecosystem services in the EU*; https://ec.europa.eu/environment/news/measuring-what-ecosystems-do-us-new-report-ecosystem-services-eu-2021-06-25_en

Also IPBES Multidisciplinary Panel: *Information note on applying "nature's contributions to people"*; https://ipbes.net/sites/default/files/inline-files/ipbes_mep_note%20on%20NCP%20by%20MEP.pdf

Scenarios

The following cases reflect environmental dilemmas or trilemmas because the conflicting interests on the different sides are in any case environmental (in broad terms, considering climate as an environmental issue).

A. Renewable energy by wind farming

Commonly, wind farms require an EIA and a permit according to EU and Member State law. Decisive for the energy transition, wind farms also trigger conflict with various environmental interests, most importantly species protection, landscape and nature conservation. Also other interests may block the development of these installations, such as defence (radar system) and – not least – opposition from people living nearby (the NIMBY social phenomenon or syndrome). The construction of the wind farms including transport of towers and masts (150-200 meters long) may also have a substantial impact on forests and the water environment. In addition, the building of roads cause fragmentation of the areas with an impact on environmental interests.

- How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure? Is there a difference between the permit procedure for land-based and sea-based wind farms? Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development? Are there any planning instruments applicable?
- In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?
- How are the local opinions dealt with in the permit procedure? Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?
- Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects “in the aftermath” so to speak (cf. Article 6.2 of the Habitats Directive)?

Austria

- How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure? Is there a difference between the permit procedure for land-based and sea-based wind farms? Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development? Are there any planning instruments applicable?

More than one third of final energy consumption in Austria is generated from renewable sources.[1] In the field of renewable energy, hydropower is by far the most widely used source of electricity generation. In 2020 55-67 % of electricity generation in Austria have been covered by hydropower, around 45.5 terawatt hours of electricity were generated from Austrian hydropower plants.Wind power comes second by a wide margin: at the end of 2021 1,307 wind turbines with a total capacity of 3,300 megawatts supplied energy.

In general there is an "east-west divide" with regard to planning laws and to the realization of windfarms: Up to date no windfarms have been built in the alpine states Tyrol, Vorarlberg and Salzburg. Most installations have been implemented in Lower Austria (over 700 installations) and Burgenland (over 400 installations). The current government wants to significantly increase the number of windfarms due to the energy and climate crisis. An Act for the Expansion of renewable energy (Erneuerbaren-Ausbau-Gesetz) has very recently been adopted.[2] New funding schemes aim to incentivise the realization of windparks also in less windy regions.

The Austrian legal system provides an integrated permit procedure for wind farms if the fall within the scope of the EIA-Act.[3] The EIA requirement is dependent on the electricity output, the number and size of converters and the location of the project. Besides nature conservation areas, the mountainous region (above 1000m) is considered ecologically sensitive and thus lower thresholds apply. Very roughly farms with at least 20 turbines or 20 MW (in ecologically sensitive areas 10 turbines or 10 MW) require an EIA.

The EIA-permit procedures is a consolidated permit procedure: The authority (the state government) applies all the substantive provisions required for the approval of the project under federal or state administrative law in a consolidated procedure (consolidated development consent procedure).

The electric network and grids will require a permit according to electricity law. The relevant permit requirements will include provisions in nature conservation law (and if applicable because of clearings also in forestry law) that require a balancing and weighing of interests. In any case the EIA Act includes a provision[4] that requires an overall assessment of competing interests and allows for a rejection of the application "if the overall assessment

[1] For details see the statistics on renewable energy: https://de.statista.com/themen/3927/erneuerbare-energien-in-oesterreich/.
[2] EAG, BGBl I 150/2021, last amendment BGBl I 13/2022.
[3] EIA-Act (Umweltverträglichkeitsprüfungsgesetz –UVP-G 2000) Federal Act on Environmental Impact Assessment (Environmental Impact Assessment Act 2000). BGBl (Federal Law Gazette) 697/1993 last amendment BGBl I 80/2018.
[4] § 17 (5) EIA-Act.

shows that, when considering public interests, in particular that of environmental protection, serious environmental pressures are to be expected due to the project and its impact, including, in particular, interactions, cumulative effects or shifts, and cannot be prevented or reduced to a tolerable level by obligations, conditions, deadlines, other requirements, project modifications or offsetting measures. Within the framework of these evaluations, relevant interests of sectoral legislation and Community legislation that are in favor of the project's implementation shall also be assessed."

Building and Planning Law and Nature Conservation Law fall within the competence of the states. Therefore, although the EIA permit procedure is consolidated, the material provisions that are applied in the permit procedure for windfarms differ widely. In general there is an "east-west divide" with regard to zoning laws and the actual realization of windfarms (see above).

In general planning laws require a land use permit and set up distance requirements with respect to residential areas (750 to 1200m). Some states[5] make use of planning instruments (special zoning categories) that designate areas that are suitable for wind farming (Eignungszonen). At the end of 2021, the state of Salzburg has drafted a new regional development program that designates eleven priority zones. In the zones, faster procedures are supposed to be possible, for example because a Strategic Environmental Assessment (SEA) has been carried out to check for environmental compatibility.

- In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?

See above with regard to the weighing and balancing of competing interests and the overall assessment in the scope of and EIA.

- How are the local opinions dealt with in the permit procedure? Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?

In EIA permit procedures neighbours and also local citizen initiatives may participate. The latter may also raise objections on environmental grounds. Usually objections are raised with regard to landscape, nature conservation and health (noise, shadow cast).
Local Communities benefit if the municipality owns the land. Sometimes citizens can invest in new installations and sometimes the community strikes a deal when acting as a host community.

- Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?

Nature protections laws and general environmental acts for industrial installations provide for measures if the relevant permitting requirements are not met (any longer). I do not currently know of cases where this has been made use of in the context of wind farming.

[5] E.g. Burgenland, Lower Austria and Styria.

Author: Verena Madner

Belgium (Flemish region and federal level)

How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure?

Building a large onshore windfarm in Belgium requires a prior single (integrated environmental) permit (omgevingsvergunning). This represents a major shift in environmental policy in Flanders, since the construction and operation of large onshore windfarms used to require both a building permit (stedenbouwkundige vergunning) as an environmental permit (milieuvergunninge). Until recently, a company seeking permission to construct an onshore windfarm was obliged to obtain a building permit from the municipality. This permit, however, only allowed it to build, demolish, renovate or change the primary use of a property. In order to engage in economic activity, such as the operation of a windfarm, with potentially adverse environmental effects an additional environmental permit was re-quired. The type of environmental permit required depended on the nature of the potentially adverse environmental effects: a permit from the provincial authorities was required for the most harmful types of activities (class 1) whereas permits for less harmful (class 2) and notifications of the least harmful activities (class 3) were issued by the municipal authorities. Since the term of an environmental permit was limited to 20 years, a company had to renew its permit upon expiry and go through the entire process again. In practice, acquiring different permits via various procedures proved to be relatively time-consuming and cumbersome.

In 2014, the Flemish Parliament heeded the calls of the business community for smoother and more smooth permit procedures by enacting legislation providing for a single permit. This was included in the so-called Omgevingsvergunnigsdecreet. Under the new legislation, the environmental permit and the urban development permit are integrated into a single permit of indefinite duration (eeuwigdurende vergunning). The idea is to authorize both urban development and the operation of a business by means of a single permit on the basis of a single application, public inquiry and consultation procedure. In order to obtain a single permit, an application must be filed with the Environmental Agency (Omgevingsloket). The various procedures have been reduced to two and have been simplified, updated and digitalized. The entire procedure is thus significantly faster. In principle, the Environmental Agency will direct the applicant for a single permit to the competent municipality. The Flemish Government and provinces, however, are responsible for granting single permits for projects whose size and impact necessitate review at the regional or provincial level. This is, amongst others, the case for windfarms.

Another major change is that a single permit will be granted for an indefinite duration, although certain economic activities are subject to ad hoc assessments. It will thus nolonger be necessary to request a new permit every 20 years for the operation of a windfarm. Even so, certain provisions grant the competent authorities the power to revise the applicable permit conditions and, after 20 years, to even call into question the permitted activity itself.

In many instances, the obtainment of a single permit for a windfarm is made subject to a prior Environmental Impact Assessment (EIA). In principle a full-fledged EIA is required for a windfarm of 20 or more windmills or, when the windfarm can generate impact on a protected

site, an EIA is needed starting from 4 windmills. Only when it can be established that the project will not give rise to significant environmental effects, which is to be ap-proved by the competent authority for EIA, a simpler assessment suffices. It is to be approached as a conditional EIA-requirement. Yet, even for windfarm projects that fall below the above-mentioned de minimis-threshold, a EIA-screening is still required. Accordingly, a screening document needs to be included in the permit application. Here, a concrete analysis is to be made of the potential significant environmental effects that can be generated by windmills. Only if it can be maintained that there exists no risk of significant effects, these small-scale windfarms can bypass the EIA-duties. There exists ample case-law dealing with the topic of cumulative impacts, which is specifically relevant if applicants slice up their applications in order to avoid EIA-assessment duties.

Is there a difference between the permit procedure for land-based and sea-based windfarms?

Yes, amongst others due to the distribution of competences in Belgium. The procedure for obtaining a license and permission to build and operate a wind farm is in accordance with the law on the Protection of the Marine Environment (20 January 1999,) and two royal decrees: royal decree VEMA of 7 September 2003 (amended on 26 December 2013) concerning the procedure for licensing and authorizing the activity and royal decree MEB of 9 September 2003 (amended on 26 December 2013) concerning rules on the assessment of the environmental impact.

The applicant seeking to construct an offshore windfarm must submit an Environmental Impact Study (EIS) to the Scientific Service Management Unit of the North Sea Mathematical Models (MUMM) of the RBINS. This report is submitted to the public for consultation. If cross-border effects could occur, a consultation round is organized with the countries concerned. MUMM then produces an environmental impact assessment (EIA). Based on the EIS, the EIA and the results of the public consultation, MUMM passes its recommendations to the Federal Minister for the Marine Environment. The minister then decides whether or not to grant the environmental permit, and with which conditions.

Besides the environmental permit procedure, there is procedure for obtaining a domain concession for the proposed project area. The application is submitted to the General Energy Directorate of the Federal Public Service Economy, SMEs, Self-Employed and Energy, which advises the Minister for Energy. The domain concession is granted by the Federal Minister for Energy (Royal Decree of 20 December 2000) for the proposed project area.

Applications for laying cables are also made to the General Energy Directorate of the Federal Public Service Economy, SMEs, Self-Employed and Energy, which advises the Minister for Energy (Royal Decree of 12 March 2002).

Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development?

Yes and no. If no major infrastructure works or modifications are needed, for instance in the case of relatively small onshore windfarms, such works might be integrated in the omgevingsvergunning. This makes also sense since opting for a contrary position could lead to a lack of integrated assessment of the environmental impacts generated by the windfarms. In recent years, though, a lot of political discussions arose because the construction of new

offshore windfarms will necessitate major changes to the grid in Flanders, which cause a lot of unrest in the Flemish Province of West-Flanders.

Are there any planning instruments applicable?

Yes, as far as windfarms onshore, reference is to be made to the Windplan 2025, which was adopted by the Flemish government as part of its wider Energy and Climate Plan 2021-2030 (Vlaams Energie- en Klimaatplan 2021-2030).

On 20 July 2018, the Flemish Government approved the draft Flemish Energy Plan 2021-2030 and the draft Flemish Climate Policy Plan 2021-2030. In adopting the Flemish energy plan 2021-2030, the Flemish government defined its contribution to the EU's energy efficiency and renewable energy targets by 2030. It also formulated proposals to make energy infrastructure smarter and more flexible. The Climate Policy Plan outlines climate policy for the period 2021-2030. Amongst its primary goals in terms of renewable energy, the Flemish government aims to increase the amount of renewable energy production, amongst others by increasing the amount of wind power generation capacity to 2.5 GW by 2030 (in 2020 the wind power generation capacity reached 1.4 GW). The Windplan 2025 lists 15 measures aimed at achieving this ambition target. Amongst others, several of these actions includes measures aimed at better reconciling the construction of windfarms with the applicable spatial planning rules. Also the update of the applicable sectoral environmental rules (Vlarem II), which was needed after the ruling of the CJEU in the Nevele-case (Case C-24/19), is on the agenda. In the latter ruling, the CJEU held that both the Vlarem II-rules as well as the requirements included in the Circular Order for Windfarms (Circular EME/2006/01-RO/2006/02) qualified as a plan in the meaning of Articles 2 and 3(2) of the SEA Directive (200/42/EC). This was specifically the case since both instruments contain various provisions regarding the installation and operation of wind turbines, including measures on shadow flicker, safety and noise level standards, which serve as benchmark when assessing permit applications for windfarms.

In this respect, it needs to be stressed that applications for windfarms in principle need to be in accordance with the applicable spatial zoning plans. This is problematic in itself, since most of these plans have been established and adopted in times when wind turbines did not represent a realistic policy option. In a spatially fragmented region such as Flanders, urban sprawl represents a serious obstacle for granting planning permissions for windfarms. In the above-mentioned Circular, several principles regarding the bundling of wind turbines as well as distance criteria vis-à-vis existing houses have been laid down. How-ever, principally speaking, windfarms are not eligible as agricultural activities and thus, unless application is made of derogation clauses, they cannot be authorized in zones that have been designated as agricultural lands. In order to mitigate this rigorous outcome, the so-called 'clichering'-technique has been included in the Flemish spatial planning code. It is presumed that the authorization of wind turbines does not put into jeopardy the agricultural activities in such zones, reason why still permits can be granted for windfarms in this context. Of course, the construction of windfarms can also be integrated into new spatial execution plans, which can modify the existing zoning prescription on the Flemish territory (ruimtelijke uitvoeringsplannen). But given the clichering-technique this is no mandatory requirement, even though it might create more leeway in terms of location alternatives and SEA. The provisions in the above-mentioned Circular stress the importance of soundmotivation when it comes to the alignment of future windfarms with the existing landscapes.

It needs to be stressed out that the competent agency for nature conservation has also drafted a Flemish Risk Atlas Birds/Bats, which provides further recommendations on where the building of wind turbines might clash with species protection rules.

When it comes to offshore windfarms, reference is to be made to the Marine Spatial Plans. To give one illustration, at the initiative of the minister for the North Sea, a zone of 238 km² in the Belgian part of the North Sea was reserved for the production of renewable energy (Marine Spatial Plan of March 2014). In this zone 399 wind turbines are planned by 2020, totalling a capacity of more than 2,200 MW. Based on a 40% capacity factor for wind farms, these wind turbines would produce almost 10% of the electricity production in Belgium by 2020, or an equivalent of almost half of the electricity consumption by households.

In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?

For now, limited attention is being paid to this topic. Of course, the environmental benefits of windfarms can be used as an argument to derogate from existing protection schemes. The IROPI-clause of Article 36ter, §5 of the Nature Conservation Decree (Article 6(4) of the EU Habitats Directive). To a more limited extent, such rationale could also be instrumental in the context of spatial planning; although I am not aware of any instances where such argumentation was used to deviate from existing planning instruments.

How are the local opinions dealt with in the permit procedure? Are there any eco-nomic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?

This is mainly being dealt with by the application of the existing participation and consultation schemes. Prior to a single permit, participation procedures have to be set up. These will allow the local community and affected citizens to express their remarks, concerns and comments in this respect. In the above-mentioned Circular, it is stressed that preventative communication is key in order to create sufficient local support for new windfarms. This should take the shape of early info-sessions, consultation rounds and on site-visits, if feasible. There is no legal requirement to share the economic benefits of windfarms with the local community, although in several communities local ordinances now require benefit sharing with the local community as a pre-condition for the facilitation of new windfarms. The municipality of Eeklo is a widely know example of a more progressive approach to windfarms. Through ensuring that the local community is reaping the benefits of the future wind turbines – since they can become shareholders – there exists almost no protest against the windfarms.

Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?

The implementation of Article 6(2) of the EU Habitats Directive leaves a lot to be desired in the Flemish Region. In theory, it is possible to amend existing permit conditions – through Article 36ter, §2 of the Flemish Nature Conservation Decree in light of unforeseen risks. In the administrative practice, environmental permits have been granted which included strict monitoring protocols. In several protocols, it is stated that the operation of the wind turbine is

to be stalled whenever it is interfering with bats or birds, for instance during the breading or rearing season, or during warm nights in the summer. In the recent case-law, these protocols have not always been treated with deference. It needs to beascertained that the protocols are not used as a cover-up to authorize wind farms at locations where they will inevitably generate significant risks for protected species. In the re-cent administrative practice, the Flemish minister competent for the environment has declined several permits with reference to bird protection, both in the context of forests as well as farmlands.

Author: Hendrik Schoukens

Croatia

[1] Permit procedures

Pursuant to Environmental Protection Act and Decree on Environmental Impact Assessment, wind farms are subject to a mandatory environmental impact assessment (EIA) only if they have a capacity of more than 20 MW. For all other wind farms a screening procedure is carried out. Furthermore, any change to these projects which may have significant adverse effects on the environment is also subject to the screening procedure, whereby the competent Ministry (currently: Ministry of Economy and Sustainable Development) assesses the significant negative impact on the environment at the request of the developer.
The Ministry is the competent authority for carrying out both the EIA and the screening procedure for wind farms.

The appropriate assessment is regulated by the Nature Protection Act, which is the law transposing the Birds Directive and the Habitats Directive. Pursuant to the Nature Protection Act, the assessment is carried out in two stages. The first stage is called the prior assessment. This procedure is a preliminary assessment that determines whether a plan or project is likely to have a significant impact on a particular conservation area, either individually or in combination with other plans or projects. If the answer to this question is affirmative, then the second stage, i.e. the 'full' appropriate assessment is carried out. Although it is distinct from the EIA, the screening for appropriate assessment is mostly conducted together with the EIA screening procedure. Equally, when the assessment of the environmental impact includes 'full' appropriate assessment, both assessments are carried out within the framework of the EIA.

There are no offshore wind farms in the Croatian part of the Adriatic Sea (not yet), so there is no difference between the permit procedure for land-based and sea-based wind farms.
In addition to, above mentioned, environmental procedures, the wind farm projects must obtain: energy approval, secured connection to the electricity grid, building permit, and any property issues must be resolved, i.e. ownership or use of land on which the project will be built must be obtained. The process of establishing ownership or use of land is carried out by different bodies, depending on the type of land and who owns the land. Unresolved property issues and poor management of land registry are major problems in Croatia. There are often delays in proceedings until property disputes are resolved.

The table below shows basic steps in the process of obtaining different permits.[6] Each of these steps is governed by different legislation and implemented in separate procedures. The procedure regarding the connection to the electricity network is a separate procedure. There is no integrated (combined) decision-making process for the whole development.

Inclusion in the spatial plan and Strategic Environmental Assessment (SEA)	Tender for energy approval[7]	Contract for connection to the electricity network	Environmental Impact Assessment and Appropriate Assessment	Location permit[8]	Settlement of any property-legal issues	Building permit	Use permit[9]
Spatial Planning Act, Environmental Protection Act	Electricity Market Act	Electricity Market Act	Environmental Protection Act, Nature Protection Act	Spatial Planning Act		Building Act	Building Act

When considering individual permit, the benefits of wind energy in relation to climate are taken into account with brief explanation. For instance, environmental impact study for wind farm Svilaja only stated that from the aspect of the impact on climate change, the project shall have a positive effect in the long run because greenhouse gas emissions per kWh of electricity produced from wind farms are almost non-existent.[10] The other example is environmental impact study for wind farm Korlat (total capacity of 63 MW) which stated that by producing from a wind farm with a power of 100 MW, compared to conventional energy sources, the savings include 489.4 million litres of water and 260,000 tons of CO2.[11]

[2] Planning instruments

The most interest in wind power projects has so far been expressed in Dalmatia (southern, Mediterranean region of Croatia). In accordance with the Spatial Planning Act, the main documents related to spatial planning are the State Plan of Spatial Development, the spatial plans of counties and the spatial development plans of municipalities. Spatial plans of lower levels must be aligned with higher-level spatial plans.

The State plan for spatial development shall be adopted for the territory of the State. Although Article 196 of the Spatial Planning Act stipulated that the State plan for spatial development should be adopted no later than 1 January 2016 (i.e. two years after the entry into force of this Act), the State plan has not been adopted yet.

Some counties in Croatia regulate the locations of wind farms quite precisely in their spatial plans and do not leave much space for municipalities to arrange this issue at their discretion.[12] According to available data, only one county prepared a Plan for the Use of Renewable Energy Sources in its territory for which SEA was carried out.[13] One of the biggest problems

[6] Guide for the Development and Implementation of Renewable Energy Projects in Croatia (EnergoVizija (Energy with Vision), Renewable Energy Sources of Croatia, and European Bank for Reconstruction and Development), December 2021, p. 32.
[7] Energy approval enables developers to acquire the status of project holder and entry in the Register of Renewable Energy Sources and Cogeneration and Privileged Producers.
[8] Location permit determines the spatial conditions for construction based on the design of the project.
[9] Use permit confirms that the project has been built in accordance with the building permit.
[10] Environmental impact study for wind farm Svilaja, Ires Ecology Ltd., December 2016, p. 302.
[11] Environmental impact study for wind farm Korlat, Vitaprojekt Ltd., February 2016, p. 132.
[12] Guide for the Development and Implementation of Renewable Energy Projects in Croatia, p. 33.
[13] Dubrovnik-Neretva County, Strategic Environmental Assessment of the Plan for the Use of Renewable Energy Sources in the Dubrovnik-Neretva County, January 2014.

is the fact that wind farms sites were included in most spatial plans before the full implementation of SEA Directive in Croatia, i.e. without the proper analysis of cumulative impacts on nature.
In accordance with the Spatial Planning Act, anyone can propose amendments to the spatial plans of the municipality, but the municipality is not obliged to initiate the procedure of amendment. The county's spatial plans are amended and supplemented by county assemblies. A proposal for amendment may be submitted to the county, but the procedure for responding to these proposals is not regulated. For the planned amendment to the spatial plan, a SEA (or, at the minimum, SEA screening) and, at least, screening for appropriate assessment must be carried out. In Croatia, many wind farm sites are defined in high biodiversity zones and most of these locations are part of the Natura 2000.

[3] Local community
Local community as public concerned does not have the right to participate in other administrative procedures concerning issuing permits except EIA and appropriate assessment (which may be carried out in one integrated procedure). Within this procedure, prior to the adoption of the decision on the environmental acceptability of the project, the competent authority (i.e. Ministry of Economy and Sustainable Development) shall inform the local and regional self-government units on whose territory the project shall be implemented or may have impact on it and allow them to participate in the procedure. In addition, the following shall be taken into account when adopting the decision: results of the environmental impact study, opinions of other authorities designated by special regulations; objections, proposals and opinions of the public and public concerned as well as results of any transboundary consultations.

Regarding the issue of any economic benefits for the local community, units of local self-government on whose territory the wind farm is located receive 0.0013 euro for each kilowatt-hour of electricity produced.

[4] Unforeseen harm detected when the wind farm is built

Monitoring, as prescribed in the EIA procedure under the Environmental Protection Act (hereinafter: EPA), contains significant shortcomings in the sense that it is not prescribed how to proceed if such monitoring shows negative environmental impacts. It is only envisaged that the environmental inspector shall order the supervised person to carry out environmental monitoring determined by the EIA decision (i.e. decision that the project is acceptable for environment), if he/she finds that they are not carried out (Article 238/1). In addition, EPA provides for a fine to the developer in the amount ranging approximately from 13 000 to 19 000 euro in the event of non-monitoring (Article 260/1/19).
On the other hand, Nature Protection Act does contain provision according to which monitoring and reporting programme determined by the decision that the project is acceptable for the ecological network Natura 2000 are mandatory content of the main project which is an integral part of the decision approving construction (Article 43.a). In addition, competent authority shall, ex officio, adopt an amendment to the decision that the project is acceptable for the ecological network, if on the basis of the results of the programme of monitoring and reporting on the state of the conservation objectives and the integrity of the ecological network area, it is determined that the project implementation despite the application of the mitigation measures (which were prescribed by the decision that the project is acceptable for the ecological network), there has been a significant impact on the conservation objectives and integrity of the ecological network area (Article 175/2). The Ministry may at any time

revoke, in whole or in part, decision that the project is acceptable for the ecological network in the event of non-compliance with the conditions or mitigation measures or occurrence of unforeseen events with negative effects on nature (Article 175/6).

To my knowledge these provisions of Nature Protection Act have never been used in practice.

[5] Infringement procedure

In May 2020 European Commission initiated infringement procedure against Croatia (letter of formal notice) to improve its application of the Habitats Directive concerning assessment of impact of wind farm projects on Natura 2000 sites. Croatia systematically failed to correctly apply the Habitats Directives when authorising changes to wind farm projects along its coast. In particular, authorisation procedures do not ensure that all relevant impacts on protected species and habitats are considered and are done without sufficient evidence that the projects will not negatively affect the integrity of the sites.[14] This is an active infringement case.

In the procedures for approving changes to wind power projects, the impacts were not adequately assessed, i.e. the conclusions of these procedures were made without sufficient evidence that these projects would not adversely affect birds, as well as other components of nature. The problems that environmental NGO Biom pointed out to the European Commission concerned the procedures in which Biom participated either through participating in EIA and AA screening procedures or through litigation. Biom has provided the European Commission with data regarding nine procedures. For example, part of the problem concerns wind projects that went through EIA process about 10 years ago and then received positive decisions from the Ministry. After several years some of these projects started with construction, with changes in the characteristics of the wind power plant. The problem arises when data from studies resulting from the procedures carried out for the first versions of the procedure are used in the EIA and AA screening procedures regarding the modification of the projects. Most ornithological research conducted for "old" projects does not meet today's standards, i.e. they have not been carried out in accordance with methods that provide quality data necessary to analyze the potential negative impacts of wind farms.[15]

Author:Lana Ofak

Czech Republic

- *How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure? Is there a difference between the permit procedure for land-based and sea-based wind farms? Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development? Are there any planning instruments applicable?*

Regarding the difference between the permit procedure for land-based and sea-based wind farms, there are currently no water-based wind farms in the Czech Republic.

[14] https://ec.europa.eu/commission/presscorner/detail/en/inf_20_859

[15] Translation of the interview with Dunja Delić from Biom, November 2020, http://www.energetika-net.com/specijali/intervju-mjeseca/trebamo-nove-smjernice-za-procjenu-utjecaja-vjetroelektrana-na-ptice-31219

Summary

In the Czech Republic, there is only partial integration of permit procedures. This means that protection authorities (e.g., nature, water, forest, air) issue opinions or binding opinions according to their respective legal act or statute. These opinions and binding opinions are used in subsequent procedures (e.g., procedures according to Act No. 183/2006 Coll., Building Act). The Building Authority is the authority that ultimately decides whether the project can be built. The Building Authority issues land-use decisions and building permits.

The generation of electricity is entirely separate from construction and environmental procedures. According to Act No. 458/2000 Coll., Energy Act, all electricity generation permits are dealt with in procedures. This also means that different relevant authorities are part of the decision-making process.

Extended version

Urban planning instruments
From the procedural perspective, the construction of wind farms (WF) must be first dealt with in urban planning instruments. Since the construction of WFs can visually affect municipalities and various public interests. They need to be dealt with in Regional Land Use Plans (land use plans for the particular region). Within Regional Land Use Plan, the region can postulate even stricter conditions than statutory conditions laid down in Act No. 114/1992 Co., on Nature and Landscape Protection (NLP). However, any restrictions or limitations need to be sufficiently justified (as the Supreme Administrative Court stated in the past decisions).[16]

Important planning documents are Local Land Use Plans. On the one hand, they need to follow Regional Land Use Plans, but on the other hand, the municipalities have a significant margin of appreciation within these planning instruments. Local Plans can further restrict or limit the construction of WFs.

All of the above-stated planning instruments can significantly affect the construction of new WFs. Besides limitations and restrictions, the public and the concerned public can object to any changes in plans. Objections of the concerned public are required to be adequately resolved. This can also pose a significant hindrance in a construction project.

The procedural aspects of the construction process are dependable on several scenarios that are usually dealt with by different competent authorities. Therefore, we do not have a one-stop permit procedure.

EIA requirements

[16] STROUHAL, Jakub a Vojtěch VOMÁČKA. Conservation of Nature and Landscape in the Process of Locating, Constructing and Operating Wind Power Plants in the Czech Republic. In Jančářová, Ilona. Dudová, Jana a kol. *Sustainable Development and Conflicts of Interests in Nature Protection*. 1. vyd. Brno: Masarykova univerzita, Právnická fakulta, 2018. p. 210. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia, svazek č. 600. ISBN 978-80-210-8815-3

The first scenario is whether the WF satisfies requirements for the EIA procedure under the Act. No. 100/2001 Coll., the Environmental Impact Assessment Act. The EIA Authority conducts an EIA assessment.
The act sets several different conditions in which the projects fall within the scope of the EIA assessment[17]:

1. If the WF's pole is 50 m and higher, the project needs to be assessed based on the conclusion of the screening procedure.
2. If the height of the pole reaches at least 25 % of the limit value (50 m) and is located in the specially protected area or within the protection zone of such area set according to NLP and the competent EIA Authority determines the need to carry out screening procedure, then the construction needs to be assessed based on the conclusion produced in the screening procedure.
3. Lastly, the project needs to be assessed if a negative impact on Special Areas of Conservation (Habitat Directive) and Special Protection Areas (Birds Directive) cannot be excluded based on the preliminary assessment of the Nature Protection Authority. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

The result of the EIA assessment is an EIA report. The EIA report has a procedural form of a "binding opinion". The binding opinion is the basis for subsequent decision-making in subsequent procedures such as land-use decision and construction permit.
According to the EIA Act, the competent EIA Authority needs to assess how the project can impact the population, public health, environment (including fauna and flora, ecosystems, biological variability, soil, air, climate, landscape, natural resources, tangible assets, and cultural heritage, e.g., complex assessment).[18] These issues and interests need to be assessed together and in their interactions. Special attention needs to be paid to the NATURA 2000 network during the assessment.

Subsequent construction procedures

Subsequent construction procedures are the same for EIA and non-EIA projects. However, the Building Authority is bound by the EIA Report for EIA projects. The Building Authority conducts the procedures according to the Building Act (Act No. 183/2006 Coll.). The authority can issue a land-use decision and a construction permit and order a trial operation of WF. However, land-use decision and construction permit have to come out from relevant binding opinions issued by environmental and health protection authorities as the basis for the final decision of the Building Authority.
Every protection authority operates under a specific legal act. The developer needs to obtain positive binding opinions concerning various protected environmental interests. Interests can cover:

- Landscape character (Nature Protection Authority) according to NLP[19],
- significant landscape elements[20], ditto,

[17] § 4 EIA Act.
[18] § 2 EIA Act.
[19] § 12(2) NLP.

- protection of specially protected areas (excluding the Natura 2000 network) such as national parks, ditto[21],
- Natura 2000 network (Nature Protection Authority and subsequently EIA Authority) according to NLP and EIA Act[22],
- soil protection (Soil Protection Authority) according to Act No. 334/1992 Coll., on the protection of the agricultural land fund (PALF)[23],
- noise pollution (Public Health Authority) according to Public Health Protection Act (Act No. 258/2000 Coll.)[24],
- forest protection (State Forest Protection Authority) according to Forest Act (Act No. 289/1995 Coll.)[25],
- water sources protection if the project is able to affect water source (e.g., river, spring) (Water Protection Authority) according to Water Act (Act No. 254/2001 Coll.)[26].

If the project can affect the protection of specially protected species, the Nature Protection Authority issues a decision to exempt the protected species at the specific location from the protection.[27] However, the legal act is a decision and not a binding opinion; therefore, it stands beside partially integrated procedures.

New Building Act – an overview

The current building law has been an object of recodification for several years in the Czech Republic. Currently, there is a new Building Act that integrates land-use decision and building permit into one procedure.[28] However, the act will be applicable from 1. July 2023.[29]

The new Building Act stipulates legal and environmental requirements for new projects.[30] The new project has to be projected and constructed in a way that is safe for human and animal health and safety, minimizes noise pollution within and outside the construction project (and during the use of the project), and precludes negative impact on the quality of environment and climate (the last condition is not a universal restriction but it is limited only to some adverse effects connected to the construction, use, and demolition of the project).[31] Furthermore, there is a general obligation to build the project so as not to cause excessive encroachment on fauna and flora.[32]

Besides the new Building Act, the Ministry of Environment has introduced a legislative proposal regarding Integrated Environmental Opinion. The opinion will integrate nine environmental acts (EIA Act, NLP, Water Act, PALF, Act No. 201/2012 Coll., on Air Protection, Act No. 541/2020 Coll., on Waste, Act No. 62/1988 Coll., on Geological Works,

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[20] § 4(2) NLP. These elements are ex lege: forests, peatbogs, ponds, lakes, watercourses. There can be other specially registered elements.
[21] § 37 NLP.
[22] § 45c NLP.
[23] § 9 PALF.
[24] § 30 Public Health Protection Act.
[25] § 14(2) Forest Act.
[26] § 17 Water Act.
[27] § 56 NLP.
[28] § 197 Act No. 283/2021 Coll., (new) Building Act.
[29] § 335 ibid.
[30] § 148 ibid.
[31] Ibid.
[32] § 148(2) ibid.

Forest Act and Act No. 224/2015 Coll., on Prevention of Major Incidents). This act could help make administrative procedures fully integrated as opposed to the current state.

Electricity generation
The construction procedure is separated from all procedures connected to energy use and electricity generation. All electricity generation procedures fall under the Energy Act. This means that entirely different authorities serve as concerned public authorities (the Ministry of Industry and Trade and the Energy Regulatory Office as opposed to the Ministry of Environment and sometimes the Ministry of Agriculture in environmental issues).

Firstly, the operator of WF needs to obtain a license to be able to produce and sell generated electricity.[33] The Energy Regulatory Office is entitled to issue the license. For the construction of WFs, special conditions apply according to the Energy Act.[34] The Ministry of Industry and Trade has to authorise the construction of a new WF. The authorisation is not issued if the WF does not correspond to urban planning and other planning instruments such as state energy policy or state mineral resources policy.
However, the authorisation is not conditional for procedures according to the Building Act (e.g., land-use decision and a construction permit) and other environmental procedures.[35]

In other words, the construction procedure and connected environmental protection are separate procedures from the energy authorization procedure.

- *In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?*

Impacts related to climate change and the region's vulnerability with respect to climate change manifestation are explicitly listed among the information provided in the EIA assessment. The authors of documentation have a duty to assess the project's impacts on climate, beside others. It means, that the contribution of WF to climate change mitigation is to be assessed along with other interests in the EIA procedure with findings included in the EIA Report. According to Annex 4 part D, the documentation has to contain impacts on: population and public health, climate, and air quality, noise levels and other physical and biological characteristics (e.g., vibrations, radiation), surface and underground water, soil, natural resources, biological diversity (fauna, flora, ecosystems), landscape and its ecological functions, tangible property and cultural heritage (including architectonical and archaeological aspects).

In general, it can be stated that the decision-making authorities need to balance public interests in permitting procedures. On the one hand, there is an interest in nature and species protection and conservation and/or public health, and on the other hand construction of WFs reduces energy dependency on fossil fuels, mitigates climate change, and is in line with the EU climate policy. Nevertheless, we cannot say that climate change benefits pose an overriding public interest in practice because investors usually bind climate change mitigation and economic interests together.[36]

[33] § 4 Energy Act.
[34] § 30a Energy Act.
[35] § 30a(5) Energy Act.
[36] Müllerova H. Ochrana klimatu proti ochraně přírody? Hmotněprávní východiska pro řešení kolizí na příkladu větrných elektráren [Climate protection against nature protection? Substantive grounds for solving collisions in

- *How are the local opinions dealt with in the permit procedure? Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?*

As stated in the first response, public opinion can change the final form of planning instruments (particularly municipality plans). If the majority of the public is against WF, then local planners can introduce strict conditions for the construction of new WFs. However, these conditions have to be justified; otherwise, administrative courts could rescind the planning instrument. Furthermore, it must be noted that negative personal opinions might be stated during oral proceedings, but if they do not provide any relevant data, they will be discarded. During subsequent procedures, public opinion might be heard in the EIA procedure as public or concerned public, but again, these opinions have to introduce relevant data and not merely reiterate the NIMBY stance.
Wind farm operators might mitigate negative public opinion on WFs by donating money to the municipality or doing community service. However, there are no other economic benefits for the local community.

- *Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?*

The Czech legal system contains provisions that allow (to some extent) for subsequent changes. However, it can be differentiated between two scenarios.

In the first scenario, the WF is already operational (meaning all preceding administrative acts are fully enforceable). The Nature Protection Authority cannot subsequently restrict/limit or entirely halt activity.[37] Otherwise it could pose an infringement of legal certainty and be in a breach of constitutional principles.

In the second scenario, administrative proceedings are still ongoing or decisions according to the Building Act are not enforceable yet. According to the Administrative Procedure Code (Act No. 500/2004 Coll.), if a protection authority (or any competent authority) that issued a binding opinion finds out particular circumstances, it can rescind or amend the previously issued binding opinion.However, the binding opinion is not an administrative decision. Therefore, it is also needed to amend or rescind a decision that used the binding opinion as the foundation for the final decision (in the case of WFs, Nature Protection Authority issues binding opinions for land-use decision according to the NLP and Building Act). Therefore, the Building Authority ought to renew the administrative procedure ex offo.

Authors: Jiri Vodicka, Ilona Jancarova

Denmark

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case of wind power plants]. *České právo životního prostředí : časopis České společnosti pro právo životního prostředí*. Česká společnost pro právo životního prostředí, vol. 2/2021, No 60, p. 32. ISSN 1213-5542.
[37] § 66 NLP.

1. Introduction

Regarding energy from wind, Denmark has been a pioneer and been engaged in development of windmills sine 1970'ties. Today energy from windmills covers about 45 % of the Danish production of electricity. In 2020 the total Danish production from windmills was 16,27 TWh.

At Parliament there has been a general support for the increasing production of wind energy which also has been an industrial success since the Danish Company Westas A/S is the biggest producer of wind mills in the world. Caused by local opposition to the placing of wind farms onshore, more windfarms are placed of shore.

2. How does your system deal with different interests?

Integrated or a sectorial (divided) permit procedure:

Trying to prevent opposition from neighbours, Denmark has since 2008 has a system, which is supposed to compensate neighbours for economic loose more than 1 % and in 2019 a regime giving neighbours the right to sell their property to the wind farm was established. However, the many instrument to prevent resistance from neighbours to wind farms has not worked – but instead created a new interest or alliance with annex IV species from local citizens.

Until 2018/2019 the Danish case law on EIA-permits and planning decisions reflects that the priority of wind farms often did not require an assessment of Natura 2000 impact. This can be illustrated by one case offshore and one case offshore.

MAD 2009.585 Ekn: The EIA permit for wind farm *offshore at Rødsand* with 90 wind mills 150 metre high partly placed within a Special Protected Bird Area based on a screening of the project's impact on migratory birds ithout an assessment under art. 6(3) was upheld by the appeal board arguing that the EIA permit requires a monitoring program on impact on birds and the importance of improving renewable energy.

MAD 2012.1947 H: The supreme Court upheld the decision by the former Natura Appeal Board to issue an EIA-permit for windfarm onshore (Tåsinge) close to Special Protected Bird Area based on a screening under habitat directive 6(3) concluding that the negative impact of the project was minor when taking into account, that the windfarm replace a former windfarm and the negative impact of the birds of the former wind farm

This former caselaw practice has partly been replaced by a more EU-conform interpretation of the habitat directive since 2019.

The legislation on establishment of wind farms distinguish between onshore wind farms and of shore wind farms. The permit procedure is divided with different competent authorities implying that all projects which effect Annex IV species requires permit from the National Environmental Protection Agency (EPA).

Establishment of wind farms onshore requires municipal and local plans, an EIA-permit all issued by one of the 98 local municipal councils – which includes two separate regimes regarding Natura 2000 protection and protection of annex IV species – and the plan and the EIA permit can be appealed to the Complaining Board on Plans respectively the complaining

Board on Environment and food. If the projects requires that Annex IV species temporarily need to be removed, it require permits from the national Environmental Protection Agency which also need to be involved, if it is necessary to use the derogation in art. 16 of the habitat directive. Appeal of plans and EIA permit has no suspensive effect, unless the Appeal Board decide otherwise, which only is used in extraordinary cases. Decision

Case: *MRF 2021.65 Pkn MRF 2021.121 Mfk*: The plans respectively the EIA permit for the biggest windfarm onshore (supplying 65.000 houses with energy) was annulled by the two appeal boards because of insufficient Natura 2000 assessment.

Establishment of wind farms offshore requires EIA permit issued of the Energy Agency for the offshore installation under the renewable Act and an EIA-permit and planning for installations onshore issued by the local municipal council. EIA permits regarding offshore installation can be appealed the the Energy Complain Board while EIA permits regarding inshore installation can be broad before the Complaining Board on Plans respectively the complaining Board on Environment and food. - cases

MAD 2018.419 Ekn: The EIA permit regarding i*nstallation offshore of wind farm North Sea South* was annulled because insufficient EIA since certain environmental aspect of the project was not covered by the EIA permit (referring to C-2290/03 Barker)

MRF 2021.183 Mfk: The EIA permit regarding installation onshore *of wind farm North Sea South* was annulled because there was only made a screening on how the cabel impact on the Natura 2000-river (Skjern Å) with reference to case 323/17 *People over Wind*

The experience of the Baltic Pipe Project – *MRF 2021.184 Mfk*:

The Baltic Pipe Project is a project which is intended to supply Poland and the Baltic Countries with gas from Norway – and the Danish part is a pipe through Denmark. The Danish EPA issued an EIA permit for the project in 2019. The EIA permit was brought before the complaining Board on Environment and food, which in May 2021 annulled the EIA permits because the assessment of the projects impact on three annex IV-species was found insufficient. The project was not finished and all constructions work was temporarily stopped. Three weeks later the Danish EPA issued a permit to resume the construction works on some distances of the project.

3) In what way does the decision-making procedure take account of the benefits of wind energy as a whole in relation to climate?

The general problem of the Danish Decision making procedure compared to the EU law is that under traditional Danish Administrative Law the balancing of interests is basically not divided from assessment of the environmental impact. When EIA and Natura 2000 assessment (and assessment on impact on annex IV species) is required, the overall Danish approach has been that negative impact is not acceptable. So instead of highlighting the negative impact, which will require to use the derogation clauses, the negative impact on nature from windfarms (and other projects supported by the authorities) are either ignored or underestimated.

In response to the many cases in 2020 and 2021 where the different Appeal Boards have annulled EIA permits for wind farms, the Parliament has adopted various legislation for future

projects removing access to administrative complains – which can be illustrated by two new legislative act:

Act 2021/1157 on Establishing of Lynetteholm (a new island for a new part of the city in the Port of Copenhagen) requiring 2 mio m^3 of old dumped waste at the Sea bottom to be taken up and placed in Køge Bay (not far from Sweeden). Under this Act all environmental authorities has been given to the public developer (Udviklingsselskabet By og Havn) and there is no access to administrative complains to the Appeal Boards.

Act 2021/2379 on Establish of Island in the North Sea for renewable energy in which all access to administrative complains to the Appeal Boards.

4) Local opinion

Generally, the EIA procedures and SEA procedures on wind farm is subject to major local interest and objections from local neighbours and almost all wind farm onshore has been brought before the administrative appeal boards Complaining Board on Plans respectively the Complaining Board on Environment and food. Until 2018/2019, the appeal boards generally upheld planning decisions and EIA permit for wind farms. The fact that the statutory order on noise from windfarms until 2019 was adopted without a SEA procedure and according to C-290/15 and C-24/19 should be invalid had no impact on the two complaining boards – and their position was upheld by the high court in MAD 2019.244 V rejecting preliminary questions to the CJEU based on the reasoning, that the environmental requirements in the new statutory order from 2019 adopted after a SEA procedure was the same as the former statutory order and therefor the High Court found the former statutory order valid – despite this interpretation was rejected by the CJEU in C-41/11

After the two Complaining Boards in 2020 and 2021 has applied a more EU-conform interpretation of the habitat directive and annulled EIA permits for major project, the respond from Government and Parliament have been to reduce access to the two Complaining Boards and partly centralize decision making more at state level as described above.

5) Unforeseen harm

Regarding impact on particular birds and Annex IV protected bats, further monitoring requirements are often included in EIA-permits and has also been used in some cases as part of the reason of the Appeal Boards to grant the EIA permit.

New information about public access to Danish Case law

This report doesn't include information on the cases on aquaculture, fish stocks and water quality or regarding forestry and agro-energy cultures and the production of biofuels.

I have however one announcement regarding public access to case law.

The Law Faculty at Copenhagen University has established a new Environmental Legal Research Platform (Miljøretlig Forskningsportal - MRF) which brings summery of environmental case law (including CJEU-cases) and academic comments and is open and without payment. The MRF-platform is not only used by academia but is also used by Danish

lawyers, appeal boards and agencies. The link to the MRF-platform is: https://jura.ku.dk/miljoeretlig-forskningsportal/.

Author: *Peter Pagh*

Finland

Wind farming: Local master plan, sectorial permit procedure and separate EIA

In Finland larger wind farms normally need a local master plan according to the Land Use and Building Act (LUBA, 132/1999), environmental assessment procedure according to the Act on EIA process (252/2017, over 10 windmills) and building permit. Very often the EIA process and environmental impact of the planning process are combined. If there is object that may be disturbed, also environmental permit may be needed according to the Environmental Protection Act (527/2014), and if placed on water body (sea or lake), water permit is needed according to the Water Act (587/2011). Permit according to the Nature Conservation Act (1096/1996) needed separately for protection exceptions (e.g. directive species, Natura 2000, etc.). In most common cases there is a local master plan and building permit, because there is no need for other permits.

There are special provisions in chapter 10 a of the LUBA (sections 77 a, 77 b and 77 c, 134/2011) concerning wild farms planning, but also general rules concerning master planning in chapter 7 of the LUBA must be followed and procedural provision of chapter 8 of the LUBA.

According to the section 77 b of the LUBA when drafting a local master plan for wind farm must be taken into account that the plan guides enough building and other land use; wind mils are fitted to the landscape; technical service and electricity transfer is possible to organize.

Different interests are taken into account in drafting a local master plan for wind farm. According to the section 39 of the LUBA there are several matters that must be taken into a count when a local master plan is drafted. Firstly, the regional plan and national land use objectives. Secondly there is a long list of matters, which related to wind farming include e.g. the functionality, economy and ecological sustainability of the community structure; opportunities to organize traffic; opportunities for a safe and healthy living environment; reduction of environmental hazards; protection of landscape and natural values; and sufficient number of areas suitable for recreation. In practice it is reconciliation of several matters.

Building permit is more or less formality for a wind mill if there is a local master plan and application is following plan. It will be given according to provisions of chapter 19 of the LUBA.

Related to reindeer herding there is interesting decision of the Supreme Administrative Court (KHO 2022:22). According to it the local master plan for wind farming did not fulfill the requirements of the regional plan and sections 32(1) and 39(1) and therefore it was illegal. The decision-making procedure does not formally take into account climate issues as a whole, but in reality, climate issues are off course important. However, there are other interests that might be at least as important in local municipalities (e.g. real estate taxes and land rental incomes for land owners). Because it is normal land use plan procedure, local opinions are

widely taking into account. Sensitive species etc. are takin into account in planning, but normally not specific Article 6.2 measurements are made.

At the moment, there are couple of windmills that are at sea, but they are relatively close to shore. Therefore, they may not be called off-shore wind farms. There is at least one off-shore wind farm that has been permitted according to the Water Act and couple of in other phases of permitting and land use planning. There seems to remain land area left for wind energy and off-shore sea farms are not at the moment economically reasonable, but this may change relatively soon.

Author: Ari Ekroos

France

- How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure? Is there a difference between the permit procedure for land-based and sea-based wind farms? Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development? Are there any planning instruments applicable?

The ordinance n° 2017-80 related to the "*autorisation environnementale*" (environmental authorization) and its decree n° 2017-81 adopted the 26 January 2017 make a big difference regarding the procedure. Before the new texts, there was no integrated permit procedure. Several independent authorizations had to be requested.

- The first one was for the operation of the wind farm. It was called:
- "ICPE" (*Installation classée pour la protection de l'environnement* - Classified Installation for Environmental Protection) authorization (under the environmental code) as far as land-based wind farms are concerned (heading 2980 of the nomenclature), or
- "IOTA" (which basically means "water law") authorization for sea-based wind farms.

Other requested authorizations were:

- related to the construction of the wind farm (a building permit under the urban planning code),
- and possibly another one if one or several protected species or their habitats had to be impacted by the project (the "species and habitats protection" derogation of the article 16 of Habitats directive, transposed in the article L. 411-2 of the environmental code but expanded to all "national" protected species and not only those listed in annex IV of the directive).

The new provisions entered into force the 1st March 2017. Since then, there is an integrated permit procedure called "*autorisation environnementale*" (environmental authorization) provided for in the article L. 181-1 and following of the environmental code. Projects subject to ICPE and IOTA authorizations, such as land-based and sea-based wind farms, fall within the scope of the reform. The environmental authorization replaces several other procedures for the relevant projects, including the building permit (only for land-based wind farms, but sea-based wind farms are not subject to building permit), the "species and habitats protection" derogation, but also the "no objection" (*absence d'opposition*) under the Natura 2000 impact

assessment regime pursuant to VI of article L. 414-4 of the environmental code. It means that contrary to the previous situation, the environmental authorization cannot be granted before getting the species and habitats protection derogation and/or the no objection under the Natura 2000 assessment regime when needed.

One may note that projects falling within the scope of the environmental authorization are in principle – but not systematically anymore - subject to a "classic" EIA (under directive 2011/92EU – article L. 122-1 and following of the environmental code). This is especially the case for land-based (see heading 1 in the annex to article R. 122-2 of the environnemental code) and sea-based (see heading 31 in the annex to article R. 122-2 of the environmental code) wind farms except under certain technical thresholds. As a consequence, land-based and sea-based wind farms are subject to the Natura 2000 appropriate assessment as well when they are likely to significantly affect a Natura 2000 site, individually or because of their cumulative effects, whether or not the territory they cover or their geographical location is located within the perimeter of a Natura 2000 site (article R. 414-19 of the environmental code).

The EIA under 2011/92EU directive and if needed the Natura 2000 appropriate assessment are the first critical stage(s) where the conflicts of environmental interests are dealt with. Each of them must in particular describe the initial state of the environment / of the Natura 2000 site and the significant effects that the project is likely to have on the environment / on the Natura 2000 site objectives of conservation (see respectively articles R. 122-5 and R. 414-23 of the environmental code).

For instance, in a case law relating to a sea-based wind farm project in the Mediterranean shore of France, meant to be built in Special Protected Areas covered by the Birds directive, the administrative judge rely on the EIA to state that: "According to chapter 2 of the impact assessment of the project, concerning the initial state, the Yelkouan shearwater is the second most observed bird species in the immediate vicinity of the project site during the avifauna monitoring campaigns, with respectively 2,373 and 1,636 individuals counted, all observations cumulated by boat and by plane, equivalent to 27.85% of the total number of birds observed by boat and to 12.56% of those observed by plane Scopoli's shearwater was observed more rarely, with 114 and 68 individuals counted, respectively, all observations cumulated by boat and by plane" (Administrative Appeal Court of Nantes, 6 oct. 2020, n° 19NT02389, Assoc. Nature et citoyenneté Crau Camargue, § 55). And also that : « It appears from the various evaluations carried out for the petitioner that the impact of the disputed project will be, for the Yelkouan and Scopoli shearwaters, "low to moderate" with regard to "the effect of disturbance and associated loss of habitat" and "the barrier effect and modification of trajectories". These levels of impact are corroborated by the documents in the file, especially considering the small size of the wind farm in question in relation to the very large area of foraging for the species. The evaluations carried out for the petitioner company also qualify the risk of collision between the yelkouan or Scopoli shearwater and the wind turbines of the disputed project as "low to moderate", since the sweeping area of the blades will be between 20 and 185 meters above sea level » (§ 57 and 58).

However, it does not seem that a comparison between the disavantadges in terms of impacts on the environment (biodiversity, landscape…) and the benefits in terms of greenhouse gases emissions reduction occurs at this first stage. Indeed, the benefits of wind energy as a whole in relation to climate do not have to be described in the EIA.

What can be drawn from the case-law, is that this kind of comparison may more likely occur at a second stage when a derogation is requested, whether for the protection of species (article 16 of habitats directive, article L. 411-2 of the environmental code) or for the conservation of Natura 2000 sites after an impact assessment concluding that the project could have significant effects (in application of the precautionary principle). In any case, two similar conditions must be met: the absence of alternative solutions, and an imperative reason of overriding public interest, including those of a social or economic nature. For the species protection derogation, is added the absence of nuisance on the maintenance of the populations of the species concerned at a favorable conservation status in their natural range (planned reduction and compensation measures being taken into account).

According to a rather recent study focused on species protection derogation in the field of renewable energy production facilities (and assessing the administrative practice as well as the case-law): "With regard to the imperative reason of overriding public interest, the application for derogation must, at the very least, demonstrate that the project is part of the national and European policy of the energy transition and that it responds to a regional will of deployment of renewable energies (…). As regards the absence of satisfactory alternative solution, it is in the applicant's interest to demonstrate, at the application stage, that it has sought or implemented all possible means to avoid requesting a derogation. This implies, in particular, to include in the file the different types of renewable energies previously envisaged, the various sites studied, taking into account their stakes in terms of biodiversity. In the same way, the analysis by the applicant of several sites, from the point of view of the landscape constraints and the presence of species in the implantation zone are necessary, as well as the geographical and technical characteristics of the project to limit its impact on the species and their habitats. Finally, with regard to maintaining the population of the species concerned in a favorable conservation status, the file must include a precise description of the avoidance, reduction and compensation measures that will be implemented" (Laura Descubes and Antoine Bourrel, "La derogation "espèces et habitats protégés" en matière d'installations de production d'énergie renouvelable: entre incertitudes et tentatives de clarification, *Energie Environnement Infrastructures*, December 2020, Etude 2).

The case-law study shows that compared to other economic activities (such as the building of shopping centers, the operation of quarries…), the french administrative judges are more likely to accept the existence of an imperative reason of overriding public interest when a project involving the development of renewable energy sources is concerned (see example in D.). The reason is precisely because of the positive impact of wind farms on climate. Moreover, the fact that a wind farm project is part of the implementation of a planning instrument promoting the development of renewable energies seems to be a critical point for the administrative judge (see example in D). Among these numerous planning instruments, we can mention the *schémas régionaux du climat, de l'air et de l'énergie (SRCAE) –* "regional climate, air quality and energy plans" (that are from 2019 included in a new integrated planning instrument at the regional level, called the *schema regional d'aménagement et de développement durable du territoire* - "regional plan for land-use and sustainable development of the territory"). It includes a wind power regional plan (*schema regional éolien*) that defines, in coherence with the objectives of the European legislation on energy and climate, the parts of the territory favorable to the development of wind energy. At the local level of a group of municipalities, the *zones de développement de l'éolien(ZDE) –* "Wind power development zones" had also to identify the places that would fit the most for wind farm buildings on the territory. However, they were removed from the legislation by the law n° 2013-312 of 15 April 2013, except those created before this law came into force.

- *In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?*

See above

- *How are the local opinions dealt with in the permit procedure? Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?*

A public enquiry (*enquête publique*) was classically provided for in the former ICPE and IOTA authorizations, and still during the beginnings of the environmental authorization procedure. However, the "ASAP" Law (L. n ° 2020-1525 of 7th December 2020 *d'accélération et de simplification de l'action publique* – Law to accelerate and simplify public action) is partly replacing the public enquiry by a procedure for public participation by electronic means (article L. 181-9 and following of the environmental code). This reform does not concern the projects subject to EIA, that continue to fill within the scope of the public enquiry. As seen above, land-based and sea-based wind farms are mainly subject to EIA, so as to public enquiry. The guarantees for local people that rights of participation are respected are not equal, especially because an "investigating commissioner" (*commissaire-enquêteur*) in only present for public enquiries (see article L. 123-1 and following of the environmental code). Independent from the administration as well as the private sector and bound to impartiality, the investigating commissioner ensures that the enquiry runs smoothly and can organize meetings with the project owner.

The way local opinions are taken into account also depend on the applicable participation procedure. In a public enquiry, within a maximum of 30 days following its closure, the investigating commissioner shall submit his report and reasoned conclusions. This report must state the "observations and proposals" that were made during the inquiry (article L123-15 of the Environmental Code).

Before the public enquiry, the biggest projects may also be subject to a "public debate" (*débat public*) organized by the national commission for public debate – which is an independent administrative authority. The public debate deals with the appropriateness (i.e., the very principle), objectives and main characteristics of development projects or facilities of national interest that present strong socio-economic stakes or have significant impacts on the environment or regional planning (article L. 121-1 of the environmental code). That is to say the largest development projects, with the requirement that they be of national interest. Public debates are due to last up to four months. At the end of the debate procedure, the President of the commission publishes a report and draws up a summary. However, the commission does not give its opinion on the substance of the project. Besides, there is no formal obligation for the project owner to take the results into consideration, so as to the local opinions. Still, he is required after the public debate to make public his decision on whether or not to continue the project. If necessary, he specifies the modifications made to the project and the measures he deems necessary to take to draw lessons from the debate.

Compared to public enquiry, public debate allows an earlier participation that not only deals with technical characteristics of the projects, but also with their appropriateness. Since the ASAP law of 7th December 2020, sea-based wind farm projects specifically fall within the

scope of the public debate (article L. 121-8-1 of the environmental code). The law provides that "The public is consulted in particular on the choice of the location of the potential installation area(s)". For instance, a public debate was held from 30th September 2021 to 28th February 2022 about a sea-based windfarm project off the island of Oléron (in the Atlantic Ocean). The report and summary of the debate were issued by the national commission for public debate on the 28th April 2022. Concerns were in particular raised about the sensitiveness of the area, where a marine park and several Natura 2000 sites are set up. The project owner (i.e. the French State) is due to give his decision by the 28th July 2022 at the latest.

- *Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?*

Article 6.2 of the Habitats Directive is transposed at article L. 414-1 V of the environmental code. It provides that "Natura 2000 sites are subject to measures intended to conserve or restore to a state favourable to their long-term maintenance the natural habitats and populations of species of wild fauna and flora which justified their delimitation. Natura 2000 sites are also subject to appropriate preventive measures to avoid the deterioration of these same natural habitats and disturbances likely to significantly affect these same species." However, we haven't found any case-law showing how this provision is implemented (or not) in practice, neither in a wind-farm project context nor more broadly. Still, follow-up measures are to be described by the project owner in the EIA and, if necessary, in the derogation to the protection of protected species and habitats. Then, the administration and/or the judge may prescribe additional follow-up measures that can help to anticipate unforeseen harms and define the way to react in such a case. For an example, see point D below.

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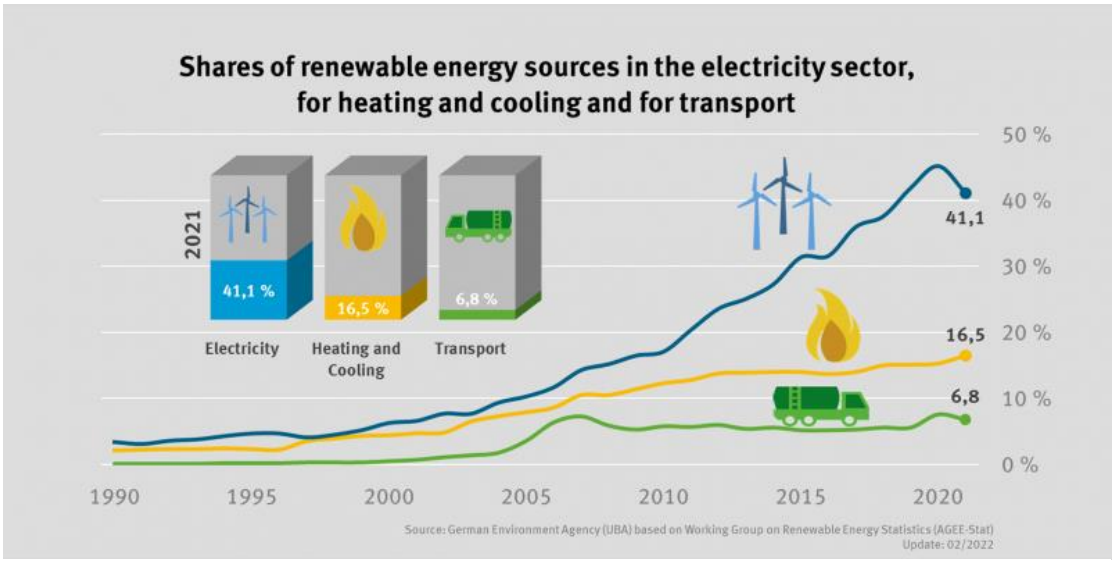
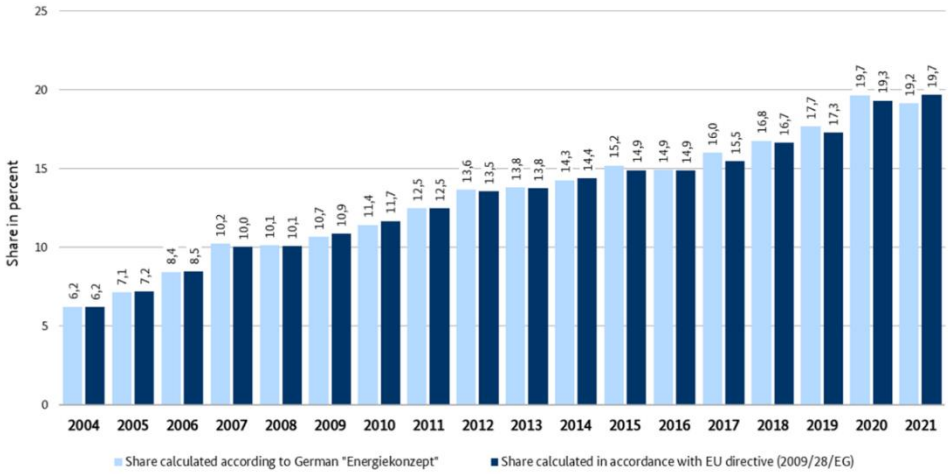
Germany

Among the three "Scenarios" wind farming is by far the most important and most controversial in Germany. At the end of 2021 some 28.280 Onshore-wind-mills were operating in Germany. The theoretically achievable total net output of these onshore plants is 56,130 MW and thus roughly corresponds to that of 40 medium-sized nuclear power plants. The practical and more limited share of renewables and wind-energy in Germany can be seen in the following graphs:



Federal Ministry
for Economic Affairs
and Climate Action

Development of renewable energy share of gross final energy consumption in Germany

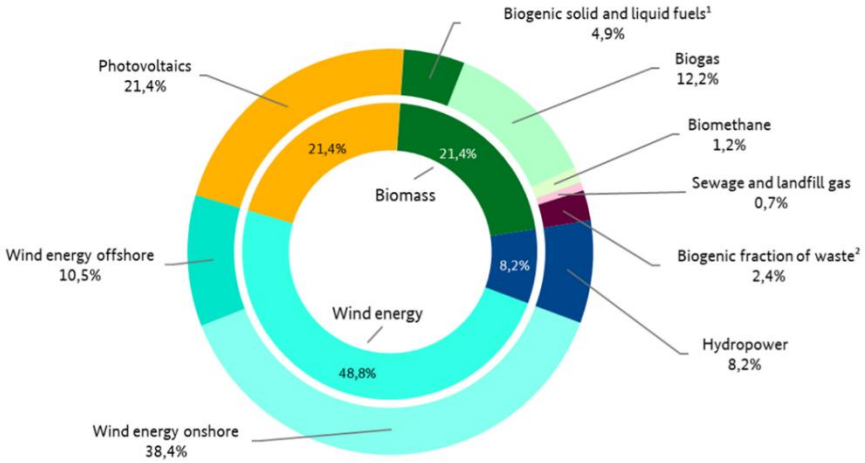


BMWK based on Working Group on Renewable Energy-Statistics (AGEE-Stat); as of February 2022

Federal Ministry
for Economic Affairs
and Climate Action

Gross electricity production from renewable energy sources in Germany in the year 2021

Total: 233,6 billion kilowatt hours



¹ incl. sewage sludge; ² biogenic fraction of waste in waste incineration plants estimated at 50 %
Notice: electricty production from geothermal power plants (0,1%) not shown because of very small share

BMWK based on Working Group on Renewable Energy-Statistics (AGEE-Stat); as of February 2022

In the last four years, the construction of new onshore wind turbines has decreased significantly. The main reasons given for this are slow bureaucratic approval procedures, resistance in the population, the negative attitude of individual state governments (especially Bavaria, see below) but also internal environmental protection conflicts, in particular with the protection of species and the protection of the landscape.

Offshore wind turbines are significantly less controversial, but also significantly fewer in number. At the end of 2021, 1,501 offshore wind turbines with a total output of 7,794 MW were in operation in Germany. By the end of 2026, the capacity of offshore wind turbines is to be increased to 12,000 MW, by 2030 to 20,000 MW and by 2040 to 40,000 MW.
The new “traffic light”-coalition and the new “super minister” for economy and climate protection Robert Habeck from the Greens has announced a massive expansion of onshore and offshore wind energy. Onshore, new locations in particular are to be developed for this purpose and nature conservation concerns are to be “put into perspective”. The development of sites in forests, on mountain tops and ridges is particularly controversial.

The discussion about the further construction of onshore wind turbines is partly characterized by rather irrational, partly even hysterical and esoteric counter-arguments. These include arguments such as the alleged "infrasound" and, in comparison to other risks, often exaggerated statements about the killing of birds, bats or other species.
In contrast, the conflicts with water protection addressed in the questionnaire have so far played no role in the German discussion.

The discussion about the expansion of wind energy in forests is mainly conducted under aesthetic and species protection aspects. Especially on the part of the private forest owners, an expansion of wind energy in forests is often advocated for economic reasons. The gains from wind energy should primarily serve to compensate for losses that result from the ecological

damage to the forests caused by air pollution and climate change. “Rational” counter-arguments against the further expansion of wind energy appear - in addition to local noise protection issues – are above all aesthetic landscape concerns about an industrialization of the hitherto comparatively untouched parts of the country.

However, since these aesthetic concerns have only had a comparatively small and weak anchoring in the law, the opponents of the further expansion of wind energy are primarily trying to use nature and species protection, which is heavily enshrined in European law. In particular, the use of environmental associations' rights of action, which have been greatly expanded by European law, is an important instrument in the dispute. Its increased use by individual environmental organizations has led to sharp controversy within the environmental movement. The number of court decisions that deal specifically with questions of the compatibility of wind turbines and the EU legal requirements for species protection is in the hundreds.

I have tried to translate the typical argumentation of the administrative courts using the example of the most recent decision of the Kassel Administrative Court of March 31, 2022 (-3 B 214/21 T, ECLI:DE:VGHHE:2022:0331.3B214.21.00, para. 22 ff.) reproduced here in abbreviated form: "22 Even if the project does not subsequently prove to be subject to an EIA, the project must nevertheless take into account the species protection concerns and cannot be approved if violations of the species protection bans cannot be reduced below the significance threshold by appropriate avoidance and reduction measures or if exemptions cannot be granted. In this context, the court is not limited to checking whether the requirements have been met and whether the result is comprehensible. […] 23 Paragraph 44(1)(1) of the BNatSchG prohibits stalking, catching, injuring or killing wild animals of a specially protected species, or removing, damaging or destroying them from the wild. According to Section 7 (2) no. 13 letter a of the BNatSchG, the wild animals of the specially protected species include animal and plant species that are listed in Annex A or Annex B of Council Regulation (EC) No. 338/97 of December 9, 1996 on the protection of specimens of wild fauna and flora by controlling trade (OJ L 61 of 03.03.1997, p. 1, L 100 of 17.04.1997, p. 72, L 298 of 01.11.1997, p. 70, L 113 of 27.04.2006, p. 26), which was last amended by Regulation (EC) No. 709/2010 (OJ L 212 of 12.08.2010, p. 1). This affects the eagle owl (Bubu bubu), the black stork (Ciconia nigra), the common buzzard (Buteo buteo) and the red kite (Milvus milvus). The skylark (Alauda arvensis) is one of the specially protected species according to Section 7 (2) no. 13 letters b) bb) BNatSchG. It is a European bird species within the meaning of § 7 Para. 2 No. 12 BNatSchG i. In conjunction with Article 1 of Directive 2009/147/EC of the European Parliament and of the Council of November 30, 2009 on the conservation of wild bird species - hereinafter: VRL - (OJ L 20 of January 26, 2010, p. 7) . […] 25 According to Art. 12 Para. 1 Letter a Habitats Directive, all forms of intentional capture or killing of specimens of the species listed in Annex IV a taken from the wild are prohibited. According to the case law of the European Court of Justice, the provision applies not only when a person acts with the full intention of capturing or killing a specimen of a protected species, but also when a person is sufficiently informed and aware of the consequences that their action will most likely have, and the action that leads to the capture or killing of specimens (e.g. as an undesirable, but accepted side effect, nevertheless carries out (conditional intent) (cf. ECJ, judgment of 01.30.2002 - C-103/ 00 -, juris No. 34 ff.; ECJ, judgment of May 18, 2006 - C-221/04 -, juris No. 70 ff.; ECJ, judgment of March 15, 2012 - C-340/10 -, juris No. 43ff.) 26 The ban of § 44 para. 1 no. 1 BNatSchG aims to protect individuals and as such is not open to a population-related relativization (cf. BVerwG, judgment of 26.09.2019 - 7 C 5/18 -, juris para. 32 ; OVG Mecklenburg-West Pomerania,

judgment of 24.08.2021 - 1 LB 21/16 -, juris para. 58). However, in order to arrive at an appropriate limitation, the administrative court rulings, especially with regard to infrastructure and intervention projects (e.g. road construction, wind turbines, high-voltage overhead lines) early on, took the view that the often foreseeable and despite all efforts never completely preventable killing of protected Individuals do not always meet the criteria of § 44 Para. 1 No. 1 BNatSchG. Instead, the prohibition is only activated if the respective project increases the risk of killing individuals of protected species "significantly" (BVerwG, judgment of 06.05.2017 - 4 A 16/16 -, para. 73, 74 with further references; BVerwG judgment of November 27, 2018 - 9 A 8.17 -, para. 98). With the law amending the Federal Nature Conservation Act, the legislature took up this “approach to significance” and clarified in the new version of § 44 para. 5 sentence 2 that there is no violation of § 44 Para. 1 No. 1 BNatSchG if the impairment is caused by an intervention in nature and landscape or a project within the meaning of § 18 Para. 2 S. 1 BNatSchG, and if – after taking avoidance measures – the risk of death and injury for specimens of the affected species is not significantly increased and this impairment is unavoidable […].27 The endangerment of protected animal species, which can never be ruled out in the case of a project to erect and commission a wind turbine, is only in conflict with the killing ban if the project increases this risk in a significant way for the animal species concerned. The criterion of significance, which is to be assessed on the basis of an evaluation, takes into account the fact that there is already a general risk of killing animals, regardless of the project, which not only results from general natural events, but can also be socially adequate and therefore has to be accepted, even if it is caused by humans but only affects single individuals. Animal life does not exist in an untouched, but in a landscape designed by humans. The protection of § 44 Para. 1 No. 1 BNatSchG (BVerwG, judgment of 06.05.2017 - 4 A 16/16 -, para. 73, 74 with further references) only applies within this framework. […] 29 Circumstances that play a role in assessing the significance are, in particular, species-specific behaviour, the frequency of the use of the area crossed and the effectiveness of the planned protective measures. In addition, other criteria related to the biology of the species may need to be considered when evaluating the significance of the risk of killing. For this professional assessment, the competent authority is granted an assessment prerogative (BVerwG, judgment of 06.04.2017 - 4 A 16/16 -, para. 75 with further references). However, this prerogative of assessment granted to the administration does not mean that the decision-making competence has been shifted from the court to the authority. If there is a lack of generally recognized standards and methods for professional assessment in the relevant professional circles and the relevant science, the judicial control of the administrative decision can reach objective limits due to the lack of better knowledge of the courts. If an extra-legal question has not yet been answered unequivocally by specialist groups and science, it cannot be objectively and conclusively determined whether the official answer to this specialist question is correct or incorrect. Article 19(4) sentence 1 of the Constitution does not require the court to resolve the non-legal factual deficit in knowledge. Courts are not in a position to independently close gaps in scientific knowledge, and they are also not obliged to issue research contracts that go beyond investigations within the framework of the state of the art. Rather, the judicial control of the administrative decision can reach objective limits due to a lack of better knowledge from the courts if there is a lack of generally recognized standards and methods for professional assessment in the relevant specialist groups and the relevant science. If an extra-legal question has not yet been answered unequivocally by experts and scientists, it cannot be conclusively determined objectively whether the administrative answer to this technical question is correct or incorrect. If, after the greatest possible clarification, the judicial control reaches the limits of the state of knowledge of ecological science and practice, the court will not be forced to further investigations on the basis of the legal protection guarantee under Article 19(4) sentence 1 GG. Rather, in such

cases, the court is permitted to base its decision on the authority's assessment of the technical question if this assessment is also plausible from a court point of view (BVerfG, decision of October 23, 2018 - 1 BvR 2523/13 -, para. 18 ff). [...]"

The legal disputes regularly revolve around the minimum distances to be maintained from certain species protected in the EU Habitats Directive and their breeding sites/flight routes. The corresponding minimum distances are specified in particular in a paper by the official state working group of bird sanctuaries (LAG VSW) "Distance recommendations for wind turbines to important bird habitats and breeding sites of selected bird species" from April 15th, 2015, 4 - Helgoländer Paper 2015, as well as currently also in the " Technical recommendations for avifaunistic recording and evaluation in wind turbine approval procedures - breeding birds" of the LAG VSW of April 24th, 2020, decision no. 19/02, p. 6, 9. Failure to comply with these distances has prompted the courts to declare wind-turbine-approvals unlawful and to overturn them.[38] The courts stuck to their own reference to these recommendations formulated by nature conservation experts, although in the meantime a state ministry in a regulation had attempted to reduce the distance requirements by a third.

The court-disputes under species protection law entail considerable investigative burdens and delays for the project operators. Species protection concerns not only lead to possible refusals or the cancellation of permits that have already been granted. According to the courts, under certain circumstances they also create obligations to temporarily switch off wind turbines[39]and to install technical equipment that is intended to help identify and prevent possible collisions with protected species. It is my impression that the requirements for wind turbines are disproportionately strict compared to other structures that endanger bird species, such as roads or large glass buildings. An interim report on the “Life Eurokite” research project, which is being commissioned by the EU Commission and in which the risks for red kites emanating from wind turbines are being examined, also points in this direction. According to this report, red kites are only be killed by wind turbines “extremely rarely” – contrary to what is still regularly assumed in the restrictive approval practice. The species will therefore not be endangered by the expansion of wind power.[40] The project has been collecting data on the red kite for the EU Commission for two years. The birds are equipped with GPS transmitters to determine the cause in the event of death. Around 700 dead red kites were tracked down and examined in this way. The most common man-made cause of death is poison, because red kites eat dead rats or mice that died on poisoned baits. Road traffic is the second most common man-made cause of death, illegal shooting is the third, electrocution from power lines is the fourth, and trains are the fifth most common cause of death. Only very rarely is death caused by wind turbines. In the research project, also the flight movements of those red kites that breed near wind farms are said to have been tracked with GPS. Here, too,

[38] VGH Kassel, Beschluss v. 14.1.2021, NVwZ-RR 2021, 293, Rn. 14 f.; OVG Koblenz, Urt. v. 6.10.2020 – 1 A 11357/19, BeckRS 2020, 33952; OVG Lüneburg, Urt. v. 25.10.2018 – 12 LB 118/16, BeckRS 2018, 33497; Urt. v. 10.1.2017 – 4 LC 198/15, BeckRS 2017, 101711; OVG Saarlouis, NVwZ-RR 2017, 966 Ls. = BeckRS 2017, 123978; OVG Münster, Beschl. v. 30.3.2017 – 8 A 2915/15, BeckRS 2017, 106448; VGH München, Urt. v. 27.5.2016 – 22 BV 15.1959, BeckRS 2016, 50118; for a differing opinion, see: VGH Mannheim, Beschl. v. 6.8.2020 – 10 S 2941/19, BeckRS 2020, 19276.

[39] OVG Münster: Schutz des Rotmilans vor Windkraftanlagen (ZUR 2021, 433).

[40] https://www.life-eurokite.eu/files/LIFE_EUROKITE_content/Presseberichte/Pressemitteilung%20zum%20Beitrag_20220223_Final.pdf; see the very differing views on this study, on the one hand: https://presseportal.zdf.de/pressemitteilung/mitteilung/zdf-magazin-frontal-eu-forschungsprojekt-rotmilane-werden-extrem-selten-von-windraedern-erschl/select_category/11/; https://www.zdf.de/nachrichten/panorama/rotmilan-windkraft-100.html; on the other hand: https://blogs.nabu.de/rotmilan/.

no significant risk of death is said to have been shown. In fact, the population of the red kite in Europe has developed positively. The red kite has been upgraded to the best category ("least concern") on the Red List of breeding birds. These statements are in stark contrast to an older study that had predicted an annual mortality rate of 4% of the red kite population from bird strikes on wind turbines alone on the basis of dead bodies and model assumptions for the state of Brandenburg.[41]

The legal uncertainties in assessing the compatibility of wind turbines with the requirements of EU nature conservation have reached such an extent in the official practice supported and demanded by the courts that wind-mill-operators have meanwhile appealed to the Federal Constitutional Court. They argued that their right to the approval of the wind-mills had been completely devalued in practice. The nature conservation requirements and the respective assessments of the authorities have reached such a level of unpredictability and arbitrary application that one can no longer speak of a legally secure and predictable approval practice. In its decision, the Federal Constitutional Court rejected the specific constitutional complaint, but at the same time called on the legislature to formulate legally binding standards for the approval practice under FFH conditions in the foreseeable future and, in particular, to spell out the open technical assessment standards in a normative manner.[42] To date, however, the legislator has not complied with this request.

- How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure? Is there a difference between the permit procedure for land-based and sea-based wind farms? Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development? Are there any planning instruments applicable?

The approval of wind turbines takes place within the approval process provided for in the Federal Immission Control Act (Bundesimmissionsschutzgesetz - BImSchG). Such a formal procedure is always required for wind turbines with a total height of more than 50 meters. This is to ensure that the planned project cannot cause any harmful effects on the environment or other hazards and that the project does not conflict with any other public-law concerns. If this is guaranteed, the applicant has a legal right to the granting of the permit (§ 6 BImSchG).

The approval procedure has a concentration effect (§ 13 BImSchG). This means that the other permits and approvals required for the operation of the system(s) are also checked and approved as part of the immission control procedure. When approving wind turbines, the focus is not only on the question of immission protection, but also on the provisions of nature and species protection law, building regulations and planning law. In addition, other legal issues such as air traffic law or the protection of landscape and monuments can be relevant.

The BImSchG provides both a simplified and a more formal approval procedure. The formal approval procedure according to § 10 BImSchG differs from the simplified procedure according to § 19 BImSchG, particularly with regard to the obligatory public participation. The procedure to be followed when approving wind turbines depends on the number of

[41] J.Bellebaum/F.Korner-Nievergelt/T.Dürr/U.Mammen, Wind turbine fatalities approach a level of concern in a raptor population, Journal for Nature Conservation 2013, 394.
[42] BVerfG, Beschl. v. 23.10.2018 - 1 BvR 2523/13 und 595/14 – Rotmilan, Rn. 24. See also: Köck: Der Umgang mit wissenschaftlicher Unsicherheit in der Rechtsprechung zum EU-Naturschutzrecht, ZUR 2022, 259.

turbines to be approved and whether an environmental impact assessment (EIA) needs to be carried out.

An EIA obligation applies to the construction and operation of a wind farm with 20 or more turbines that have a total height of more than 50 meters (§ 5 EIA Act). In the case of wind farms with three to 19 turbines, the project must at least be examined more closely by means of a site-related or general preliminary inspection, in the course of which the obligation to an EIA is assessed (§ 7 UVPG). Also of interest in this context is the question of the extent to which existing wind turbines must be taken into account in a planned project because it is a so-called cumulative project (§§ 10 f. UVPG).

If the obligation to an EIA has been determined, the applicant goes through the EIA procedure as part of the approval procedure. The core element of this is the EIA report, which deals with the environmental impact that the planned wind energy project is likely to cause. In this context, the existing environmental conditions must also be recorded and both affected communities and the public must be involved in the process (§§ 17 et seq. UVPG).

In the end, an assessment must be made as to what extent the planned project will adversely affect the existing environmental conditions in a significant way or whether effective environmental protection can be pursued and the project can be approved from an environmental impact assessment perspective (§ 26 UVPG).

- In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?

The ecological advantages of using wind energy have prompted primarily the legislature to make significant law-modifications, which have created the basis for the large-scale expansion of wind energy.

In particular, the first phases of the expansion of onshore wind energy were initiated and accompanied by a sometimes very generous subsidy regime, which subsidized the feed-in of electricity generated from the wind, solar and other renewables (electricity feed-in law). The grid operators were obliged to connect the wind turbines to the power lines and to accept/remunerate the electricity generated here. This legal construction has survived all attacks directed against it in the EU courts. In particular, the ECJ has refused to classify the legally standardized acceptance and remuneration obligations of the grid-operators as state-aid that is prohibited under EU law and must be notified within the meaning of Art. 107 TFEU. In the meantime, the subsidy instruments have been largely reduced due to the increased profitability of newly installed wind turbines.

The legislature has also privileged the expansion of onshore wind energy with the means of planning law. Wind turbines have been defined as particularly privileged projects in Section 35 Paragraph 1 No. 5 of the Building Code (Baugesetzbuch - BauGB). At the same time, the legislature has significantly reduced the possibilities for municipalities to decide against the designation of wind energy sites. In principle, there is therefore a statutory municipal obligation to designate appropriate locations.

In the individual approval procedure, the approval authority must weigh up the fundamental decision of the legislature to privilege wind energy with conflicting interests. It must not

disregard this general assessment of wind energy as ecologically advantageous with its own considerations.

However, the federal legislature has given the federal states the opportunity to at least partially relativize this obligation by creating their own distance regulations. In particular, Bavaria has introduced a legally highly controversial so-called "10 H"-regulation, which excludes the designation of wind energy sites wherever they are to be erected at a distance of less than ten times the total height of the systems from residential buildings. This regulation has led to a de facto halt to the already relatively low expansion of wind energy in Bavaria. It therefore seems questionable whether the corresponding regulation should not have been notified as a technical regulation according to Art. 1 I f and Art. 5 of the Directive 2015/1535/EU on an information procedure in the field of technical regulations (see ECJ, C-727/17, May 28, 2020 (Eco-Wind) para. 48 f.).

In the literature, the view has also been taken that the Bavarian regulation is incompatible with the constitutional requirements developed by the Federal Constitutional Court in its fundamental decision on climate protection, in particular with the requirement of the newly developed "intertemporal protection of freedom".[43]

In accordance with the previously developed case law of the administrative courts, the other federal states regularly only require a distance of 3 H. In the last few days, however, the Bavarian government itself has announced partial restrictions to its policy directed against the expansion of wind energy and relativized the 10 H-regulation.

- How are the local opinions dealt with in the permit procedure? Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?

At least the larger wind farms are approved with public participation.

The added value of a smaller wind turbine with a nominal output of 2 MW in Germany is estimated at around 2.8 million euros over a period of twenty years. With more modern and larger onshore wind turbines of up to 5 GW, the added value is correspondingly greater.

The economic participation of the local population in the economic returns from wind energy use has been discussed intensively in Germany, but has only partially succeeded. In addition to the plant operators, the economic beneficiaries of wind energy have so far primarily been the owners of the areas that are suitable for construction. Alongside the public purse, in the past this has mainly led to considerable profits for individual farmers and will potentially lead to profits for forest owners. These windfall profits of individuals have reduced rather than increased the acceptance of wind energy by others.

In the meantime, the legislature has made normative efforts to privilege "citizen wind farms" and thus promote both the economic participation of the local population and the acceptance of wind energy. Under easier conditions, “citizen energy companies” can participate in the tender for state-mediated payments for the feed-in of wind power. According to the figures available to me - although they seem rather uncertain - about 40% of the onshore turbines are owned by private owners who can be assigned to the community wind farm complex. The

[43] Leisner-Egensperger, Baurechtliche Vorgaben für Windkraftanlagen im Lichte des Klimaschutzes - Die Bayerische 10 H-Regelung und das Gebot der intertemporalen Freiheitssicherung, DVBl. 2022, 202.

operation of the wind turbines by local citizen wind companies also regularly increases the tax revenue of the respective municipality, because the corresponding operating companies are regularly based on site.

With a decision dated March 23, 2022 (published on May 5, 2022), the Federal Constitutional Court (1 BvR 1187/17) ruled that the law on the participation of citizens and communities in wind farms in Mecklenburg-Western Pomerania (Citizen and Municipal Participation Act - BüGembeteilG) is compatible with the Constitution. This law obliges the operators of wind turbines (project sponsors) to only operate wind farms through a project company to be set up specifically for this purpose and to encourage local residents and local communities to purchase shares in the company or, instead, to purchase savings products by local residents and the payment of a levy to the municipality with a total of at least 20% of its income. This is intended to improve acceptance of new wind turbines and thus promote the further expansion of onshore wind energy. In the opinion of the Federal Constitutional Court, the public interest goals of climate protection, the protection of fundamental rights from impairments caused by climate change and the security of the electricity supply are sufficiently important to justify the serious encroachment on the professional freedom of project developers enshrined in Art. 12 (1) GG.

Corresponding models play no role in the offshore sector.

Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?

Author: Bernhard Wegener

Greece

Question 1: How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure? Is there a difference between the permit procedure for land-based and sea-based wind farms? Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development? Are there any planning instruments applicable?

A. *The respective regulatory framework concerning the permits required for onshore wind farms*

Law 3468/2006 which has been amended several times, constitutes the key legislative framework for the authorization of RES projects in Greece, including the wind farms.
The main milestones for the authorization of a wind park are the following:

a) The producer's certification
The producer's certification which was introduced by Law 4685/2020 (article 11) substituted the production' s license, which was issued by the Regulatory Authority for Energy.[44] The

[44]*I am very grateful to Dr Panagiotis Galanis, holder of two LLMs in Environmental and Energy Law for his valuable contribution in writing this report.

producer's certification has to be issued if certain criteria covering concrete aspects of the project are satisfied. A first significant criterion which has to be examined concerns the compatibility of the project with the basic provisions of the Special Framework for Spatial Planning & Sustainable Development for RES. In particular it is examined whether the project is not planned to be installed in any a-priori exclusion zone, as set in the Special Spatial Planning Framework[45]**.** In deviation from the previous provisions for the production license, the producer's certification can be issued without examining whether the project exceeds the "carrying capacity" of the broader area.[46]Furthermore, it is examined whether the project fulfils certain criteria which concern the chosen location and in particular the existence of sufficient energy space (the non exceedance of the network capacity), the possible overlapping with other authorized projects and the distance between the energy producing installations.[47] In the case of offshore wind parks a producer's certification for specific projects has to be issued. The producer's certification certifies, thus, that an investor has registered admissibly to the geo-informational system of the Regulatory Authority for Energy (RAE) the interest for an energy project in **a** concrete area, so that the authorization procedure can begin.

b) The EIA procedure and the environmental permit

Law 4014/2011 and the relevant Ministerial Decisions specifying the Law constitute the basic legislative framework for the environmental authorization.[48] The driving force for its adoption was the simplification and the acceleration of the environmental authorization procedure. The respective legislative framework was amended certain times, while the latest revision was made by Law 4685/2020.

One of the basic characteristics of the Law 4014/2011 is that it reduced the categories of projects subject to the EIA procedure from 4 to 3 (Article 1), so that an environmental authorization is required only for projects classified in the Category A, which is divided in 2 subcategories (A1 and A2). Furthermore, for projects classified in the Category B, namely those that are regarded as having local environmental impact, Article 8 of the Law 4014/2011 lays down a simplified notification procedure.

Another characteristic of the legislative framework is the integration, to the largest extent possible, of the plurality of the environmental permits that were foreseen in the previous legislative framework. In particular, the environmental permit for projects of Category A (subcategories A1 and A2) integrates all the waste-related permits (namely those for the treatment and disposal of solid waste and waste-water) and the approval for the intervention in a forest area, if required (Article 12 of the Law 4014/2011, as modified). Only the water use permit is not integrated in the environmental permit.

The Greek Council of State ruled that the production license constituted mainly a project feasibility approval. (Council of State Decision 1418/2015, Decision 4293/2014, Decision 4250/2014, Decision 3572/2014).

[45] In accordance with the provisions of the Special Framework for Spatial Planning and the Sustainable Development for RES the following areas are classified as exclusion zones in which wind parks cannot be installed: a) the areas which are **classified** as nature reserves or strict nature reserves in accordance with the Law 3937/2011 (Law on the Protection of the Biodiversity), b) the core areas of the national parks and aethetic parks which are classified as such by the provisions of the national legislation c)areas classified as priority habitats in accordance with the EU nature protection legislation d) wetlands protected under the Ramsar Convention.

[46] The carrying capacity concerns the maximum number of wind turbines which are permitted to be installed in each area and is determined in the Special Framework for Spatial Planning & Sustainable Development for RES.

[47] It is worth referring that no criteria concerning the economic viability of the project or its compatibility with the provisions of the spatial planning regulations, except for those set in the Special Framework for Spatial Planning & Sustainable Development for RES are examined for the issuance of the producer's certification.

[48] See *Gogos Konstantinos*, Die umweltrechtliche Vorhabengenehmigung in Griechenland, EurUP 2015, p. 2-11.

Another characteristic of the environmental authorization framework (Law 4014/2011, as modified by Law 4685/2020) is that environmental permits are valid for 15 years. Furthermore, the procedures for the modification or the renewal of the environmental permit are significantly simplified.

In accordance with the 74463/4562/2020 Ministerial Decision that modified the previous Ministerial Decision for the classification of the energy-related projects to categories for the purposes of the environmental authorization, the following wind farm projects are classified to subcategory A1: a)wind farm projects with installed capacity greater than 60MW b)wind farm projects with installed capacity greater than 45MW which are located in protected areas (Natura 2000 Network etc.) and c) wind farm projects which include the construction of a High Voltage Line of a length longer than 20 km. The competent authority for the environmental authorization of these projects **is the Special** Environmental Authority of the Ministry for Environment and Energy.

Wind farm Projects with installed capacity between 10MW-60MW or projects that include the construction of a High Voltage Line of a length longer than 20 km are classified to sub-category A2. The competent authority for the environmental authorization of these projects is the Regional Directorate of Environment of the Decentralized Administration of the area where the project is planned to be installed.

Projects with installed capacity between 1MW-10 MW are classified to the category B and are subject to a simple notification procedure, which consists of the submission of a declaration of the investor to the competent authority that confirms the compliance of the project with the "Standard Environmental Committments" set for the wind farms.

If the wind project is going to be located in a protected area (designated under the EU originated legislation on nature protection), an appropriate impact assessment is required. The Special Ecological Assessment (the term for the appropriate impact assessment in greek legislation) constitutes an integral part of the EIA Study. Moreover, the approval on the basis of the conclusion of this assessment is integrated in the environmental permit (Articles 10 paras. 1 and 3 and 11 paras. 8,9 and 10 of the Law 4014/2011, as it is in force). It is worth noting that in accordance with art. 5 of Law 3739/2011 („ Law for the protection of biodiversity"), RES projects (including wind farms) can be located in the protected areas designated in accordance with the provisions of the EU originated nature protection legislation (i.e. Special Areas of Conservation and Special Protection Areas)[49] as well as in the other protected areas which are designated in accordance with the national legislation (natural parks, wild life refuges, protected landscapes and seascapes) provided that the specific conditions and measures set out in the environmental permit safeguard the preservation of the protected area. Moreover, Article 5 of Law 3739/2011 sets out that the installation of RES Projects (wind farms, photovoltaic installations) is not permissible in those parts of the protected areas that are designated as wetlands of international importance

[49] It is worth noting that the legal instruments set in the greek legal order for the protection and management of the protected sites of the NATURA 2000 network are the following: a)the Presidential Decree which is issued on the basis of a Specific Environmental Study and determines the permissible uses, the prohibitions and the terms under which the permissible activities can take place b) the Management Plan of the protected area issued in the form of a Ministerial Decision that sets the conservation objectives, the management actions and the specific conditions for the permissible activities.

under the RASMAR Convention and as priority habitats by the respective Commission Decision in accordance with the provisions of the Habitats Directive. [50]
Art. 45 para. 3 of the Law 998/1979, as it is in force, sets out that the intervention in forests or forest areas (a distinction that is laid out in the greek constitution) is permissible in exceptional circumstances for the implementation of certain categories of projects serving the general interest, including those which concern the construction and installation of wind farms and photovoltaic installations.

c) Connection to the system or grid
The binding grid connection offer, which provides for the grid connection, is issued after the submission of an application by the investor to the system operator[51] provided that the environmental permit under the provisions of Law 4014/2011 is already issued.[52] The grid connection offer is valid for three years. (article 8 paras. 3,4 and 5, article 8a, article 9 and 10 of the Law 3468/2006, as it is in force).

d) The installation license
The competent authority is bound to grant the Installation License, in the case that the investor has obtained a binding Grid Connection Offer and an environmental permit and **fulfils** the other legislative requirements (article 8 paras. 1 and 2 of the Law 3468/2006, as it is in force).

e) The Building Permit
The building permit for the wind farms is granted by the local town planning authorities following a standard application and the review of the compliance with the building regulations.

f) The Operation License
The operation license is granted by the Decentralized Administration of the area in which the project is going to be **implemented after** the construction of the wind farm and the successful trial operation for an initial term of twenty (20) years.

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[50]The Council of State was called to examine the compatibility of the provision of the Special Framework for Spatial Planning and Sustainable Development for Renewable Energy Sources (Article 6 para.3), which in principle allows the installation of wind mills in the Special Protected Areas (i.e areas for the protection of birds), with the provisions of the 2009/147 Directive ("Birds Directive"). In particular, the relevant provision of the Special Framework for Spatial Planning laid out that the installation of wind farms in the Special Protected Areas (SPAs) requires the elaboration of a specific ornithological ("bird-related') study, which, in addition to the EIA Study, can set specific requirements for the project implementation or even result to the refusal of the authorization. The Court ruled that the afore-mentioned provision does not contravene the Birds Directive to the extent that it requires the ornithological study as a precondition for the authorization of wind mills in SPAs. The Court ruled, though, that the omission of the Special Framework for Spatial Planning to introduce a provision which would presuppose the elaboration of a specific ornithological ("bird-related') study for the authorization of wind farms also in the designated " Significant Areas for Birds" which are not designated as SPAs, is not in compliance with the Birds Directive. Therefore, the Court gave a six-month deadline to the administration to introduce a relevant provision **(**Council of State Decision 807/2014). In response to the Ruling, the legislator introduced a provision that reflects the content of the Ruling (article 13 of the Law 4269/2013).
[51]The competent Operator for the Grid Connection Offer to RES projects and for the Interconnected System and Grids of up to 8 MW capacity is the Hellenic Electricity Distribution Network Operator, while the Independent Power Transmission Operator ist the competent operator for issuing grid connection offer for RES projects with a capacity of more than 8 MW.
[52] In the case that the wind energy project is subject to the notification procedure set out for the Category B projects, only the respective declaration of compliance with the "Standard Environmental Commitments" for wind farms has to be submitted.

*Conclusion:*The existing regulatory framework setting out the permitting procedure for RES is only, to some extent, integrated, as certain permits are required for the operation of an onshore wind farm. In recent years, certain legislative efforts have been undertaken (i.e. Law 4685/2020) with the aim to simplify and accelerate the environmental authorization procedure, also for RES projects. For the time being, draft legislation that aims for further simplification of the licensing procedures for RES projects is discussed by the Parliament after e period for public consultation. The simplification concerns mainly the connection to the grid, the installation and the operation license.[53] The draft legislation lays down the establishment of a uniform informational system, in which the applications and the accompanying documents for the proposed project have to be submitted (Articles 39-41).

*B. The distinction between onshore and **offshore** (sea-based) wind farms*

Article 6a of the Law 3468/2006, as it is in force, sets out that the installation of a marine wind park is permissible if such an installation satisfies the requirements set out in article 10 of the Special Framework for Spatial Planning for RES and a specfic plan which is subject to Strategic Impact Assessment, is approved in the form of a Presidential Decree. The Specific Plan determines the precise location of the offshore wind park and the provided installed capacity. In the next stage, the environmental authorization of the offshore marine farm takes place. The installation license, including the binding grid connection offer, is issued by the Minister for Environment and Energy in deviation from the ordinary authorization procedure. At the next stage, an open tendering procedure takes place for the construction of the offshore wind park. The connection to the grid and the utilization of the park is awarded to the contractor for a certain time free of charge.[54]The draft legislation contains provisions only for pilot offshore photovoltaic installations and not for the offshore wind parks (Articles 90-96 of the Draft Law).
It is also worth referring that the respective marine spatial plans that should have been elaborated by 21 March 2021 in accordance with the provisions of the marine spatial planning directive have not been adopted so far.[55] The adoption of the respective plans could be of crucial importance for the identification of the suitable locations of the competing uses in the marine space, including those which concern the installation of offshore wind farms.

C. The applicable planning instruments: The Special Framework for Spatial Planning and Sustainable Development for RES

As already indicated, the planning instrument which is applicable with regard to the allowable location of the onshore wind farms is the Special Framework for Spatial Planning and the Sustainable Development for RES, which aimed to cope with problems that relate to the sitting of RES installations and can be mainly attributed to the long lack of coherent planning regulations in Greece.[56] The central direction that underpins the special spatial framework is the prioritization of the utilization of RES over other land uses, mainly by

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[53] The draft legislation is available at : https://www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=82809615-45f1-48bd-9b18-aeb7016e7329 (accessed on 24.06.2022). The draft legislation includes also provisions for the electricity storage.
[54] Article 15 para. 17 of the Law 3851/2010, as it is in force, lays down that the submission of new applications for the installation and operation of offshore wind farms is not allowed and that the pending applications are examined in accordance with the existing provisions.
[55] Law 4546/2018 transposed the Marine Spatial Framework Directive in the greek legal order.
[56] V. Karageorgou, *The Fast-Track Authorization of Large-Scale RES Projects: An Acceptable Option?* in :L. Squantini et al (Eds), Sustainable Energy in Diversity- Challenges and Approaches in Energy Transition in the European Union, European Environmental Law Series No 1, 2014, p.65**,** 69.

setting criteria for the location of the different kinds of RES projects. The basic features of this planning instrument are the following: a) the setting of a methodology for the calculation of the carrying capacity of each prefecture (administrative unit) as regards the installation of wind farms b) the setting of wind priority areas and of landscape criteria for wind farm installations and c) the introduction of rules for the calculation of the hydropower reserve capacity and the sitting of hydropower projects.[57]

D. The relevant jurisprudence of the Council of State

The introduction of the Special Framework for Spatial Planning and the Sustainable Development of RES is associated with the re-consideration of the stance of the Council of State concerning the high level of protection of certain eco-systems. In particular, the Court adopted a pro-RES approach, which is characterized by the prioritization of the RES projects and their associated environmental benefits over other environmental objectives, such as the protection of the forests or the biodiversity. The main justification for the revisiting of the stance of the Court lies in the recognition of the significant contribution of RES to deal with climate change, as it is set out in the relevant International and European legal instruments that set concrete climate and energy-related targets to be achieved in certain timeframes. The Decision 2499/2012 of the Council of State (Plenary) constitutes a very characteristic example of the re-orientation of the Court' stance, as the Court ruled that the installation of wind farms in areas designated for re-forestration, even before such re-forestration is completed, does not come in contradiction with the relevant constitutional provisions (Article 24 par.1 and Article 117 par. 3 respectively), if it is ensured that the intervention in this area takes place only to the extent that it is necessary for the installation of the wind farms and the accompanying works.[58]

In deviation from this approach, the Council of State ruled that the Ministerial Decision which set the framework and defined the permissible uses in a protected area for a limited time-period[59] and also prohibited the installation of wind parks in that area is valid (Council of State Decision 1690/2020).The Court's reasoning was based on the assumption that the Ministerial Decision was based on well-documented scientific studies which demonstrated that the prohibitions of certain uses and activities within the limits of the protected area were necessary for the preservation of the ecological integrity of the protected area and the protected species.

Question 2: In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?

As it is already indicated, the benefits of wind energy in relation to climate and the achievement of the emission reduction objectives are taken explicitly into account within the framework of the legislative provisions which regulate the permitting procedure for wind farms. Therefore, the simplification and the acceleration of the permitting procedures for the installation of RES projects characterizes the existing legislative framework which prioritizes the benefits associated with the use of RES in relation to the protection of other environmental goods (biodiversity, forests). Furthermore, the jurisprudence of the Council of State has

[57] V. Karageorgou, supra, note 56, p. 70.

[58] The re-orientation of the Court's stance was reaffirmed in a series of Decisions (Council of State Decision 453/2014, Decision 649/2019).

[59] It was laid down in the respective Ministerial Decision that it would be in force for 2 years, until the Presidential Decree is issued by which the conservation objectives, the protective measures and the permissible uses in the protected area would be determined.

adopted a pro-RES stance that is based on the recognition of the contribution of renewable energy sources to combat climate change.

Question 3: How are the local opinions dealt with in the permit procedure? Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?
As already indicated, Law 4014/2011, as it is in force, and the accompanying Ministerial Decisions set the framework for the public participation and the consultation of the "public concerned" in the permitting procedure of the wind farms. The "public concerned" is determined in line with the provisions of the Aarhus Convention and the EU Law. In this context, the citizens who are affected by the wind energy project (neighbours, citizens live in close distance) and local and national environmental NGOs belong to the "public concerned" and have, thus, the right to participate in the public consultation which constitutes part of the environmental authorization procedure. The deadlines laid down in the legislative framework (Law 4014/2011, as modified by Law 4685/2020) for the public consultation are rather short. In particular, the deadline for the "public concerned" to submit opinions on the content of the EIA Study for the projects of subcategory A1 is 30 days since the Study is made publicly known (article 3 b.lit.dd of the Law 4014/2011, as modified by Law 4685/2020).[60] Moreover, the same deadline (30 days) is set out for the "public concerned" to submit opinions on the content of the EIA Study for the projects of subcategory A2 (art.4 para. 3 lit.d of the Law 4014/2011, as modified by Law 4685/2020). The competent authority for granting the environmental permit for the wind farms has to consider the opinions submitted by the "public concerned" along with the opinions of the authorities involved. The authority is not though bound by the opinions expressed by the "public concerned" and there is no specific obligation for the authority to provide the reasons for which the respective comments and opinions have not been adopted (if that is the case). The issue that is raised, is whether the deadlines are sufficient for the "public concerned" to get informed by having access to the relevant file and to express opinion on it. This is especially the case when complex projects, such as large-scale wind farms and the accompanying works are subject to the environmental authorization.

Finally, wind farms which are classified to the Category B projects are not subject to an EIA procedure, so that no public consultation procedure takes place.
The existing legislative framework does not set out any economic benefits for the local communities associated with the installation of wind farms.

Question 4:Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?
The environmental permits for wind parks located in the Special Protection Areas (SPAs) include, to a significant extent, certain terms which set the obligation of the operator to adopt a monitoring programme on the effects of the operation of the wind farm on the birds having their hosts in that area and the adoption of certain measures to avoid significant effects on

[60] Article 3 para. 4 of the Law 4014/2011, as it is in force, sets out that the deadlines for the submission of the opinions of the authorities involved and the "public concerned" can be extended by a decision of the General Secretary for the Environment on the basis of a reasoned opinion of the competent authority (ie. the Special Environmental Authority).

birds.[61] In the case that the Environmental Inspectors mainly after an in-situ inspection find out that the terms of the environmental permit which concern the impact of the operation of wind farms on the birds have been infringed, they can propose to the Secretary for the Environment the imposition of an administrative sanction (mainly of financial nature) or the temporal revocation of the environmental or the operation license so that the necessary measures for the protection of the birds are taken.[62] The issue which is though raised is whether the measures set in the environmental terms are sufficient to ensure the conservation status of the protected birds.

Author: Vicky Karageorgou

Hungary

In Hungary, the first wind turbine was put in operation in the year of 2000, the last in 2010. Approximately 329 MW of capacity entered the system, 324.9 MW remain in operation today. This approximately covers 1.3-1.5% of the Hungarian electricity consumption[63].

Despite good production results of the existing turbines, no new capacity has appeared in the system in the last 12 years, and since 2016, legislation has prohibited the installation of new wind farms in Hungary.

According to Section 10(4) of the 253/1997 Government Decree[64] no wind farm may be located in a populated area and within 12,000 meters of its boundary. There is no territory in Hungary that would meet this requirement. The 12km boundary is exceptionally high in Europe, a comparison to other country's regulation is shown in the below table[65]:

Minimum protection distance from residential areas for the installation of wind turbines in some European countries, Source: MK 2016, JRC 2018, WindEurope 2019 – translation

Country	Minimum protection distance	Permissible noise level (dB)

[61] The Green Tank, Environmental Terms of Wind Farms: Assessment and Suggestions for Improvement, March 2021, available at : https://thegreentank.gr/2021/04/30/aepo-aiolika (accessed on 30.04.2022). It is worth noting that the Study examines the terms included in the environmental permits for wind parks located in the protected areas and the extent to which specific terms are set to ensure the protection of birds during the operation of the wind farms.

[62] Certain environmental NGOs submitted a complaint to the European Commission, in which they claimed that Article 6 para. 3 of the Habitats Directive was violated by the environmental authorization of large-scale wind farms in protected areas. In specific, it is argued that because the environmental authorization was based on incomprehensive appropriate impact assessments ("Special Ecological Assessment is the term if the greek legislation, the substantive criterion laid down in article 6 para.3 which requires that the competent authority can authorize the project only after having ascertained that it will not adversely affect the ecologic integrity of the protected area concerned, was not satisfied in the context of the authorization procedures. Therefore, projects with significant impact on biodiversity have been authorized. Relevant information is available at: https://www.callisto.gr/blog/kataggelia-stin-eyropaiki-epitropi-gia-ta-aiolika-parka-entos-prostateyomenon-periohon-natura (accessed 3.05.2022).

[63] Hungarian Energy and Public Utility Regulatory Authority (MEKH) 2019

[64] Government Decree No. 253/1997. (XII. 20.) on national town planning and construction requirements

[65] Wind energy in the 21st century – and in Hungary, page 42, in Hungarian (https://energiaklub.hu/files/study/Energiaklub_Sz%C3%A9lenergia%20a%2021.%20sz%C3%A1zadban_2.pdf)

	(m)	(depending on height)	day	night
United Kingdom	-		43	35-40
Italy	**200**	6H	40	40
Czech Republic	**120-500**		50	40
Croatia	**350**		45	45
Germany	**400**	10H	50	35
Netherlands	**400-600**		47	47
Spain	**500**		55	45
Romania	**500**			
France	**500**		35	35
Austria	**800-1200**			
Belgium		3H-4H	environmental noise level	39
Denmark		4H	39	39
Poland		10H		
Hungary	**12000**			

The appearance of the unprecedentedly strict regulation surprised not only the domestic and foreign professional and non-governmental organizations, but also the potential investors, and they have had to wait for the decision to be justified ever since. Applying the value of the protected area defined in the decree, it can be stated that Hungary has practically no area that would not be affected by this exclusion.

It should also be noted that in addition to the total ban, further restrictions have been introduced into the Hungarian legal system. According to point 5.1.2.12. of the 8/2001 GM Decree[66] the turbine can be 100 m high and have a maximum capacity of 2 MW. On the basis of a European comparison, it can be stated that these criteria only affect the lower limit of the indicators of commercially available wind turbines, as investors are interested in installing equipment of increasing size and capacity in order to increase wind energy production. Another surprising mosaic in the confusing picture is the 50-meter blade length limit for turbines with a power output of more than 50 kW - especially in light of the fact that the blades of machines currently on the market are now typically between 75 and 100 m long.

The Hungarian National Energy Strategy was published in 2020. It is the core document that envisions the country's energy-related goals and directions until 2030. It states that *"we do not plan to increase wind power capacity over the period of the strategy."*

Given the current energy crisis in EU, Hungary's position may change but at this time there is no indication of that.

Given the ban of wind farms, the above questions do not arise in Hungary.

[66] GM Decree No. 8/2001. (III. 30.) on the entry into force of the Regulation on the Technical and Safety Requirements of the Power Plant

Authors: Erika Fiala-Butora, Eszter Zlatarov

Italy

- *How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure?*

1. *Permit/authorization procedure for the realization and operation of wind farms*

The primary legislative framework defining the type and modalities of authorisation procedures for the development of renewable energy installations including wind farms is represented by Legislative Decree 387/2003 and Legislative Decree 28/2011, respectively transposing and implementing into the Italian legal system Directive 2001/77 on the promotion of electricity from renewable energy sources in the internal market, and Directive 2009/28 on the promotion of the use of energy from renewable sources, and which repealed Directive 2001/77.

Both legislative instruments have among their objectives that of simplifying, rationalising and facilitating the procedures for the authorisation and developments of installations for the production of energy from renewable sources. To that end, they established special authorisation procedures for the development, building and operation of renewable energy installations. These authorisation procedures vary depending on the type of installations and of the renewable source involved. For wind plants, we can distinguish between 3 main types of authorisation procedures: *Autorizzazione Unica*, the Simplified Administrative Procedure (*Procedura amministrativa simplificata*) and Communication to the Municipality.

For wind farms, the Autorizzazione Unica ("AU"; literally 'Single authorisation') is the most common type of authorisation procedure (art 12 of Legislative Decree 387/2003). It is called 'unica' because it is granted at the end of a procedure in which all the administrative authorities with a specific competence or interest in the procedure or in the project are called to participate. The AU is a valid title to build and operate the energy installation in conformity to the approved project and this permit must also contain a specific obligation for the operator to restore the site to the previous conditions, if and once the wind installation will terminate its operation (art 12(4) Legislative Decree 387/2003).

This AU procedure can be regarded as integrated. A special feature of this procedure is the *Conferenza dei Servizi*, which is an administrative procedure aimed at ensuring the contextual consultation of all the administrative authorities interested and representative of the public interests involved.

Additionally, there are specific provisions aimed at the integration of other interests in the decision-making procedure. Article 12(3) of Legislative Decree 387/2003 which disciplines the AU provides that when granting the authorisation the competent authorities (i.e. the Region or the State) must comply with the relevant applicable law on the protection of the environment, the landscape and the historic and cultural heritage. This means that for projects related to wind power plants and wind farms to be located on areas subjects to landscape and/or cultural heritage constraints, article 146 of the Code of Cultural heritage and landscape (*Codice dei Beni Culturali e del Paesaggio*) applies, requiring a mandatory assessment of the

compatibility of the proposed projects with the landscape, and the subsequent granting of the landscape authorisation (*autorizzazione paesaggistica*). This aspect, however, has recently undergone important legislative changes (see further below).

Of particular relevance are also the National Guidelines approved in September 2010 for the authorisation of renewable energy projects and installations. These complement the legal framework of authorization procedures established by legislative decree 387/2003. As the AU is most often carried out at regional level, the main objective and focus of those guidelines is indeed to provide common guides across the various regions on integrating environmental and landscape considerations in the procedures for the development and promotion of renewable energy projects and in the authorisation of renewable energy installations.

Moreover, as far as the broader environmental interests and considerations are concerned (such as interests related to the impact of the projects on nature and biodiversity), these are also addressed primarily in the context of the Environmental Impact Assessment (EIA) procedure which is mandatory for specific type of wind installations. Indeed, because of the relevant thresholds [see table below] EIA is arguably mandatory for all the authorisations concerning the building and operation of wind farms.

The EIA is also somehow built into the AU procedure: according to article 12(4) the overall duration of the decision-making procedure regarding the granting or not of the authorisation shall not exceed 90 days, but this excludes the time necessary to carry out the EIA procedure or the previous undertaking of the screening procedure.

EIA requirements for wind installations:

The competent authority is the State or the Regions depending on the cases (see table below).

State competence: Competent authority: Ministry of Ecologic Transition, in collaboration with the Ministry of culture. Art 7-bis Legislative Decree 152/2006 + Annex II and II-bis	- Building and operation of on-shore wind plants producing electricity and whose power is above 30 MW. - Mandatory EIA also apply to any modification or extension of the above projects if they are situated even partially in a natural protected area or in one of the sites included in the Natura 2000 Network (art 6(7) (b) and Annex II of Lgsl Decree 152/2006). - Mandatory *screening* applies to any modification and extension of the above projects if they do not fall in natural protected areas or Natura 2000 sites (Annex II-bis).

Regional competence (public administration with tasks related to the protection of the environment) Art 7-bis Legislative Decree 152/2006 + Annex III and IV	- Mandatory screening for on-shore wind plants whose power is above 1 MW (see Annex IV). - Mandatory EIA for on-shore wind plants whose power is above 1 MW and located in protected areas as defined by the law or on Natura 2000 sites.

Balancing and conciliation of different interests in the decision-making and authorization procedure for wind farms: recent legislative developments

Overall, the legislative framework governing renewable energy projects, including the building and operation of wind farms, reflects the difficult attempt of balancing between on the one hand the pursuit of climate change and energy security concerns through provisions aimed at promoting and incentivising the production and use of renewable energy, and on the other hand the need to take into account of legitimate concerns related to nature conservation and biodiversity and landscape protection.

According to several academic commentaries, some of the current provisions applicable to the authorisations of renewable energy installations, including wind farm, reflect a clear favour of the legislator towards the promotion of this type of energy. These include, in particular, article 12(1) of Legislative Decree 387/2003 which qualifies all works for the realization and operation of plants fed by renewable sources, as well as any work and infrastructure connected to that purpose, and authorised through the AU procedure, as "works of public utility and urgency".

Moreover, with the adoption of the National Integrated Plan for Energy and Climate in 2019 and the National Resilience Plan (PNRR) in 2021, there have been several developments which went in the direction of further boosting the production and use of energy from renewable sources. The most relevant recent legislative developments in this direction include:

The Simplification Decree (Decree 77/2021) aimed at defining the normative framework to achieve the objectives outlined in the National Recovery and Resilience Plan (PNRR) and the Integrated Plan for Climate and Energy). One of its main objectives is to streamline and simplify the EIA and authorisation procedures in the attempt of tackling what were perceived as the main obstacles to their effective development, namely lengthy bureaucratic processes and particularly for wind farms, the firm opposition of either the Regions or of local administrations motivated on the basis of landscape considerations.

This new law identifies a specific category of projects regarded as necessary to achieve the energy transition and included in the National Plan for Resilience (PNRR) and the National Integrated Plan for Energy and Climate (PNIEC). Projects in this category notably include the realization of new renewable energy installations – thus the realization and operation of wind

farm falls in this category. For these projects the decree reduces in some cases significantly the duration of the AU procedures and the time available for public consultation and decision-making in the context of EIA procedures (see art 25 (2 and 2-bis) of Legislative Decree 152/2006, as amended by art 20 of Decree 77/2021; projects are listed in Annex I-bis of Legislative Decree 152/2006).

The inclusion of landscape and cultural heritage interests in the EIA procedure takes place through the requirement that for all the projects (including renewable energy projects) for which the EIA is of competence of the State, the relevant decision concerning the EIA is taken by the competent authority (i.e. Ministry of Ecological Transition, former Ministry of the Environment) in agreement with the Director General of the Ministry of Culture (art 25(2)) Legislative Decree 152/2006). Moreover, Article 25 (2-quinquies) provides that the agreement of the Ministry of Culture may in some cases be inclusive of the landscape authorisation required under art 146 of the Code of Cultural Heritage and Landscape for those projects that are situated in areas classified of national interest for their landscape or cultural heritage aspects. The impact of this amendment is significant because under the Code of Cultural Heritage and Landscape the Regions are competent to decide on the landscape authorisation, after having previously obtained the opinion, in some cases binding, of the *Sovrintendenza* (i.e. *(i. e. the local Cultural Heritage and Landscape Protection Authority)*.). Thus, the new provisions may have the effect of bringing the decision-making power for landscape or cultural heritage aspects back to the State level, through the Ministry of Culture.

Along the same lines is the provision (art 30 of Decree 77/2021) which amends the procedure for the granting of the *Autorizzazione Unica* (art 12 of Legislative Decree 387/2003) by providing that for projects related to renewable energy installations to be situated in areas subject to landscape protection, the procedure shall envisage the participation of the Ministry of Culture which shall express its mandatory but non-binding opinion during the *Conferenza dei Servizi*. Failure of the Ministry to do so within the provided deadline means that the competent authority will proceed with the request of authorisation. The Ministry of Culture's failure to clearly express its opinion within the deadline also means that the same will be precluded the possibility to subsequently oppose the project by reiterating its dissent through the remedies usually available under the law – i.e. recourse to the Presidency of the Council of Ministers after the closure of the *Conferenza dei Servizi*, and in case an agreement is not reached among the dissenting administrative authorities, decision on the matter at the level of the Council of Ministers (an example of this remedy being activated is illustrated in the case study at the end of this questionnaire) .

This is again significant as it may be regarded as a way to bypass the application of the provisions of the Cultural Heritage and landscape code (art 146 of the Code) which required the binding opinion of the *Soprintendenza (i. e.*. Indeed, in the past, the negative opinion of the *Soprintendenza*, often combined with the reluctance of the Region or of the other local authority to the development of renewable energy projects, have been in several occasions one of the main factors slowing down the authorisation processes, and thus the development and operation of wind farms.

Other important amendments to the authorisation frameworks for renewable energy installations are included in Legislative Decree 199/2021 (implementing EU Directive 2018/2001 on the promotion of use of renewable energy). This law provides that the Ministry

of Ecological Transition, together with the Ministry of Culture and the Ministry of Forestry and Agriculture, shall adopt specific decrees to establish uniform principles and criteria for the identification of areas suitable and not suitable to renewable energy installations. This process shall take into account the interests of landscape protection, cultural heritage and the environment. On the basis of these criteria, the Regions shall then identify the suitable areas in a way to respect the principles of minimization of impacts on environment, territory and landscape. The law says however that the non-inclusion in the list of the suitable areas does not automatically mean that a site is not suitable. The law itself identifies areas which are considered suitable, including sites already hosting renewable energy installations, as well as areas that are degraded or in the process of decontamination.

- *Is there a difference between the permit procedure for land-based and sea-based wind farms?*

The procedures are similar, but the main difference lies in the authority and level of governance who is competent for the authorisation and for the EIA.

For on-shore wind plants the AU is usually granted by the Region (or by the Province if delegated by the Region) and is required if the wind plant power is above 60 KW, or above 1 MW if so provided by regional law. The AU is instead granted by the State (Ministry of Economic Development) if the installations have a thermal power equal or above 300 MW.

For off-shore energy installations [art 12(3) of Legislative Decree 387/2003] the competence for the authorisation is at State level. The AU is therefore granted by the Ministry of Transport having consulted with the Ministry of Economic Development and the Ministry of Environment. The State is also competent for the EIA procedure.

Additionally, the building and operation of off-shore energy installations requires that the operator is previously granted the marine state property concession (*concessione demaniale marittima*).

- *Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development?*

Article 12 of Legislative Decree 387/2003 on the administrative procedures for renewable energy installations expressly includes in its scope of application both the building of the installations and the connected work and infrastructure which are necessary for the building and operation of the installations. Moreover, the National guidelines clarify (point 3) that article 12 includes in the notion of 'connected works' also the services and the works necessary for the connection to the electricity grid. However, the building of new electricity network or the expansion of those network are not included. This interpretation seems shared by the relevant case-law (see decision of *Consiglio di* Stato 7681/2021).

- *Are there any planning instruments applicable?*

With respect to planning instruments, the applicable law (art 12(3) of Legislative Decree 387/2003) provides that for renewable energy installations the granting of the *Autorizzazione Unica* in compliance with the applicable norms on the protection of the environment, landscape and cultural heritage is tantamount, where necessary, to an approval of a variation to urban planning. A subsequent provision (art 12(7) of Legislative Decree 387/2003)

provides that renewable energy installations can be situated also in areas classified as agricultural area, provided that there is compliance with the applicable norms on the protection of traditional agricultural practices, biodiversity, cultural heritage and rural landscape.

- *In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?*

The requirement to take into considerations the benefits of wind energy in relation to climate is not explicitly spelled out in the legal framework applicable to the individual authorisation procedure for wind installations. However, it does emerge implicitly from certain provisions which reflect the understanding, particularly at the State level (rather than at regional level), of the importance of promoting the production of electricity and energy from renewable sources. Both Legislative Decree 387/2003 and subsequent integration (see for example Legislative Decree 28/ 2011) and the 2010 Guidelines reflect the need to balance on the one hand the importance to develop renewable energy by providing appropriate incentives, and on the other hand, to give appropriate relevance to landscape and environmental considerations.

Nevertheless, it may be said that more recently, through the new PNRR and more specifically through the PNIEC, the Italian legislation places a greater emphasis on the climate change objectives related to energy transition by 2030 and the crucial role that renewable energy may play in the achievement of those objectives. Thus, the recent legislative developments outlined above are particularly significant for acknowledging the importance of developing renewable energy installations, including wind farm, for climate and energy security purposes.

- *How are the local opinions dealt with in the permit procedure?*

The main contexts where local opinions are included in the permit procedure are the public consultations carried out during the EIA procedure, and in the framework of the *Conferenza dei Servizi* for the installations authorized through AU procedure.

- *Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?*

Art 5, legge no 53 del 2021(Legge delega), comma 2 (lettera h), provided that the government, in the implementation of directive 2018/2001, observes the following principles and criteria:

Lettera h: identify incentive measures for the promotion of the renewable energy communities aimed at promoting the participation of local communities in the development of installations. Creation of energy communities: citizens, businesses and industries as well as local and competent authorities.

On the specific aspect concerning possible benefits, incentives or other support measures for local communities (local communities, citizens, or municipalities) hosting wind farms, the law does not seem to regulate this. Indeed, the focus of the legislation is essentially on envisaging various forms of economic incentives for producers of renewable energy.

- *Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?*

No specific provision in this sense have been detected in the applicable Italian legislation.

Authors: Massimiliano Montini and Emanuela Orlando

Latvia

According to the National Energy and Climate Plan 2021-2030 Latvia intends to develop new projects based RES significantly. The aim includes developments of wind power energy projects to ensure energy production capacity from wind of at least 800MW by 2030 (the aim will be reassessed and most likely raised up by 2023).[67]
At the same time, so far, there have been no major developments of the wind farms in Latvia. In recent decade, all development initiatives were discontinued after or even before the EIA without getting development consent at the municipality level.[68]
According to quite many discussions on the reasons of lack of **land-based** wind farms in Latvia, several main obstacles have been identified:

1. NIMBY (well organized and load opposition from locals and broader society, usually during the EIA procedure)
2. A political nature of a decision refusing a development (a council of a municipality has to issue a development consent accepting or refusing a development). So far, decisions have been negative including when there has been a positive EIA (at least during the recent decade),
3. There are no incentives for either a municipality or local inhabitants (who usually point out negative consequences they would have starting with damaged landscape without any benefit why to tolerate such projects) to accept a development.

With respect to off-shore wind parks – none have been built. However, since 2020 there are intensive discussions on how to ease and improve the procedures in order to facilitate the

[67] At this moment, the installed capacity from wind power is around 78MW making 3% of total electricity production.
[68] The recent case before the Administrative court (*Pienava Wind*) probably will change this trend (at least the *Wind energy association* so believe). Briefly about the case: The municipality refused the authorization mainly due to negative opinion of the society against that development (the authority's recommendation following the EIA was positive after reduction of wind turbines from 28 to 22). Last year the Administrative district court annulled the municipality's decision and requested to issue an authorization (Judgement of 26 Jul.2021 in case No. A420181220, *Pienava Wind*). This judgment is appealed and pending adjudication at the Appeal court. Meanwhile the third party in the case – the developer (Pienava Wind) requested injunctive relief for authorizing to start the project that has been delayed since 2016. The injunctive relief refused at the first instance but received at the last instance on 10 Janv.2022. (Decision of the Administrative Supreme court No.SKA-571/2022) So, they can proceed with the development while waiting for the authorization from the municipality and the result of the adjudication. The Supreme Administrative court based its decision issuing the injunctive relief mainly on the grounds that the authorization should have been granted and was refused without legitimate legal grounds. Thus, in a sense prejudging the result of the case waiting before the Appeal court.

developments of such projects, especially in light of the agreement signed by two governments (LV and EE) for developing joined off-shore wind park.[69]

In fact, taking into account the requirements of the legislation establishing the system for developing off-shore wind farms, it is not surprising that none has been developed yet. In short, requirements are unenforceable, as, for example, a request for a permit to carry out a feasibility assessment of the area (prior requiring a development consent) needs to include very detailed information about the territory, nature conditions etc. It is in effect requirement to submit such type of information that could become available only during detailed assessment of the area….but to make the assessment one needs a permit. So, it seems the legal framework (incidentally or not) includes the requirements that are impossible to fulfil.

At this moment, the legislation establishing a system for the planning and permitting procedures of off-shore activities is under scrutiny and would be significantly changed. Therefore, not worth reporting about current state.

While preparing information for this report it turned out that the system of land-based wind farm developments are going to be changed significantly as well, in effect abandoning EIA… Therefore, I decided to reflect on intended "reforms", as right now it is completely unclear what will remain from the existing system with respect to wind farm authorization process. Since middle of April there is widely announced initiative on the table of the Government launched by the minister (thus, elaborated by the MEPRD[70]) to completely change the system with respect to authorizing wind farms (with capacity in excess of 50MW). In short, an EIA requirement is going to be abandoned. The minister believes that the EIA is the reason why no wind firms has been built during last decade and thus to facilitate the process it shall be abandoned substituting with 'technical requirements.' It is claimed that the environmental interest would be taken into account by a developer as during an authorization procedure they will be obliged to receive 'technical requirements with respect to environmental protection' from the State Environmental Service…

The main argument to change the "cumbersome" procedure for wind farm developments – 'urgent need' of energy independence that of course, nobody objects to. The 'informative report' has been prepared by the Ministry and presented to the Government with the main aim to get acceptance from the Government to proceed with the new legislation. On the 21 March 2022, the Government tasked the Ministry to elaborate a new law aimed at facilitating the development of wind energy (by simplifying and speeding up procedures). The main argument of the task assigned "to develop reasonable procedure and time limits" as argued in the Report – urgent action required to facilitate energy independence (including due to the war in Ukraine).

The planed approach is indeed worrying but no major objections have been made so far (except from one or two ENGOs). The new law (intended for "optimizing procedures") is still not on the table but the main elements and arguments have been indicated in the Informative Report presented to the Government. Several trends could be pointed out:

[69] The Governments of Latvia and Estonia signed a Memorandum of Understanding (MoU) on it in July 2020. They aim to run a joint auction in 2026. The capacity of the proposed offshore wind farm is up to 1,000 MW, and the project is expected to be commissioned by 2030.

[70] The Ministry is responsible for three policy areas: Environmental protection, including climate policy; Regional Development; as well as Digital agenda) with one political representative (minister) for all three. So, one may guess that it is very challenging to represent equally two former policy areas.

- Aim to assign the status of an '**Objects of National Interest'** (ONI) for each wind farm development project with capacity in excess of 50MW.[71]
- **Abandoning an EIA procedure**. Aimed to be substituted by the 'technical requirements' issued by the State Environmental Service (not clear on what type of procedure/assessment they could be able to issue "technical requirements" as the timeline allowing for 30 days to issue such requirements means it is unlikely a proper assessment can be performed).[72] Nevertheless, there is a claim that 'environmental requirements will not be disregarded as they will be included in the 'technical requirements' issued by the SES (State Environmental authority) with respect to particular development.
- Abandoning public rights of participation… The chart about the envisaged procedure foreseen just 'informing the public' about the intended development, place and characteristics.[73]
- In the new law for 'facilitating wind farms developments,' it is aimed to include:

  1) areas where wind farms may be developed:
  - industrial areas; forest territory (outside cities and villages); agricultural areas. (Similar to existing general planning regulation adopted by the Government regulation, however, the latter regulation was used by some of municipalities to forbid the developments of wind farms in their territory through the spatial planning regulation. The new approach intends to preclude municipalities' rights of adopting such restrictions, as well as the status of ONI allows to ignore any restrictions adopted by the municipality with respect to territory developments).[74]

  2) restrictions setting areas where wind farms would not be allowed:
  - specially protected nature territories, including *Natura 2000* and 2 km around them; in protected areas around military airports and radars; around cultural monuments; in agricultural territory with national significance (special existing classification status)

  3) "mandatory requirements for nature protection" – it seems that these requirements are understood as containing three elements:
    - (i) *not in Natura 2000* territory and closely around;

[71] Prior the approval of the NIO status, the project would be required to get technical requirements for connection to the transmission system from a transmission system operator thus certifying availability of transmission capacity.

[72] The argument is based on EIA Directive Art.4(2) that according to the Report allows a MS to decide whether EIA is needed at all for Ann II type of projects. So, implicitly indicating that MS is completely free to decide whether to require EIA….(no CJEU case law cited and seems to be completely unknown to somebody preparing that Report….)

[73] The Report to the Government has made "interesting" statement (or assessment) that "the Aarhus Convention does not envisage that wind farms are objects that need consultations in contrast to e.g. industrial objects, animal farms etc…" [literal translation of this *alarming assessment…)*

[74] In fact, there is on-going dispute between the Ministry and some municipalities as the former considers that the municipalities do not have competence to adopt 'blind' prohibition with respect to whole its territory. So, according to the Ministry, they are allowed to plan their territory but not to forbid particular activities that are otherwise legitimate. At this moment, there is two pending cases before the Constitutional Court with respect to prohibition of gambling business in certain municipalities.

- (ii) if protected nature territories might be affected - *compensatory measures* to be taken to protect nature… and birds and bats;
- (iii) if compensatory measures are not possible to be established – a developer will need to pay damages for destroyed or damaged protected habitats and species … (we have heard this approach before)….

Summarizing the key points/trends of the new initiative of "optimizing procedures and timelines" for wind farms developments:

- Object of National Interests (for speeding the process and in effect excluding the planning restrictions adopted by the municipalities);
- Abandoning an EIA procedure as well as limiting the rights of the general public to 'being informed' instead of having a say;
- 'Type of territories' included in the law establishing rule where the wind farms are to be allowed and where not;
- Nature protection requirements included in the law (it seems to be just statement without real coverage of 'requirements' limiting with statement on compensatory measures…)
- Environmental requirements limited to the obligation of the SES to issue 'technical requirements' – within 30 days. The public and society "are to be informed about" these requirements.
- Building permit (in 15 days) issued by the Central Building Control Office (instead of a municipality's building authority)
- Project to be accepted in 8 working days
- Acceptance of the preconditions to start building process – within 3 working days.

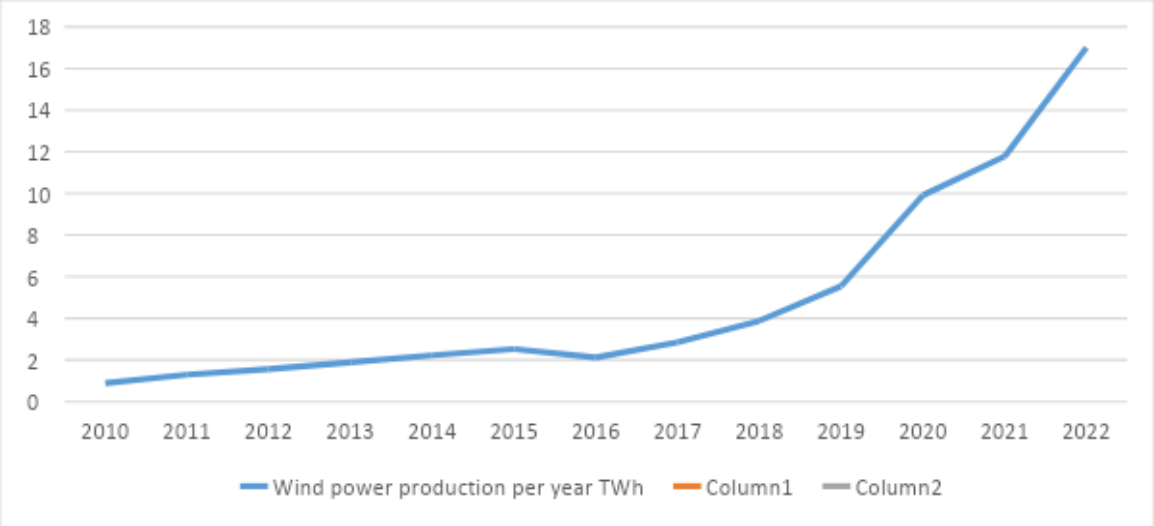
It seems there is strong pressure to proceed with such simplified procedure for wind farms authorizations within the nearest months. Most likely, there will be a draft for a law launched during May/by the end of May.

Author: Zaneta Mikosa

Norway

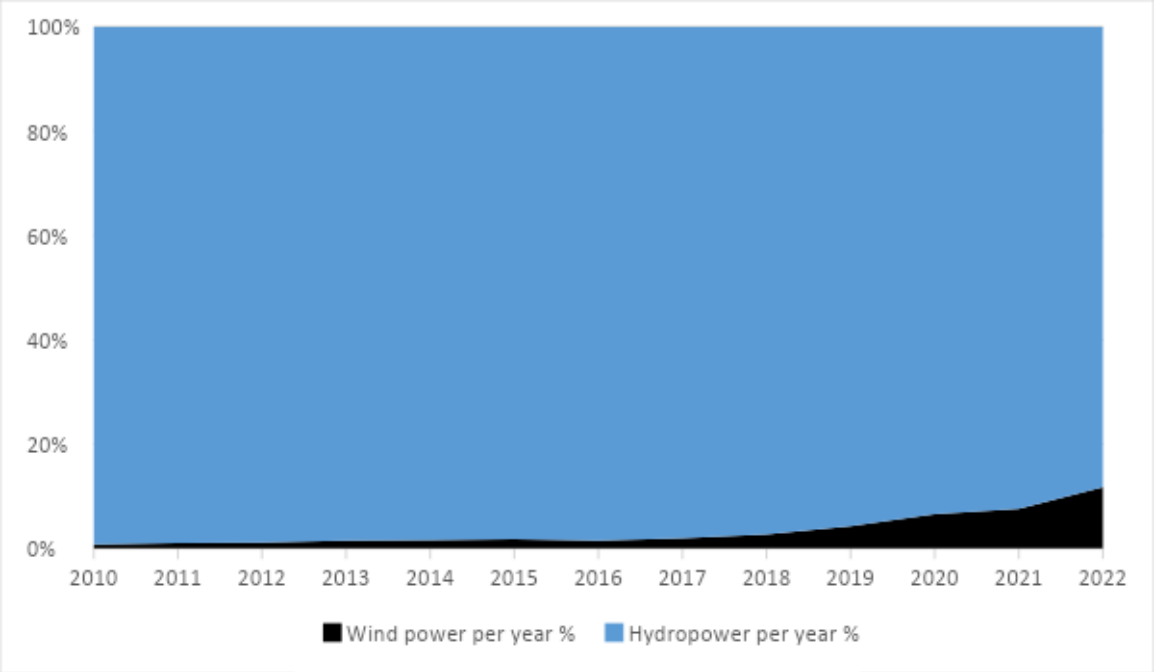
So far, commercial production of electricity from wind power has taken place on-shore in Norway. As illustrated in figure 1, such production is a fairly recent phenomenon in the Norwegian context.

Figure 1, wind power production in Norway 2010-2022 (projections for 2022 based on production in 2021)



Wind power production is very far behind hydropower, as illustrated by figure 2. There is hardly any commercial production of solar power in Norway. Over the period, these two sources represented 97.6 % of Norwegian electricity production. Norway has been a net exporter of electricity – during the period the net export was 7.5 % of production. Export of electricity is most likely increasing, much due to construction of new cables and lower electricity prices in the Norwegian market than elsewhere – over the past 15 months net export has been 12.7 % of production.

Figure 2, wind power as share of renewable energy production in Norway 2010-2022 (projections for 2022 based on production in 2021)



Construction of wind power has been very controversial in Norway in recent years. A draft national plan for wind power developments ("nasjonal ramme for vindkraft") was scrapped in 2019, recently there has been an informal moratorium on the issuing of new permits awaiting discussions on how to apply the Planning and Building Act, and the Supreme Court recently

decided that two of the largest wind power developments in Norway, covering an area of 60 km^2, had been established in violation of Sami indigenous cultural rights under Article 27 of the International Covenant on Civil and Political Rights.[75] Norway has followed a wind power development policy of establishing large-scale industrial developments located far from major population centres and close to existing major power lines. The two developments found illegal by the Supreme Court are parts of what is claimed to be Europe's largest land-based wind power development, including six individual and geographically separate projects with 277 turbines with a production capacity of 1 057 MW covering an area of 116 km^2.

2) How does your system deal with different interests?

a) Integrated or a sectorial (divided) permit procedure: There is an integrated procedure for dealing with different interests, headed by the Norwegian Water Resources and Energy Directorate (NVE) which is a directorate under the Ministry of Petroleum and Energy. Importantly, the procedure has in practice been exempted from municipal and regional planning procedures under the Planning and Building Act (2008), since permits can be adopted as zoning plans. This means that the energy authorities have the final decision-making power in such cases, and that other public authorities are limited to providing input during the decision-making process.

b) Land-based vs. sea-based wind farms: Permits for land-based wind power are decided on the basis of the Energy Act (1990 no. 50), while decisions on marine developments are made based on the Offshore Energy Act (2010 no. 21). While the former applies the rules on SEA and EIA adopted according to the Planning and Building Act, the latter sets out separate rules on SEA and EIA mirroring the rules that apply to the offshore petroleum sector. The land-based permit process is based on individual applications, and consists of a two-stage procedure: i) a general concession that set a very flexible framework for the project, and ii) a subsequently validation of a detailed plan regarding environment, transport and construction. In practice, there is no clear procedure for carrying out SEAs for land-based developments. The Offshore Energy Act sets out only a very general obligation to carry out impact assessments, presumably a SEA, when opening up marine areas for energy production. While rules on project specific EIAs have been adopted under the Act, no further rules on the details on SEAs exist.

c) Combined decision-making process: The general permits consider how the wind power development shall be linked up with the grid.

d) Planning instruments: In 2007, the Ministry for Environment established guidelines for the planning of localization of wind power production. Regional authorities produced such plans which were subsequently approved by the Ministry, such plans were elaborated for eight regions. These plans were set aside in the process of elaborating a national plan for wind power. As mentioned, the draft national plan was subsequently scrapped due to opposition, and the status of plans for land-based wind power is for the moment unclear. For marine wind power, there exist general marine management plans for four main maritime regions that identify environmentally sensitive sea areas. There is no plan that focuses on wind power development.

[75] HR-2021-1975-S

3) In what way does the decision-making procedure take account of the benefits of wind energy as a whole in relation to climate?

Wind power has in general been considered as beneficial from the perspective of its contribution to the lowering of greenhouse gas emissions. However, Norwegian consumption of electricity has almost exclusively been from hydropower. Plans to commence electricity production based on natural gas were quite advanced in Norway, but were shelved due to low profitability. Hence, the main contribution to mitigation has been associated with the prevention of emergence of fossil fuel based electricity production in Norway and increasing export of electricity to countries that otherwise would have depended on fossil fuel for electricity production.

A significant issue more recently has been the destruction of wetlands associated with large-scale wind power developments. It has turned out that the climate effects of destroyed wetlands have not been taken into account, and that the net mitigation effect might in worst case scenarios have been negative for some of the developments. There is still significant lack of knowledge in regard to these issues. Nevertheless, there is currently more awareness of these challenges in EIAs, and the design of projects might avoid some of these negative effects.

4) Local opinion

a) Permit procedure: In practice, municipalities have had strong influence on whether projects have been awarded the general permits. Literature has suggested that municipalities have effectively had "veto power" in this phase. Where the interests of municipalities align with those of central authorities and wind power developers, however, other local interests have had very limited impact. Importantly, this has resulted in indigenous (Sami) interests been overruled (as exemplified with the abovementioned Supreme Court decision), and in significant local opposition to wind power developments, including the establishment of a number of issue-specific NGOs, some of which have unsuccessfully brought cases to courts.

Many projects have experienced long delays between the initial permit and the subsequent detailed plan regarding environment, transport and construction, in some cases more than 10 years. Even if permits are time-limited, the Directorate has as a standard extended the deadlines without reconsidering the application. The final plan has frequently deviated significantly from the project that was considered in the permit related EIA. Even if a new and less clearly defined EIA is to be carried out for the detailed plan, local interests are frequently overruled at this stage of the process. The delays, project revisions as well as changes in project ownership have led many municipalities to change their opinion regarding projects. This has resulted in municipalities opposing several projects unsuccessfully.

b) Economic benefits: The main means for local communities to benefit from wind power development is through property taxes. However, no special regime exists for wind power developments, and many municipalities are generally sceptical about introducing property taxes in general. Moreover, significant challenges occur in terms of discriminatory treatment. Many municipalities have entered into more or less formal agreements indicate significant municipal disappointment with the outcomes of such agreements.

5) Unforeseen harm

Permits generally include monitoring requirements, in particular where future consequences of projects are uncertain, e.g. periodic surveillance of birds and reindeer in the area. Where such effects are identified, the Directorate may impose additional measures to be taken to reduce related harm.

Author: Ole Kr. Fauchald

Poland

1. Models of conducting the investment process in the light of the binding regulations

In Poland, the investment process with respect to various projects may be divided into two types (models):

1) classic (standard) - based on provisions of "general laws", regulating issues of spatial planning, environmental protection, real estate management and implementation of the construction process,
2) special - based on provisions of the so-called "special legal act" (*specustawa*), for which the provisions of the „general acts" constitute the basis only in matters not regulated in the "special legal act".

As indicated in the literature, „*a special law act is a legal act of a special nature in relation to ordinary legislation [...]. Underlying this separateness, there is the goal that the legislator intends to achieve, using means facilitating its attainment[...]. By its nature, a special law as a solution deviates from the standard of the ordinary law [...]. The goal which could be achieved by applying ordinary laws, is achieved in a simpler and faster way*"[76].

Polish legal system has developed a practice of implementing "special legal acts" in the area of infrastructure investments of fundamental importance for the state[77].

The purpose of a "special legal act" is to introduce solutions aimed to simplify (facilitate) and "speed up" the decision-making process into the legal system[78].

The legislator is not bound by any formal criteria when deciding which projects should be regulated by "special legal acts". Such acts may concern a specific investment (e.g. the Act on the Central Communication Port[79]) or a particular type of projects (e.g. roads, airports, housing investments). A "special legal act" regulates the given matter in an autonomous way, excluding - within the regulated scope - the application of general laws[80].

Among the most important legal instruments used by a "special legal act" there is the establishment of special regulations (simpler, by force of law), relating to general spatial planning norms and concerning expropriation and compensation, as well as deadline for issuing decisions or their enforceability.

[76] Cf. D. Sześciło, M. Chylak (ed. A. Bodnara), Opinia prawna Helsińskiej Fundacji Praw Człowieka w sprawie projektu tzw. specustawy powodziowej, p. 6 -7.
[77] E.g. Act of 10 April 2003 on special principles of preparation and implementation of investments in the field of public roads (consolidated text in Journal of Laws of 2022, item 176 as amended).
[78] D. Sześciło, M. Chylak op. cit., p. 7.
[79] Act of 10 May 2018 on on the Central Communication Port (consolidated text in Journal of Laws of 2021, item 1354 as amended).
[80] Cf. D. Sześciło, M. Chylak, op. cit., p. 7.

A specific example is the Act on promotion of electricity generation in offshore wind farms[81] (hereinafter: the Offshore Act). It does not integrate certain sectorial permit procedures into a single administrative decision, but instead introduces mechanisms aiming to shorten the time of the whole investment process by providing immediate enforceability of the "environmental decision", water consent, construction permit, operating permit, as well as shortening the deadlines for: a) issuing these decisions, b) lodging appeals and c) examination of complaints by the court. This special regulation is justified because the Offshore Act:

- serves realization of Poland's obligation to ensure an appropriate share of RES in gross final energy consumption;

- contributes to achievement of the EU's collective RES target (32% by 2030) and the target indicated in the National Energy and Climate Plan for 2021-2030 (21% share of RES in gross final energy consumption by 2030)[82].

2. Classic model of conducting an investment process

The classic (standard) model of conducting an investment process includes different stages and various required decisions, *inter alia*, those of:

-localization nature (zone plans, location decisions),

-construction and operation nature (building permit, operating permit),

-regulated nature (e.g. "environmental decision", permit to deviate from species protection, permit to remove trees, water-law permit, electricity generation concession and so on)[83].

In the context of integrating and striking the right balance between various conflicting interests (economic, social, environmental, local, conflicting environmental interests) the local/zone plans and the decision on environmental conditions of approval for the implementation of a project that may have a significant impact on the environment (hereinafter the "environmental decision") are of particular importance.

These stages of the investment process are characterized by holistic, integrated approach to various conflicting interests. They will be presented briefly in p. 2.1. and 2.2.

2.1. Local plans as an instrument to protect the environment and resolve conflicting interests

The local spatial development plan is a planning instrument for environmental protection which, at the same time, serves to resolve conflicting interests, including those related to environmental protection.

Pursuant to the provisions of the Act of 8 March 1990 on Municipal Self-Government[84] and Article 3 (1) of the Act of 27 March 2003 on spatial planning and development[85], the

[81] Act of 17 December 2020 on promotion of electricity generation in offshore wind farms (consolidated text in Journal of Laws of 2022, item 1050).
[82] Explanatory memorandum to the Offshore Act, part. A1 https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=809
[83] Explanatory memorandum to the Act on amending the Act on providing information about the environment and its protection, public participation in environmental protection and environmental impact assessments, and some other acts, Paper 939;https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=939 (access date: 12 September 2022).

municipality decides on the designation, manner of development and conditions for development of the land. This competence is referred to as planning authority, which means the responsibility for shaping of the municipality's spatial policy, including, *inter alia*, adoption of local spatial development plans and their amendments. The decision to proceed with preparation of a local plan or to amend a local plan is taken by the municipality.

The function of the local spatial development plan is to determine the purpose (the permitted use) of the land covered by the plan (Article 4 of the Act). Therefore, further decisions (other actions) authorizing certain uses of the environment or certain projects should be consistent with the local spatial development plan[86].

Spatial planning is a continuous process in which opposing interests (private interests and various public interests) are balanced.

Pursuant to Article 1(2) of the Act on spatial planning and development, spatial planning shall, in particular, take into account, inter alia, architectural and landscape values; the requirements of environmental protection, including water management and protection of agricultural and forest land; the requirements of protection of cultural heritage and monuments, as well as the goods of contemporary culture; the requirements of protection of health and safety of people and property, as well as the needs of the disabled; or the needs of the public interest.

When determining the land use or specifying the potential manner of development and use of the land, the municipal authority „shall weigh the public interest and private interests, aiming to protect the existing state of land use, as well as changes to its management, and economic, environmental and social analyses" (Art. 1(3) of the Polish Act on spatial planning and development).

Determination of the said designation of the land often requires balancing of conflicting interests. Expectations of potential investors, property owners and other legal entities may be diametrically opposed, and the space in which an activity would be implemented is limited. Moreover, such a conflict may occur, *inter alia*, between public purposes or fall within the broadly conceived protection of the environment (its components). For example, there may be a conflict between the needs of protection of outstanding natural elements and the needs of exploitation of mineral deposits, such as geothermal waters[87].

The jurisprudence of the administrative courts indicates (see e.g. judgment of the Supreme Administrative Court of 31 May 2010, II OSK 575/10) that:

> *„(...) the wording of the provisions of the Spatial Planning and Development Act unambiguously indicates that the 'public interest' has not been given primacy over the interest of the individual. The legal solutions adopted in the Act of 27 March 2003 on*

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[84] Act of 8 March 1990 on municipal self-government (consolidated text in Journal of Laws of 2022, item 559 as amended).

[85] Act of 27 March 2003 on spatial planning and development (consolidated text in Journal of Laws of 2022, item 503 as amended).

[86] Cf. Z. Niewiadomski (ed.), Planowanie i zagospodarowanie przestrzenne. Komentarz, Warsaw 2015; W. Federczyk, A. Fogel, A. Kosieradzka-Federczyk, Prawo ochrony środowiska w procesie inwestycyjno-budowlanym, Warsaw 2015.

[87] Cf. A. Fogel, Dopuszczalność wprowadzania ograniczenia w zagospodarowaniu terenu w planie miejscowym - z uwagi na ochronę środowiska, [in:] W. Federczyk, A. Fogel, A. Kosieradzka-Federczyk, Prawo ochrony środowiska z procesie inwestycyjno-budowlanym, Warszawa 2015, p. 92 et seq.

spatial planning and development (...) are based on the principle of balancing the national interest, the interest of the municipality and the interest of the individual. This implies an obligation to carefully balance individual rights (interests of citizens) and public interest. This is particularly important in the event of a collision of such interests, including the interest of the municipality with the interest of citizens arising, for example, from the ownership right to land Property"; "Although Article 1(2)(1) and (9) of this Act provides that spatial development shall take into account the requirements of spatial order, including urban planning and architecture, as well as the needs of the public interest, it also requires that the ownership right be taken into account - Article 1(2)(7)"; "The basic principle of equality before the law requires that all interests involved in a given case are balanced. The essence of the principle of balancing conflicting interests is based on the correct implementation of two elements: balancing of the value of interests and the result of such balancing".

In the context of the problem of resolving the indicated collision of environmental interests and private interest of land owner, it is necessary to point to the argumentation included in the judgment of the Voivodship Administrative Court in Warsaw of 23 January 2019, ref. IV SA/Wa 2117/15, stating that:

> *„(...) allocating land for the purpose of public greenery, i.e. areas of organized greenery available to the public, is not the realisation of a public purpose justifying expropriation and granting appropriate compensation for the deprivation of the ownership right. The obligation arising from Article 7 (1)(12) of the Act on municipalities to perform tasks in this scope, as well as the obligation specified in Article 78 of the Act on environmental protection of 2004 to establish and maintain green areas and wooded areas, does not mean that the consent is given to performance of these obligations primarily, and even exclusively in this case, at the expense of owners of real property located within the municipality*".

The holistic approach to various environmental interests in spatial planning proceedings is guaranteed by mandatory SEIA which consider various environmental interests (e.g. nature conservation, climate, landscape).

2.2. The decision on environmental conditions of approval for the implementation of a project that may have a significant impact on the environment (the "environmental decision") and the EIA[88]

The decision-making process concerning projects likely to have a significant impact on the environment is generally divided into two main stages[89]:

- the first stage involves obtaining a decision on environmental conditions for the execution of a given project (the "environmental decision"),

- the second concerns the investment permit, i.e. a decision on the basis of which the contractor is granted the right to carry out the project.

[88] See: Act on providing information about the environment and its protection, public participation in environmental protection and environmental impact assessments (consolidated text in Journal of Laws of 2022, item 1029) – father as "The Environmental Law".

[89] Explanatory memorandum to the amendment to the "The Environmental Law", paper 939 https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=939 (access date: 12 September 2022).

The third stage pertains to the operating permit entailing the right to put the project into operation.

The “environmental decision” is the first decision required in the investment process for projects that may have a significant impact on the environment. Public authorities issuing investment permits are bound by the “environmental decision”.

In the procedure for adoption of the “environmental decision”, an EIA or a screening procedure is carried out. If the project may, at the same time, have significant effects on Natura 2000 site, the “Natura assessment” is integrated in the EIA.

The EIA procedure is an instrument of presentation, by participating entities (parties, public, public authority), of various interests (environmental protection, human health, living conditions, material goods, monuments, interaction between those elements, ways of preventing and limiting the negative impact on the environment, as well as the required scope of monitoring). The environmental decision is places to balance conflicting interests with reference to the environmental report, as well as comments of the public (however, arguments and concerns of the opponents to the investment do not have to be shared and thus taken into account during the decision-making process) and opinions or consents of specialized public authorities.

The “environmental decision” has a binding character. A catalogue of grounds for issuing a negative decision includes premises relating to environmental interests, including human health and “spatial order” as a paradigm of sustainable development. They concern (see art. 81 of the Environmental Law”):

- conflict of the planned project with the provisions of the local spatial development plan,
- the possibility of a negative significant impact on the Natura 2000 area and the lack of fulfilment of conditions set out in Article 6(4) of the Habitats Directive,
- refusal of the investor to allow the execution of the project in another variant than the one specified in the application,
- possibility of not achieving the environmental objectives included in the river basin management plan,
- refusal to agree on the conditions of project's execution by the public authority participating in the proceedings,
- occurrence of contradictions with substantive legislation (e.g. the distance rule for wind farms, see below).

This means that if it is guaranteed that the planned project does not violate the substantive law (and if procedural requirements are fulfilled), cannot cause harmful effects on the environment, including public health (because of used mitigation or compensation measures), and does not conflict with other public-law concerns (spatial order), the applicant has a legal right to be granted the permit.

In this context a judgment of the Voivodship Administrative Court in Warsaw, in which the court argued the refusal to issue a positive environmental decision due to the project's impact on human health with reference to, among others, prevention and precautionary principles and

protection of human rights, is worth noting. The case concerned the construction of a poultry farm and the level of odour nuisance. In the judgment of the court stated that[90]:

" (...) when assessing the excessiveness of odour impacts, it cannot be ignored that odour emissions may in certain situations lead to a violation of the right to respect for private and family life and housing, i.e. values protected, inter alia, under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms".

"These rights may also be violated in immaterial ways, such as by noise, emissions of harmful substances, odours and other interferences".

2. Scenarios

The following cases reflect environmental dilemmas or trilemmas because the conflicting interests on the different sides are in any case environmental (in broad terms, considering climate as an environmental issue).

A. Renewable energy by wind farming

- How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure? Is there a difference between the permit procedure for land-based and sea-based wind farms? Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development? Are there any planning instruments applicable?

Wind energy is not only dependent on environmental conditions, but also affects the environment, including human health:

-negatively (noise, light phenomena, natural values, landscape values, agricultural land protection, land use) and

-positively (climate protection).

- Is there an integrated or a sectorial (divided) permit procedure?

There is a sectorial (divided) permit procedure. The whole investment process is very complicated and includes decisions of a locational nature (local plans, location decisions), of an architectural and construction nature (building permit, operation permit), as well as various decisions of a regulatory nature (e.g. environmental decision, water consent, concession for energy production and so on) required by separate acts applying to a certain activity.

- Is there a difference between the permit procedure for land-based and sea-based wind farms?

[90] The judgment of the Voivodship Administrative Court in Warsaw from 9.09.2020 r., IV SA/Wa 2720/19, LEX nr 3067921.

The permit procedure for land-based and sea-based wind farms differs in some aspects (see below).

- Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development?

Construction of the wind farm includes also the execution of necessary installation for the connection to the existing electrical networks.

- Are there any planning instruments applicable?

Yes: spatial plans and maritime spatial development plans (see below); Polish Energy Policy until 2040; National Energy and Climate Plan 2021-2030, which, *inter alia*, sets climate and energy targets for 2030 - 21-23% share of RES in gross final energy consumption.

1. Land wind farm

1.1. Localization of land-based wind farms and conflicts of interests

Conditions for location of land-based wind farms are regulated by the Wind Energy Investment Act from 2016[91] ("the Distance Act"); offshore wind farms are outside the scope of that Act. The Act introduces in art. 3-5:

- a requirement to locate a wind power plant on the basis of a spatial development plan (in which diverse private and public interests are integrated and balanced - see part. I (2.1).

- minimum distance of a wind turbine from residential buildings and certain protected areas (national parks, nature reserves, Natura 2000 areas and forest promotion complexes) - the distance is to be equal to or greater than 10 times the height of the wind turbine measured from ground level to the highest point of the structure (total height of the wind turbine).

The requirement to locate a wind power plant on the basis of a spatial development plan and the distance rule (10 ha) must be taken into account when issuing further decisions (e.g. environmental decision or building permit – art. 6 of the Distance Act).

The statutory determination of the minimum distance of wind towers from residential buildings and certain protected areas is an example of transferring the valuation and balancing of conflicting interests to the legislative stage. The 10 HA principle is intended to "protect multiple values from dangers posed by the construction and operation of a wind farm. Dangers related to operation of such an investment are of divergent nature: health-related (due to noise emission), environmental (due to threats directed towards various forms of nature) and aesthetic (due to disturbance of landscapes caused by the constructed wind power plant). The normative adoption of the distance principle is therefore the legislator's response to the protests of various social groups caused by the location of wind power plants"[92].

[91] Act of 20 May 2016 on Wind Energy Investment (consolidated text in Journal of Laws of 2021, item 724).
[92] Cf. M. Przybylska, *Zasada odległościowa w procesie inwestycyjnym elektrowni wiatrowej i zabudowy mieszkaniowej a działania organów samorządowych*, PiP 2018, nr 4, s. 100-113.

That regulation has created a major barrier to the development of onshore wind farms in Poland. It has resulted in a radical restriction of the area where wind farms can be located[93]. Currently amendments to this Act are pending. They aim to make the 10 ha principle more flexible. A different (shorter) - but not less than 500 m - distance of a wind farm from residential buildings, according to the results of SEIA, can be applied in the local spatial plan; additionally, special rules for consultation of such plans with local communities and neighbouring municipalities are to be provided[94].

1.2. The decision-making process of land-based wind farms and handling the conflicting environmental interests

The so-called Distance Law „*does not regulate all aspects of the investment process related to obtaining necessary permits, such as the environmental decision, the building permit or the operation permit (...)", "nor does it introduce any simplifications to the existing procedures for obtaining decisions, it modifies mainly the provisions regulating spatial development*"[95].

In the decision-making process, integration of conflicting interests (economic, social, environmental) takes place in the EIA procedure. With regard to land wind farms, an EIA is required in cases of (see: § 2 item 1 point 5a and § 3 item 1 point 6 of the Ordinance of the Council of Ministers of September 10, 2019 on projects that may have a significant impact on the environment):

- installations using wind power for generation of electric energy: a) with a total nominal capacity of at least 100 MW (in this case an EIA is mandatory);
- installations using wind power for generation of electric energy other than listed above: a) located in areas covered by forms of nature conservation, b) with a total height of not less than 30 m; in this case, a screening procedure is conducted and, depending on its outcome, the environmental decision is issued with or without an EIA[96].

If the project may have a significant impact on a Natura 2000 site, the Natura 2000 assessment is integrated with the EIA or carried out separately in the course of the investment permit procedure.

The investor must also obtain further decisions and fulfil other formal legal requirements, *inter alia*: obtain title to land, grid connection conditions; grid connection agreement; concession for energy production, building permit, operation permit.

[93] „At the same time, the availability of such land is inversely proportional to the height of wind turbines, which marginalises the possibility of using the highest and most modern wind turbines" – cf. judgment of the Voivodship Administrative Court in Kielce of 13.01.2021, II SA/Ke 149/18, LEX nr 3121551.

[94] https://www.prawo.pl/biznes/zmiana-zasady-10h-dla-elektrowni-wiatrowych-konieczna,514220.html (access date: 12 September 2022).

[95] Cf. M. Makowski [w:] *Ustawa o inwestycjach w zakresie elektrowni wiatrowych. Komentarz, wyd. II*, art. 1 LEX/el. 2018.

[96] In literature is underlined that "*the rigid adoption of a multiple of the turbine height as a quantifier of the acceptable distance for the location of wind power plants, without taking into account their actual impacts, puts a question mark on the sense of conducting an EIA for this type of projects, since the legislator's intention was to completely eliminate any impacts on the objects of protection, which are people and forms of nature conservation, including those protected under Natura 2000*" M. Makowski [in:] Law on investments in wind power plant, art. 4, *op. cit.*

2. Offshore wind farms (distinctions)

2.1. Location of offshore wind farms - the first step (plan and spatial management of maritime areas) – art. 37^1 – 37k of the Act of March 21, 1991 on the maritime areas of the Republic of Poland and maritime administration (The Act on maritime areas)[97]

The Act on maritime areas introduces the obligation to develop a plan of spatial management of maritime areas in which the environmental, economic and social objectives of the use of the maritime areas are integrated.

The plan determines, among others, the basic function and the permissible functions for each of the areas allocated in the plan; prohibitions or restrictions on the use of these areas, taking into account the requirements of: nature conservation; the location of public purpose investments (e.g. offshore wind farms) and the areas and conditions for protection of the environment and cultural heritage, fishery and aquaculture, and the production of renewable Energy (art. 37a par. 2 of the Act on maritime areas).

A draft plan is prepared according to the ecosystem approach and taking into account: 1) the promotion of sustainable development in the maritime sector, economic, social and environmental aspects, including improvement of the state of the environment and resilience to climate change; 2) defence and national security; 3) coordination of activities of relevant actors and uses of the sea (art. 37b par. 1 of the Act on maritime areas).

The ecosystem approach, according to art. 37b par. 1a of the Act on maritime areas, means that the following cumulative conditions are met in the management of human activities:

1) the impact on the ecosystem of the planned human activity will be maintained at a level to achieve and maintain good ecological status of the environment;

2) both the ability of the ecosystem to function properly and the resistance to environmental changes will be maintained;

3) sustainable use of resources and ecosystem services by present and future generations will be made possible.

In the procedure of adopting the maritime area management plan, integration of various interests (economic, social and environmental) is also guaranteed by the obligation to carry out the SEIA and the formal integration (e.g. obligation of the competent authority to co-operate with other public authorities which submit consents and opinions, providing information as well as participation of the public).

2.2 The decision-making process of sea-based wind farm - distinctions

2.2.1. Additional decision

The Act on maritime areas introduces the requirement for the following additional (extra) decision to be obtained by the operator:

[97] Act of 21 March 1991 on the maritime areas of the Republic of Poland and maritime administration (consolidated text in Journal of Laws of 2022, item 457).

-permit determining the location for construction or exploitation of artificial islands, installations and equipment in Polish maritime areas and defining conditions for their use in these areas; issuing that decision requires opinions of the ministers competent for: state assets, energy, economy, climate, culture and protection of national heritage, fisheries, environment, geology, the Minister of National Defence, the Chief of Internal Security Agency (Art. 23 of the Act on maritime areas).

Art. 23 (3) of the Act on maritime areas specifies a catalogue of reasons for refusal of the permit, which refer to the:

-environmental interests (threat to the environment, marine or offshore resources, including rational management of mineral deposits),

-economic interests (threats to the interests of the national economy),

-security interests (defence and security of the state; the safety of sea navigation; the safety of sea fishing; the safety of flights of air ships; the safety connected with the research, recognition and exploitation of mineral resources of the seabed and the interior of the earth underneath),

-threats to the underwater archaeological heritage, and

-threats to the basic functions of the area (the main purpose of the area allocated in the plans of the maritime area), if they were determined.

- decision in the matter of approval of the project of geological works and decision on approval of the geological documentation.

2.2.2. Shortening of the procedural process

The Act on promotion of electricity generation in offshore wind farms (the Offshore Act), which aims at faster increase of the share of energy from renewable energy sources in the national energy mix, provides regulation according to which: a) the environmental decision, water consent, construction permit, operational permit, decision on geological works are immediately enforceable; b) the deadlines for issuing the above mentioned decisions, as well as lodging appeals and examination of complaints by the court are shortened in relation to the general regulation (Art. 76-78).

- In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?

The benefits of RES (including wind farms) are subject of the National Energy and Climate Plan 2021-2030. But it does not have the character of a universally binding act. According to the Plan, generation of energy from renewable sources: a) is an important element of decarbonization, energy diversification; b) meets the growing demand for energy, c) expresses the care for the natural environment and the need to promote sustainable development; as part of implementation of the EU-wide target for 2030 Poland declares to achieve by 2030 - 21-23% share of RES in gross final energy consumption.

In decision-making procedure the impact of the project on the climate is taken into account in the EIA procedure.

An example is the justification of the “environmental decision” for the project called: „Construction of offshore wind farm Baltic Central III”:

„*It is assessed that the project at the stage of construction and exploitation, decommissioning will not significantly affect the aggravation of climate change. Potential impact of the OWF BSIII on the climate should be considered in two aspects - as a negative impact and a positive impact. Negative impact on the climate of the OWF BSIII will be associated primarily with the emission of air pollutants, especially at the stage of construction, when a particularly intensive ship traffic is expected. During the construction, operation and decommissioning stages, only vessels complying with the emission standards will be operating. The positive impact on the climate will be the generation of renewable electricity by the BSIII OWF, estimated at the level from approximately 2500 GWh per year (with 600 MW installed) to approximately 5000 GWh of carbon-free electricity per year (with 1200 MW installed). Furthermore, climate and climate change are not expected to have a significant impact on the operation of the project. The conditions of re-construction, exploitation and decommissioning of the wind farm imposed in the decision take into account the aggravation of climate changes*"[98].

Another example is the judgment of the Voivodship Administrative Court in Wroclaw, in which the court dismissed the complaint against "negative environmental decision", e.g. refusal to determine the environmental conditions of approval of construction of a wind farm and accompanying infrastructure due to violation of the distance rule 10 ha:

„(…) *undoubtedly, introduction of the provisions of the Act* (the so-called Distance Act - BI MB) *was aimed at securing human health and life and creating certain location requirements excluding discretionary decisions by the authorities. An element weighing on the use of turbines is undoubtedly any national important general objective. In the Court's opinion, this goal is primarily protection of health and the environment. It should be added that the connection between the distance requirement and protection of health and the environment is directly related to realisation of the national general objective. The identified threats to these values are noise, stroboscopic effect - flickering of shadows and light reflections, electromagnetic pro-radiation, effects of the risk of fragments of the power plant breaking off, infra-sound and vibrations. On the other hand, it must also be borne in mind that the use of green energy, compared to the alternative obtention of energy by traditional methods, serves to protect the environment and it seems indisputable that the balance of the use of wind turbines is environmentally beneficial in general*"[99].

- How are the local opinions dealt with in the permit procedure?

Social conflicts are analyzed in the EIA and are part of the information provided in the environmental report.

The public (everyone) has the right to participate in the EIA procedure and the Nature 2000 assessment; the administrative body competent to issue the decision is obliged to consider the public comments made before issuing the decision.

Special rights in the proceedings, in which the EIA or the nature assessment is carried out, are vested with ecological organisations, which can exercise the right to submit comments or join

98 http://gdansk.rdos.gov.pl/files/aktualnosci/60057/Tresc_decyzji_srodowiskowej_dla_morskiej_farmy_wiatrowej_Baltyk_Srodkowy_III.pdf (access date: 12 September 2022).

99 Cf. Voivodship Administrative Court in Wroclaw of 9 February 2021 r., II SA/Wr 845/16, LEX no 3179338.

the proceedings with the rights of a party, file an appeal or a complaint to the court against the decision.

It should also be noted that objections of the local community do not constitute a normative basis for refusal to issue the "environmental decision", setting out the environmental conditions for the execution of the project.

By the way, in the context of social conflicts (the NIMBY problem), it is worth noting that the reports of the Supreme Chamber of Control concerning the location and construction of onshore wind farms emphasise that „from the perspective of local communities, the regulations on social consultations contained in the local government acts are of particular importance. In accordance with the Act of 8 March 1990 on municipalities and the Act of 15 September 2000 on local referendum, in matters important and significant for the commune, units of territorial self-government may carry out social consultations related to the construction of wind farms, including holding a referendum on the matter"[100].

- Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?

Not to our knowledge.

- Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built - e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects „in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?

The "environmental decision" specifies the scope of monitoring at the stage of construction, exploitation and decommissioning of the wind farm, *inter alia*. If significant negative impacts on the given environmental resource are demonstrated, or other significant threats to the environment are identified, the investor proposes preventive or mitigation measures in the monitoring report, and the proposed way of implementation and control of its results.

If an activity causes a negative impact on the environment, deterioration of the state of the environment to a great extent or threat to life or health, the Environmental Law provides the basis for:

- imposing the obligation on the "polluter" to limit the impact on the environment and threat to the environment or to restore the environment to a proper state (Art. 362 of the Environmental Law)

- suspension of activity in the scope it is necessary to prevent deterioration of the state of the environment (Art. of 363 the Environmental Law).

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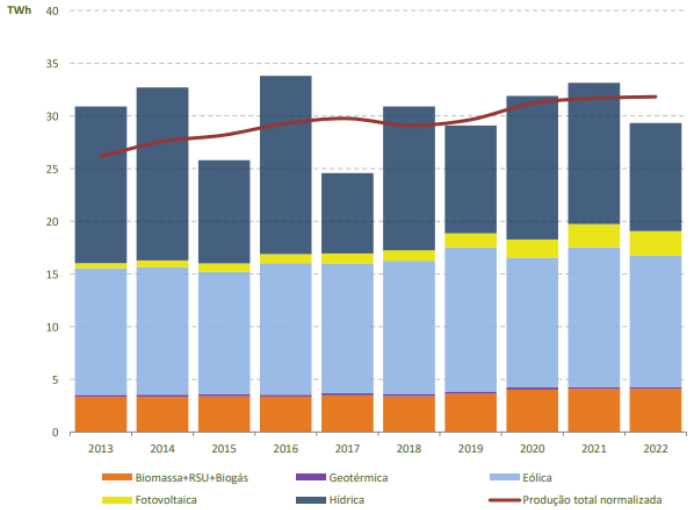
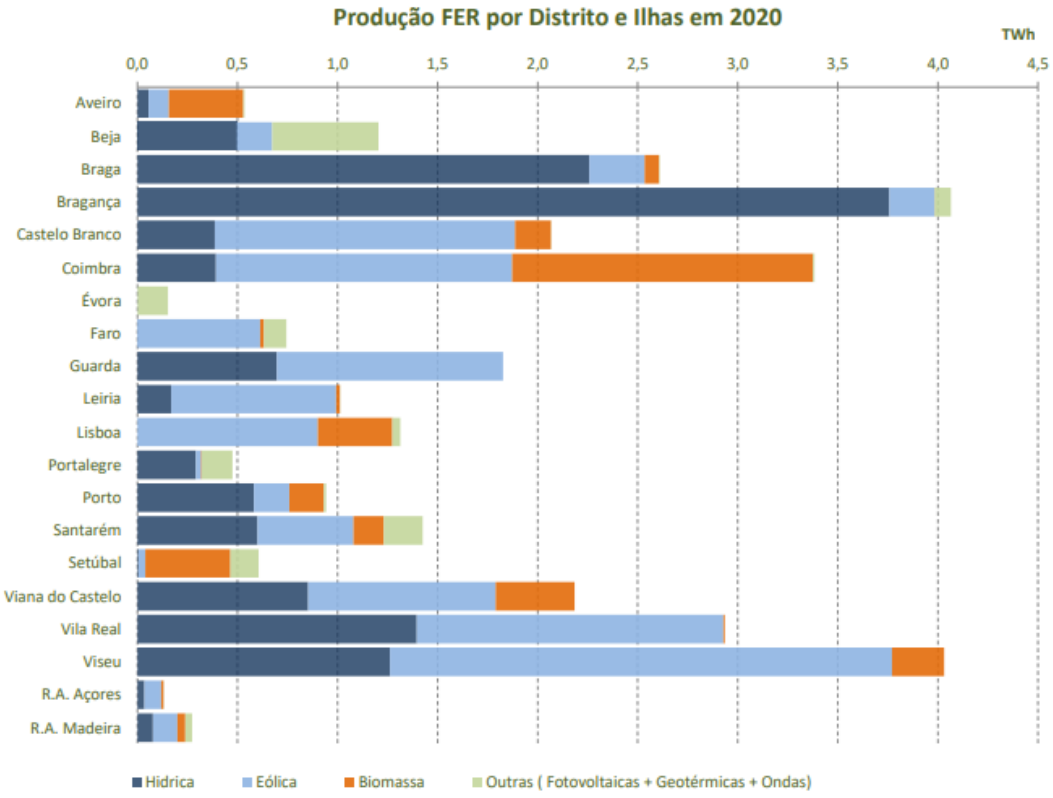
[100] https://www.nik.gov.pl/plik/id,7128,vp,9004.pdf, p. 13 (access date: 12 September 2022).

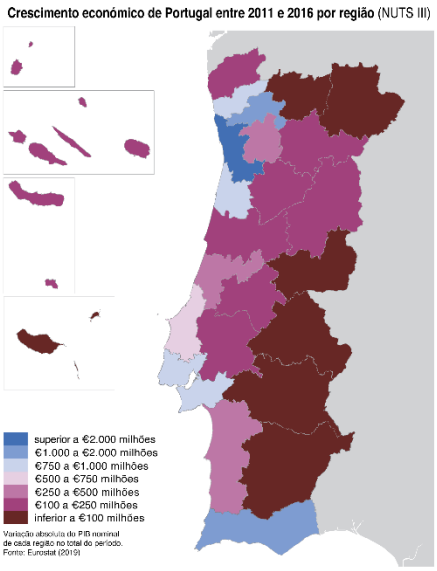
Portugal

Wind energy (light blue in the chart below) represents almost half of the production of renewables in Portugal. This proportion has been raising moderately. There were 2429 towers 2012 and 2836 in 2021.



(Official numbers of the report of the DG Energy and Geology on “Renewables” in March 2022 https://www.dgeg.gov.pt/media/zpqc0rm2/dgeg-arr-2022-02.pdf)
Looking closer, there are big regional differences and some regions represent a larger share of the total wind energy production. The same thing can be said for other renewable sources, namely hydropower, the second largest renewable energy source. This regional assimetry generates a perception of unfairness because some regions (which happen to be some of the poorest regions in the interior of the country, situated far from the more developed coastal areas) have the impression that they bear the burden of producing energy for others.





(Economic growth per regions 2011-2016)

However, the nimby syndrome associated with wind power is not too strong in Portugal. Wind farms are not systematically challenged in the courts, no big protests are organized, there is no anti-wind power environmental activism.

Besides production for direct human consumption, wind power is usually associated with hydropower production. Wind energy is used to supply energy to water lifting pumps that take the water to the dam again during the night allowing water reuse for hydropower production during the day.

The forest fire risks associated with onshore windfarms are being seriously considered as the NGOs and scientists become more vocal on the causality link between wind turbines and aerial powerlines and forest fires. How? Leaking oil from the wind turbines to the soil is common. Oil adds to the "natural combustible" of forests biomass. Furthermore, strong winds may cause the powerlines to touch each other or to suffer a short-circuit if a tree branch touches two wires simultaneously, causing a spark.
It has been proven that during summer, in high temperature and strong wind, the high voltage powerlines in forest areas triggered wild fires. To help prevent this, the operator has to cut regularly all the vegetation below and along the aerial powerlines.
(https://www.dn.pt/portugal/incendios-negligencia-da-edp-pode-ter-provocado-um-dos-maiores-fogos-do-ano-9202950.html).

- *How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure?*

The permit procedure is integrated for two reasons:
First, because it considers all the interests (nature conservation, climate, landscape, local impacts on neighbouring properties) at once in the procedure. When an EIA is mandatory the environmental report and the final decision on EIA are the places to balance conflicting interests. EIA is mandatory for 20 or more towers (or for upgrading the capacity existing towers by repowering) or for 10 or more towers if it is a nature conservation area or a sensitive area)
Second, because the procedure has recently changed to be more integrated. Before, the permit procedure used to be quite burdensome. It required multiple iterations and addressing different authorities which made the investment in wind farms (and renewables in general) unappealing. In January 2022 a new Decree-law was approved to transpose the Directives (EU) 2019/944 and (EU) 2018/2001 (Decreto-Lei n.15/2022 https://files.dre.pt/1s/2022/01/01000/0000300185.pdf) with the purpose promoting the use of RES. This new law determines that the whole procedure cannot last longer then 1 year from beginning to end, including the EIA. The competence for coordinating the procedure is the DG Energy and Geology and there is a single platform (https://eportugal.gov.pt/) to interact with the competent authorities, to request certificates, to upload documents.

- *Is there a difference between the permit procedure for land-based and sea-based wind farms?*

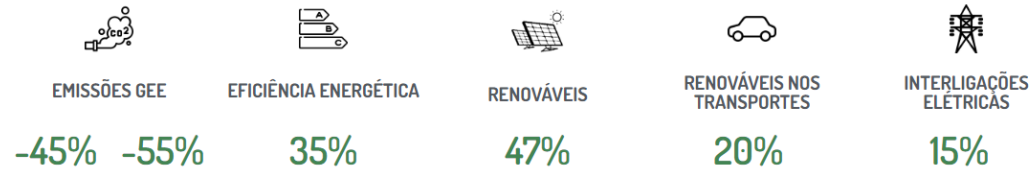
Yes. Off shore and near shore wind power are just starting. In 2022 there are only 3 wind turbines that are included in a pilot project in the north of the country. According to the law, the pilot-projects can only be installed in FTZ (Free Technological Zones) specially designated for R&D projects.

- *Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development?*

It is combined. The EIA covers both the wind farm, the powerlines and the connection to the grid (ex.: https://siaia.apambiente.pt/AIA1.aspx?ID=3417, https://siaia.apambiente.pt/AIA1.aspx?ID=3413)

- *Are there any planning instruments applicable?*

Yes, there is the National Strategic Climate-Energy Plan for 2030 (approved by a Resolution of the Council of Ministers in 2020 (53/2020) https://files.dre.pt/1s/2020/07/13300/0000200158.pdf for more information, see https://www.portugalenergia.pt/setor-energetico/bloco-3/). The NSCEP 2030 has the following goals for 2030:



The territorial plans, mainly at the municipal level, should indicate the geographic areas of the municipality that are more suited for the wind farms (Decree law n.º 80/2015, de 14 de Maio https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2333&tabela=leis&nversao). Article 15 Exploration areas for energy and geological resources

1 - Territorial programs and plans must identify areas allocated to the exploitation of energy and geological resources.
2 - The territorial plans must delimit and regulate the areas provided for in the previous number, ensuring the minimization of environmental impacts and the compatibility of uses. There is a Guidance adopted in 2020 to promote good practices for territorial plans where the inclusion of wind energy production and use in Municipal Plans is explained (https://cnt.dgterritorio.gov.pt/sites/default/files/Guia_PDM-GO.pdf).

There are as well climate change plans at the inter-municipal level, involving two or more municipalities (Ex. https://www.cimdouro.pt/adapt_clima/library.html). These plans provide the framework for the municipal plans, the only ones that are binding on citizens.

- *In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?*

The benefits of wind energy for climate are the background assumption of the decision-making procedure. The climate benefits are taken for granted and not thoroughly analysed. They are usually presented as a general positive impacts of the project. Ex. “positive impacts: The use of a natural, renewable, endogenous energy resource, which contributes to the reduction in the emission of pollutants responsible for situations such as the greenhouse effect, climate change and acid rain” (not technical summary EIA https://siaia.apambiente.pt/AIADOC/AIA3457/rnt_sobreeqpescornelio_a202231613641.pdf)

It is less frequent to quantify the effective contribution for GHG emission abatement (ex. “Contribution to the reduction of Greenhouse Gas (GHG) emissions: effective reduction of emissions in the order of 21,885 ton of CO2eq” https://siaia.apambiente.pt/AIADOC/AIA3439/40511-ea-ds01-eia-rnt-00-a2022314113023.pdf page 20)

- *How are the local opinions dealt with in the permit procedure?*

The interests and fears of the local population are considered in the “socio economic impacts of the project). The potential of land devaluation considering the proximity of the wind farm is also considered. The population is heard during the public consultations.

- *Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?*

Yes. The economic operator pays de land owner an income proportional to the energy production. This made wind parks an interesting activity for the private owners of rural land. In the case of rural areas that are "commons" ("baldios", or collective property) the installation of wind farms recently (2020) lead to the loss of a tax exemption. The "commons" did not pay property tax, but since the celebration of the easement contract, they do.

- *Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?*

The EIA procedure extends from the proposal of a project to the end of the lifecycle of the activity or, in other words, the decommissioning. After the environmental impact declaration is issued and all the conditions are established, the post assessment phase of the EIA begins and monitoring starts. During the post assessment the administration analyses the monitoring reports and should carry out environmental audits. In this context, it is allowed to change the operational conditions of the activity, and the citizens may report the need of changing the conditions imposed on the operator.

Article 2 n) n) «Post-assessment», procedure developed after the DIA or the decision on the environmental compliance of the execution project, which aims to assess the effectiveness of the measures set to avoid, minimize or compensate for negative impacts and enhance positive effects, if necessary , in the construction, operation and deactivation phases, defining, if necessary, the adoption of new measures.(https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2837&tabela=leis&nversao=&so_miolo=)

There is an interesting case, worth mentioning, where the new and unforeseen impacts of wind farms were felt on a family and on domesticated animals (not wildlife). The wind farm was situated near a horse breeding farm and the functioning of the towers was disturbing the horses (valuable bullfighting horses) due to the shadow at sunset. The rotating blades of the wind turbine caused a hypnotic effect that disturbed the horses (they were tired and sleepy).

The family was also suffering from difficulties in resting and working due to the constant noise. As a consequence, the Court ordered the operator to stop the blades every day, during sunset and also whenever the wind as too strong and caused an intense noise. (http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/4559d6d733d1589780257b7b004d464b)

Author: Alexandra Aragão

Slovenia

- *How does your system deal with these different interests? Is there an integrated or a sectorial (divided) permit procedure? Is there a difference between the permit*

procedure for land-based and sea-based wind farms? Is the Building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development? Are there any planning instruments applicable?

Dealing with interests: NIMBY is very much present in Slovenia. This is not only a case with the wind turbines but also in other cases, like incineration plans, electricity grids, roads and infrastructure projects (in public interests) etc. I believe that this is also connected with the fact that Slovenia is highly dispersedly built-up (unfortunately for many reasons) with different immovable houses and others, leaving little intact space in nature and the environment. This is also confirmed by various official statements cited below. Therefore, the past approaches that enabled dispersed constructions (kind of land sharing approach, but not strictly the one) have nowadays the effect it is hard to find a space that would not interact with individual's interests. However, this is not the main argument. There are still such remote locations where wind turbines could operate.

To my knowledge, no strategy regulates trumps of interests. On the opposite, last couple of years, the Government and the parliament tried to reduce the involvement of the NGOs in public participation in spatial planning. The Constitutional Court stopped (with an interim injunction) the Building act's applicability that adversely regulated the standing of the NGOs in court proceedings.[101] The same law, however, made possible that civil initiatives with min. 200 individuals can participate in the planning procedures as a party in the procedures (not only affected individuals or NGOs). In practice, cases that reach court are initiated by NGOs, not by the CI.

However, how to deal with different interests is left to practice and individual cases (case by case approach). Usually, the investors offer specific incentives to individuals with opposing interests (like compensations, reimbursements, being part of the investor's company, paid electricity in advance, etc. See also the case of opposition to a new plan of 9 wind turbines explained below).

There are no special rules regarding spatial planning of wind farms – not in general, and there are also no special rules for sea-based wind farms. I should begin with information that there are only a few wind turbines in Slovenia; if I am not mistaken, there are only two big ones with app 2 MW power. Therefore, one cannot talk about wind farms in Slovenia. So far. There are plans for their constructions, but all programs are now in the initial phases, i.e. spatial planning stages.

Regarding permits: The permit procedure to install the wind turbine (i.e. after SEA and EIA decisions and after the building permit (BP) is issued) is separated from other allowances and permits, including those necessary for the installation to be connected to the electricity grid. In practice, the investor first asks for preliminary information about the connection to the grid and conditions to be fulfilled (the same is true for the subvention given to the production of green energy). Electricity distribution companies are usually interested in buying green electricity since also the "*Act on the Promotion of the Use of Renewable Energy Sources*" obliges them and offers incentives (primarily financial).

[101] Case U-I-184/20 (2.7.2020).

- *In what way does your decision-making procedure take account of the benefits of wind energy as a whole concerning climate when considering individual permit applications?*

Wind energy is seen as one among other green energy sources, but it is not given a primary significance. One thing is that Slovenia is not a country with very stable and proper winds. Its relief is also very diverse. Therefore, many scientists in the past expressed the opinion that wind energy is hard to accumulate in Slovenia. However, this opinion is not commonly accepted.

Theintegrated national energy and climate plan includes the following: "Concerning wind power plants, Slovenia has the problem of siting them spatially (areas classified as secured, protected and endangered areas) and in terms of social acceptability (due to dispersed settlement, there is a limited number of locations with appropriate wind conditions wherein the vicinity there are no people or noise issues). Consequently, we remain within the potential of 415 MW in the wind power development scenarios analyzed, as estimated when the Renewable Energy Sources Action Plan [AN-OVE] was revised in 2015.

- *How are the local opinions dealt with in the permit procedure? Are there any economic benefits for the local community connected to the hosting of wind farms, such as tax revenues, subsidies or direct support?*

Not to my knowledge. *Act on the Promotion of the Use of Renewable Energy Sources* does not foresee any different benefits for local communities. It offers economic incentives for investors (like subventions for documentation needed, studies, etc.) and also local communities (i.e. state aid) but is not very specific or different from others.

- *Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?*

This would perhaps also require changing an operational permit and adding case-specific conditions. This is possible. Permits are usually not issued at once but after a certain trial period in which potential adverse effects can occur. Before issuing the final permit, these effects need to be prevented or remedied.

Author: Rajko Knez

Spain

First it is assumed that the word “integrated” refers to the incorporation of diverse requirements into a single administrative procedure. Spanish laws regulates different procedures according to the activities that may be subject to an authorisation (e.g., roads, water dams, solar installations and the like). It is within such procedures that certain integration takes place as other requirements must be considered or must take place before the adoption of an authorisation, (e.g., the allegations submitted by other public authorities). Therefore, each law regulates certain activities that may be subject to different (in cascade)

authorisations and to the fulfilment of other requirements (basically a prior environmental assessment).

As regards wind farms or solar installations, Law 24/2013, of December 26, 2013, on the Electricity Sector (hereinafter, Electricity Law), indicates (Article 21(1)) that the start-up, modification, temporary closure, transfer and definitive closure of each electric power production facility shall be subject, in advance, to the system of authorisations. The central government authorises the following electrical installations:

(a) Peninsular electric power production facilities, including their evacuation infrastructures, of installed electric power greater than 50 MW electric, peninsular primary transport facilities and connections of voltage equal to or greater than 380 kV.

(b) Production facilities including their evacuation infrastructures, secondary transport, distribution, connections, direct lines, and the electrical infrastructures of electric vehicle recharging stations with a power exceeding 250 kW, which exceed the territorial scope of an Autonomous Community, as well as the direct lines connected to generation facilities of state competence.

(c) Production facilities located in the territorial sea.

(d) Production facilities with installed electrical power exceeding 50 MW located in non-peninsular territories, when their electrical systems are effectively integrated with the peninsular system.

(e) Primary transmission facilities and connections of rated voltage equal to or greater than 380 kV located in non-mainland territories, when these are electrically connected to the mainland system.

The abovementioned installations require three basic and intertwined authorisations, the processing of those defined in paragraphs (a) and (b) (*infra*) may be carried out consecutively, simultaneously or jointly.

(a) *Prior administrative authorization*, which is processed with the preliminary project of the installation as a technical document and, if applicable, jointly with the EIA. This authorisation grants the authorized company the right to carry out a specific installation under certain conditions.

(b) *Administrative authorization for construction*, which allows the holder to carry out the construction of the facility in compliance with the technical requirements.

(c) *Operating permit*, which allows, once the project has been executed, the installations to be put into operation and to proceed with their operation.

For the authorization of electric power transmission, distribution, production and direct lines facilities, the promoter must sufficiently accredit the following points:

(a) The technical and safety conditions of the installations and associated equipment.

(b) Adequate compliance with the environmental protection conditions.

(c) The characteristics of the site of the installation.

(d) Its legal, technical and economic-financial capacity to carry out the project.

The aforementioned provisions are detailed in Royal Decree 1955/2000, of December 1, which regulates the activities of transmission, distribution, commercialization, supply and procedures for the authorization of electric power facilities. According to its Article 124 (*Environmental impact assessment procedures*) projects of electric power production, transmission and distribution facilities shall be subject to an EIA when so required by the applicable legislation on this matter (Law 21/2013, hereinafter, EIA Law). For such purposes, a public information must be carried out during the administrative authorisation stage.

As indicated above, Spanish legislation foresees the participation of other public authorities during the authorisation procedures carried out by the Administration in charge of grating the authorisation related to the subject-matter of an activity. This is particularly noticeable in the case of the central Administration as the corresponding installations are to be finally located in the territory of an autonomous community or local authority. It is for this reason that the other public authorities are entitled to participate during the authorisation of the installations by submitting allegations corresponding to their own purviews.

According to the Electricity Law, the competent Administration must send a file, containing the general characteristics of the installation and the corresponding cartographic documentation and, where appropriate, a summary document of the environmental impact study, so that within a period of thirty days the other authorities may give their agreement or opposition to the authorisation requested. Once this period has elapsed without the various Administrations affected having replied, it will be understood that they aid Administration agrees with the authorization of the installation.

EIA is integrated within the authorisation procedures, in particular within the "prior authorisation" (see *supra* at para. 3). Therefore, the EIA process is just a section of a more complex procedure. This is expressly declared by the EIA Law which regards it as "instrumental".[102] Arguably, this position is different in EIAs concerning Natura 2000 sites as a negative assessment hampers the execution of a plan or project unless an exception set out in Article 6(4) of the Habitats Directive is successfully invoked.

As regards plans, Article 4 (*Electric Planning*) of the Electricity Law provides that the purpose of electricity planning shall be to foresee the needs of the electricity system to guarantee the long-term supply of energy, as well as to define investment needs in new electricity transmission facilities, all of which shall be carried out under the principles of transparency and minimum cost for the system as a whole. Only the planning of the transmission grid with the technical characteristics defined therein is binding. Electricity planning will be carried out by the General State Administration, with the participation of the Autonomous Communities. The Plan includes (*inter alia*):

(a) As an indication, several scenarios on the future evolution of the electricity demand including a sensitivity analysis in relation to the possible evolution of the demand in the face of changes in the main parameters and variables that determine it and an analysis of the criteria that lead to the selection of a scenario as the most probable one. On the selected scenario, the resources necessary to satisfy it and the needs for new power must

[102] This characteristic also attempts to highlight that environmental matters are not to be prioritised in development consent procedures.

be analysed, all in terms promoting an adequate balance between the efficiency of the system, the security of supply and the protection of the environment.

(b) An estimation of the minimum capacity that must be installed to cover the expected demand under criteria of security of supply and competitiveness, energy diversification, efficiency improvement and environmental protection.

(c) The environmental protection criteria that should condition electricity supply activities, in order to minimize the environmental impact produced by such activities.

II. In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?

1. Provisions of Climate Change Law 7/2021

Climate change considerations are no explicitly mentioned in the Electricity Law albeit, as indicated before, electricity planning must estimate the minimum capacity that must be installed to cover the expected demand under criteria of security of supply and competitiveness, energy diversification, efficiency improvement and environmental protection. The absence of a plain mention to climate change matters does not mean that they are not relevant in decision-making as permits for the exploration and investigation of fossil fuels (including gas) have been completely banned by Climate Change Law 7/2021 (hereinafter CCL).[103] In addition, this Law sets out demanding objectives for the reduction of carbon emission that necessarily require, among other things, the intense deployment of renewables. According to Article 3(1) CCL, the following minimum national objectives are established for the year 2030 in order to comply with internationally assumed commitments and without prejudice to the competences of the autonomous communities:

(a) To reduce in the year 2030 the greenhouse gas emissions of the Spanish economy as a whole by at least 23% with respect to the year 1990.

(b) To achieve a penetration of renewable energies in final energy consumption of at least 42% by 2030.

(c) To achieve an electricity system with at least 74% of generation from renewable energy sources by 2030.

[103] Article 9 CCL reads: Article 9. Exploration, research and exploitation of hydrocarbons.
From the entry into force of this law, no new exploration authorizations, hydrocarbon research permits or exploitation concessions for the same, regulated under Law 34/1998, of October 7, of the hydrocarbon sector, and Royal Decree-Law 16/2017, of November 17, establishing safety provisions in the research and exploitation of hydrocarbons in the marine environment, shall be granted in the national territory, including the territorial sea, the exclusive economic zone and the continental shelf.
From the entry into force of this law, no new authorizations shall be granted to carry out in the national territory, including the territorial sea, the exclusive economic zone and the continental shelf, any activity for the exploitation of hydrocarbons in which the use of high-volume hydraulic fracturing is foreseen.
2. Five years before the end of the term of an exploitation concession, and without prejudice to the requirements established in the royal decree of granting, the person or entity holding the concession shall submit to the Ministry for Ecological Transition and Demographic Challenge a report reflecting the potential for reconversion of its facilities or its location for other uses of the subsoil, including geothermal energy, or for other economic activities, in particular, the establishment of renewable energies, and which must contemplate the levels of maintenance of employment.

d) Improve energy efficiency by reducing primary energy consumption by at least 39.5%, with respect to the baseline in accordance with community regulations.

The CLL omits any mention regarding the consequences derived from lack of compliance with the prior thresholds.

Therefore, procedures for the authorisation of renewables are prioritised. This is reflected, for instance, in Article 7 CCL (*Electricity generation in the public water domain*) that provides that in order to meet renewable energy objectives established in the Law, the new concessions granted, in accordance with the provisions of the water legislation on the public hydraulic domain for the generation of electric power, shall have as a priority the integration of renewable technologies into the electric power system. Whilst the preceding provisions do favour the deployment of renewables, the actual environmental benefits of such projects are to be analysed within EIA procedures.

It should be observed that the CCL indicates that the deployment of renewable energy projects should be carried out, "preferably in locations with less impact". The objective of the zoning provided for in Article. 21(2) CCL is that new energy production facilities from renewable sources do not produce a severe impact. As can be seen, the threshold established by the CCL is rather high, albeit it does not add a definition of "severe". By reference to the EIA Law, it would be a kind of impact requiring long term preventive or corrective measures.[104] The CCL does not clarify whether the reference to that threshold is to be considered as a whole or on a case-by-case basis. Neither does the CCL foresee the adaptation of existing installations, which implies that they are subject, where appropriate, to other provisions, such as art. 6(2) of the Habitats Directive and the obligation to avoid the deterioration of natural habitats and the habitats of species, as well as the alterations that may have an impact on the species that have motivated the designation of the Natura 2000 network sites, or even a new EIA, or the regularisation of those previously carried out. It should be observed that as regards Article 6(2) HD, the CJEU has stated that a "high density of wind power installations" can cause significant disturbance and deterioration of the habitats of protected bird species.[105] The CCL seeks to avoid severe impacts by means of the tool it contemplates. However, it does not impose a prohibition on the execution of such installations, although it does opt for the deployment of infrastructures to be carried out in locations "with less impact",[106] which necessarily leads to the examination of different alternatives. Apart from the provisions that may be established by the regulations of the autonomous communities, the specification of such threshold will have to come from the corresponding EIA procedures (see below at paras. 17-21).

2. Conflicts of interests in the case law

The case law of the Supreme Court has usually referred to a conflict between two interests of different nature.

(a) On the one hand, that of guaranteeing the supply of electrical energy (which the Electricity Law, as the Supreme Court observes, qualifies as "essential for the functioning

[104] EIA Law, Annex VI. Environmental impact study, technical concepts and specifications relating to the works, facilities or activities included in Annexes I and II, Part B.j).
[105] Case C-141/14, *Commission v. Bulgaria*, at paras 59 and 74-77.
[106] Art. 21.2 (second sentence) CCL.

of our society"). The Supreme Court has held that wind power constitutes "[o]ne of the most advanced and widespread technologies in Spain for producing renewable electrical energy (...) the development of which constitutes *a legal and socially priority objective*".[107]

(b) On the other hand, there is the legal interest in the protection, conservation, restoration and improvement of natural resources and, in particular, of natural spaces, wild flora and fauna.

The conflict must be resolved in accordance with the rule that gives preference to one interest over the other, if the joint and simultaneous protection of both is not possible. In other words, the prevailing criterion will always be that which results from the applicable rules. However, the compatibility pointed out by the Supreme Court can be achieved but logically not in all circumstances. Moreover, although the case law points to a necessary objectivity in terms of prevalence ("according to the rules"), these do not always (or rarely) indicate which interest should prevail. Indeed, the legislator does not always clarify which one should take precedence over others, except in some cases, as it happens with natural resource management plans.

The courts have considered a number of challenges against the authorisation of wind farms.

(a) In some cases, the Spanish Supreme Court have quashed authorisations owing to the lack of EIA (SSCJ of 14 March 2016, appeal 509/2013) or because it was incomplete as it lacked a study of repercussions on birds (SSCJ of 5 May 2017, appeal 1477/2014; SSCJ of 13 July 2015, appeal 3507/2013). In other cases, the Court has confirmed that the wind farm was in the public interest, which implied the need to occupy the property concerned as the appellant did not provide any information that would allow a conflict of interests to be assessed in relation to the use of renewable energy and the environment (SSCJ of 29 June 2017, appeal 410/2015).

(b) The Court has also upheld the refusal to install a wind farm on the grounds that several of the wind turbines were located on land classified as undeveloped land with special landscape protection. According to the Court, the environmental impact statement was not viable, since none of the administrative documents disproved the existence of negative and irreversible effects on the Natura 2000 Network, as referred to in the environmental impact statement of the controversial wind farm. This statement indicated that that the requested activity would cause a critical impact on breeding areas of threatened bird species classified as "sensitive to the alteration of their habitat", in particular protected areas classified as SPAs (SSCJ of 14 July 2014, appeal 3892/2011).

(c) An interested case can be found in the SSCJ of 21 April 2016, appeal 21 Abr. 2016, appeal 4099/2014 as the Court quashed a previous judgment that had annulled the authorisation for the implementation of a wind farm associated with a desalination plant in a maritime-terrestrial protection zone. According to the Supreme Court, desalination plants were indispensable for supplying the population of an island (Fuerteventura), and their location was unavoidably on the sea coast, from where they captured seawater for desalination. The new energy system had not altered the landscape, as it had been integrated into it. In addition, the EIA had stated that the wind farm project had no

[107] SCCJ of 30 April 2008, appeal 3516/2005, emphasis added; SSCJ of 11 December 2013, appeal 4907/2013.

foreseeable adverse impact. A similar reasoning was *mutatis mutandis* employed by the High Court of Andalucía (judgment of 21 January 2020, appeal 380/2019). The subject matter of this judgment was a previous order to suspend a wind farm. A subsequent appeal to quash that previous decision was upheld by the court that *inter alia* indicated that it was not a new installation but a project to upgrade an existing wind farm, replacing the 90 existing wind turbines with 12 new turbines. While it was true that the wind farm was located in a protected site, environmental regulations had been complied with and that the environmental authorisation had taken into account protected areas and the protection of existing flora and fauna. Thus, a series of conditions were established to ensure the protection of birds, such as reducing the number of wind turbines, modifying their location to avoid placing them in spots where there had previously been a greater number of deaths due to bird collisions, as well as ensuring a greater separation between them, and a visual surveillance programme was established to avoid possible accidents. The court added that the aim was to obtain electricity from renewable sources, which was environmentally friendly and avoided the use of fossil fuels, thus achieving better environmental protection. The possible death by collision of birds could not give rise to the suspension of the contested decision, as it would be preventing the generation of electricity with renewable sources, having to resort to other polluting sources.

(d) The High Courts have dealt with cases concerning the lack of EIA (e.g., judgment of the High Court of Castilla y León, appeal 2011/2008, judgment of 13 July 2012, appeal 252/2011; High Court of Galicia, judgment of 17 November 2020, appeal7135/2019; High Court of Cataluña, judgment of 20 September 2011, appeal 3/2008, among others).

3. Swift procedures for the authorisation of renewable installations in recently adopted Royal Decree-law 6/2022

Recently approved Royal Decree-law 6/2022, of March 29, adopting urgent measures within the framework of the National Plan of response to the economic and social consequences of the war in Ukraine, introduces certain provisions concerning EIA of renewable energy projects. This new regulation applies to State Administration projects, the application of which is submitted before 31 December 2024. The autonomous communities are entitled, if they so decide, to apply its provisions.

The procedure set out in the Royal Decree-law substitutes that enshrined in the EIA Law. Article 6 (*Procedure for determining environmental impact for renewable energy projects*) refers to projects *not located* in the marine environment referred to in certain sections of the EIA Law. The projects are subject to a procedure for the determination of their environmental repercussions provided they comply, jointly, with the following requirements:

(a) *Connection*: projects that have overhead evacuation lines *not included* in group 3, section g) of Annex I of the EIA Law. This section refers to “Construction of electric power transmission lines with a voltage equal to or greater than 220 kV and a length greater than 15 km, unless they run entirely subway through urbanized land, as well as their associated substations”.

(b) *Size*: (1) Wind power projects with an installed power equal to or less than 75 MW, and (2) solar photovoltaic projects with an installed capacity equal to or less than 150 MW.

(c) *Location*: Projects that, *not being located* in the marine environment or in areas that form part of the Natura 2000 Network, at the date of submission of the application for authorization by the developer are located entirely in areas of low and moderate sensitivity according to the "Environmental zoning for the implementation of renewable energies", a tool developed by the Ministry for Ecological Transition (mentioned above in this report).

As indicated before, the projects are not subject to an EIA as regulated by the EIA Law. Instead, the Royal Decree-law sets out a series of procedural requirements that must be followed.

The developer shall submit to the substantive body for authorization the following documentation:

(1) Request for determination of environmental repercussions for renewable energy projects.

(2) The project consisting of the preliminary in accordance with the Electricity law.

(3) The environmental impact study with the contents provided for in the EIA Law.

(4) An executive summary quantifying the accredited impacts. This summary must encapsulate the main environmental impacts of the project according to the following criteria: Effect on the Natura 2000 Network, protected areas and their peripheral protection zones and habitats of community interest; effect on biodiversity, in particular on protected or endangered catalogued species, repercussion owing to discharges to public watercourses or to the coast, to waste generation, use of natural resources, cultural heritage, socio-economic impact on the territory, and synergistic effects with other nearby projects, at least those located 10 km or less away in wind farms, 5 km away in photovoltaic plants and 2 km away with respect to power lines.

In view of the foregoing documentation, the environmental body must analyse whether the project will foreseeably produce significant adverse effects on the environment, and will prepare a report determining the environmental impact. The report may also determine the obligation to submit the authorization of the project to the conditions deemed appropriate to mitigate or compensate its possible environmental impacts, as well as conditions relating to its monitoring and surveillance. The environmental impact assessment report loses its validity and ceases to have effects if the project is not authorized within two years of its notification to the developer. The report of determination of environmental impacts cannot be subject to any appeal, without prejudice of those challenging the authorisation.

Projects with likely effects are subject to a simplified procedure for the authorization of renewable energy projects. This procedure does not contemplate a public participation stage, breaching both Directive 2011/92 and Aarhus. The procedures reduce by half some of the time periods set out in Royal Decree 1955/2000, of December 1, which regulates the activities of transport, distribution, commercialization, supply and authorization procedures for electric energy facilities.

III. How are the local opinions dealt with in the permit procedure? Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?

Local opinions are considered both during the main authorisation procedure and also in the EIA.

Economic benefits are not connected to the hosting of wind farms albeit they may certainly be included within the application for authorisation.

IV. Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?

Spanish Law 42/2007, of December 13, on Natural Patrimony and Biodiversity (hereinafter, the Natural Patrimony Law), transposes, quite literally, Article 6(2) of the Habitats Directive. Article 46(2) of the Law reads: "[T]he competent Administrations shall take the appropriate measures, especially in the management plans or instruments, to avoid in the Natura 2000 Network sites the deterioration of natural habitats and species habitats, as well as the alterations that have repercussions on the species that have motivated the designation of these areas, insofar as these alterations may have an appreciable effect with respect to the objectives of this law". As the CJEU has indicated, the fact that a plan or project is authorised according to the procedure laid down in Article 6(3) HD renders superfluous, as regards the action to be taken on the protected site, a concomitant application of the rule of Article 6(2) HD. However, the CJEU has held that it could not be excluded that such a plan or project would subsequently prove capable of causing deterioration or alteration, even in the absence of any error attributable to the competent national authorities. In these circumstances, the application of Article 6(2) HD makes it possible to meet the essential objective of conservation of the HD.[108]

The Supreme Court has examined the application of Article 6(2) HD in a case concerning the modification of an IPPC authorisation.[109] The plaintiffs alleged that the amendment should have been accompanied with further measures for the protection of a watercourse classified as SCA. The Supreme Court observed that Annex V to the decree classifying the area as a SCA indicated that the "conservation status" of "salmon" species was "reduced"; that the "uses necessary for conservation" required "applying management measures"; and that these were "necessary". In the light of the foregoing an, arguably, applying a rather mechanical interpretation, the Supreme Court held that it was indeed required in the light of the precautionary principle, that the resolution grating the authorisation adopted greater protection measures. In a different case, however, the High Court of the Autonomous Community of Asturias held that the allegations submitted by the plaintiffs (an NGO) could not be upheld since they had not demonstrated to what extent the Habitats Directive or the Natural Heritage law had been violated.[110]

It should be observed that Spanish EIA Law includes a provision, according to which, where, as a consequence of a final judgment, an assessment of the possible significant effects on the environment of a project "partially or totally carried out" must be carried out, such assessment shall be carried out through the procedures provided for in that Law.[111] In addition, the CJEU

[108] Case C-127/02 *Waddenzee*, at paras 34-37 respectively.
[109] SSCJ of 6 May 2021, appeal 5816/2017.
[110] Judgment of 24 July 2017, appeal 834/2015.
[111] 16th additional clause.

has accepted, without further elaboration, that projects not subject to EIA or to a badly carried out EIA may be regularised.

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Sweden

- How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure? Is there a difference between the permit procedure for land-based and sea-based wind farms? Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development? Are there any planning instruments applicable?
- In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?
- How are the local opinions dealt with in the permit procedure? Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?
- Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?

Developments of wind farms in Sweden require a permit according to Chapter 9 and/or 11 of the Environmental Code (1998:808, MB). Normally when applying for those permits, the operator is also required to undertake an EIA procedure and thus provide for the necessary investigation of the environmental impacts. The project specific EIS is submitted to the permit authority simultaneously with the application for a license. Permits for land-based wind farms are processed by the Regional Licensing Boards (RLB) hosted by twelve of the 21 Country Administrative Boards in Sweden. As for wind farms located at sea or in other waters, the permit procedure is handled by one of the five land and environmental courts. All decisions are appealed in the same line, that is RLB Land and Environment Court the Land and Environmental Court of Appeal. In these cases, the permit procedure is integrated and covers all aspects of the installation, from the construction, the operation and to the closing down. However, issues concerning the electric networks and grids lie outside this procedure. On land, those applications are made to the Energy Markets Inspectorate (Ei), whose decisions can be appealed to one specific Land and Environmental Court. At sea, the permit procedure for wind farms is somewhat more disintegrated. For installations inside the territorial boarder (12 nautical miles, about 22 km), the Environmental Code applies. Outside this limit, the Act on the Economic Zone (1992:1140, LEZ) applies. For the laying of cables at sea and investigations of the sea bed, the operator needs a permit according to the Act on the continental shelf (1966:314, KSL). In contrast to licenses for wind farms on land, these permits according to the LEZ and the KSL are issued by the Government, whose decision can be challenged by launching judicial review at the Supreme Administrative Court. Finally, there is no planning instrument on any level covering wind farm developments. There do exist some topic specific strategies, but they are not binding in any practical meaning. It may finally be noted Sweden posits that the time limits according to the EU Renewable Energy

Directive (2018/2001) are not applicable on the procedures in the courts, even when they act in "their administrative capacity", that is when issuing licenses.

In the integrated permit procedure under the Environmental Code, all aspects of the operation is evaluated and tried. All relevant EU Directives are taken into account, most importantly the Birds Directive and the Habitats Directive. In the procedure, the public concerned commonly invokes landscape protection and different disturbances (noise, shadows, flickering lights, etc.) to their living areas for objecting to the localisation of the wind farm at stake. These interests very rarely have an impact on the licenses given, although they may stop a small number of very ill-placed wind turbines. In that sense, priority is given to wind energy as an important source of renewable energy in the weighing of interests. So far, the benefits of wind energy as a whole in relation to climate change have an upper hand. But the picture gets quite different concerning "more absolute" interests such as the land rights of the Sami people or species protection according to the Birds Directive (slow flying birds of prey, forest hens, certain sea birds, etc.) or the Habitats Directive (bats). These "counter-interests" do have an impact on the possibility to establish wind farms in sensitive areas. However, any applicant must first pass two major thresholds; 1) the national defence, and 2) the municipal veto. The interests of the national defence is the major barrier to wind farms in the Baltic Sea, where very few have been established. This development will obviously be consolidated with the coming membership in NATO. The resistance from the National Defence Forces and the municipal veto are complicated to calculate, as the responsible applicant never further on when s/he gets to know the attitude of the representatives from those interests. Even so, when we made a study covering all applications for wind farms (200 cases) during the five year period 2014-18, the result was the following:

All together, the applications included 4,145 wind turbines, out of which 2,985 was granted license (72%) and 28% denied (1,160). Grounds for rejection in numbers and percent of the total number wind turbines:

- Municipal veto: 521 (12,6%)
- Species protection and nature conservation: 384 (9,3%)
- Reindeer farming and the land interests of the Sami people: 120 (2,9%)
- National defence: 108 (2,6%)
- Landscape protection and World Heritage Areas: 24 (0,6%)
- Neighbours: 3 (0,1%).

The municipal veto is obviously very controversial, but so are wind farms on the countryside (there are virtually no wind farms in densely populated areas). This conflict is getting more and more contentious. There is a governmental proposal to the Parliament to reform the regulation in order to force the municipalities to give their say in the planning stage of the development and to make a go-ahead decision binding for five years. However, the political opposition has already announced that they will block the proposition (we have a minority government) until a proposal for the compensation to the local community is presented. A governmental commission is assigned to look into this issue.[112]

Licenses for wind farms are normally limited for a period of 30 years under certain conditions. If unforeseen harm to birds and bats occur during that period, the competent

[112] For further information on this issue, see *Should locals have a say when it's blowing? The influence of municipalities in permit procedures for windpower installations in Sweden and Norway*. Nordic Environmental Law Journal 2020:1, pp. 59-79.

authority may intervene and order the license holder to apply for a review of the conditions or even the withdrawal of the permit in its entirety. This has not occurred in the last 20 years, that is to ay, as long as there has been wind farms in Sweden. In a very small number of cases concerning particularly ill-placed wind farms with substantial impact on white tailed eagles, there has been some efforts by the public concerned to alert the authorities in order to have them intervene. In one or two instances, the competent authorities have actually tried, but, at the end of the day, their actions have been rejected by the courts.

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Switzerland

Factual background regarding wind-energy in Switzerland: Currently there exist only 41 wind turbines in Switzerland with an annual production of 146 Mio. kilowatt hours, an amount that covers the electricity demand of around 40'000 households and satisfies 0.2 % of the total electricity consumption of the country. Compared to virtually all other European countries wind energy therefore only constitutes a very small share of total renewable electricity production – the lion share being contributed by hydropower.

According to the federal energy planning until 2050 ("Energy Strategy 2050") however, capacity should increase from around 0.145 TWh today to 1.5 TWh in 2035 and 4.3 TWh in 2050 amounting to a thirty-fold increase over the next three decades.

The general architecture of the applicable planning procedures is the result of an interplay of three factors: the distribution of powers in the structure of the federal state, the specialised permit instruments and the aspiration both of the judiciary and the legislator to ensure the procedural and substantive coherence of the system.

- *How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure? Is there a difference between the permit procedure for land-based and sea-based wind farms? Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development? Are there any planning instruments applicable?*

The concrete structure of the permit procedure is (also) governed by cantonal law and thus it is not possible to give a comprehensive description of its design. Yet, it can be said that the permit procedure takes a sectoral structure. First, projects of a certain dimension require an adaptation of the central spatial planning instrument on the cantonal level, the directional plan (Richtplan), which is to be decided by the cantonal authorities, but additionally requires the consent of the federal government (art. 8 and 11 Federal Spatial Planning Act [FSPA]). In this respect the cantonal authorities are under the obligation to "designate the areas suitable for the use of renewable energy" (art. 8b FSPA; cf. also art. 10 Federal Energy Act [FEA]).

Once this basis is laid, the municipal utilization plan (Nutzungsplan) must be brought in line with the project. This step usually requires not only the cooperation of the citizens of the municipality in the procedure of elaboration, but also their consent in communal votation. For installations with a performance of more than 5 MW this step additionally necessitates an environmental impact assessment (annex 21.8 Federal Ordinance on the Environmental

Impact Assessment) as well as the consent of the Federal Commission for the Protection of Nature and Cultural Heritage (art. 7 Federal Act on the Protection of Nature and Cultural Heritage [FPNCA]). In the current legal framework, the decision on the utilization plan constitutes the most important step in the legal development of the project, given that it usually includes the remaining questions concerning the project and involves a comprehensive weighing of interests required by federal law (art. 3 Federal Ordinance on Spatial Planning and art. 5 FPNCA).

Based on these planning requirements, the construction permit (Baubewilligung) can be granted (art. 22 FSPA). As wind parks are usually situated outside of building zones, the cantonal authorities and not as usual the municipal authorities are in charge of delivering the required permission (art. 25(2) FSPA).

In addition to those instruments in the field of spatial planning, the construction of a wind farm requires a multitude of additional permits such as clearing permits (art. 5(2) Federal Forest Act), water protection permits (art. 19 Federal Act on the Protection of Waters), a permit by the federal aviation authority (art. 63 Federal Ordinance on Aviation Infrastructure) etc.

The coordination of these procedures constitutes a challenge: art. 25a(4) FSPA as well as the case law of the Federal Tribunal demand for a coordination between the different procedures. This requirement is usually put into practice by means of a comprehensive weighing of interests on the level of the utilization plan and/or the environmental impact assessment. Therefore the procedure for the amendment of the utilization plan is usually initiated at the same time than the construction permit procedure and the procedures for the additional specialized permits. Of course, from a procedural perspective the emphasis put on the utilization plan has the consequence of somewhat hollowing out the subsequent permissions, which often just have to follow the leading procedure in a substantive manner. On the other hand, the information required for these subsequent permissions needs to be provided already on the level of the decision on the utilization plan in order to allow for a comprehensive weighing of interests.

Instead of maintaining this wide array of cantonal and municipal permission instruments and procedures, the Cantons could foresee an integrated procedure encompassing the amendment of the utilization plan as well as the construction permit and further permissions granted by the Cantons and the municipalities. Such mechanisms currently already exist in the field of hydraulic engineering or the construction of roads. However, when it comes to renewable energy, similar instruments do not exist (yet), despite the fact that the Cantons are by federal law required to provide for rapid approval procedures for the construction, expansion and renewal of renewable energy installations (art. 12(2) FEA).

Two further instruments aiming at a certain coordination of the procedures need to be named:

- The so called “Wind Energy Concept” enacted by the Federal Council on September 25, 2020 in its most recent version. The concept formulates the federal standpoint when it comes to wind-energy and it aims at ensuring that the federal interests (such as the protection of species, habitats or landscapes of national importance) are taken into account by the Cantons when they plan wind energy projects. It does not amend the distribution of powers in this field nor does it create new law, but it is binding upon

cantonal and municipal authorities and therefore has to be taken into account during the planning process. The concept contains information on the strategic objectives, general planning principles as well as some guidance on measures to be taken by the Confederation and the Cantons. However, the concept is of a fairly general nature and mainly formulates requirements when it comes to the methodological foundations of the decision process rather than substantive requirements.

- The "guichet unique". According to the Federal Ordinance on Energy (art. 7 s. FOE) the Federal Office for Energy is in charge of the coordination of the opinions and the approval procedures for renewable energy projects. The Federal Office for Energy should therefore play an important role in the coordination process, even though – again – the basic distribution of competencies is not altered and the Cantons hence remain the main actors in the planning process.

The fragmentation of the permission process has the consequence that such procedures are often very slow – they can last up to twenty years for complex projects of considerable dimensions. One of the decisive factors for this delay is that the projects not only require the cooperation of the citizens of the respective Canton or Municipalities, but they may also be brought before the courts multiple times. As of 2019 twelve of the fifteen wind-park projects at a concrete stage of development were being reviewed by the courts. Therefore, even when the majority of the population is in favour of a certain installation, its realisation can be undermined judicially by individuals at different stages. This statement is not meant as a justification a general reduction of the judicial review of such projects, but as a plea for a more focused version of judicial control.

These various hurdles (together with other non-legal factors) lead to a very surprising picture, that when it comes to the investment into projects of renewable energy abroad, Swiss electricity companies have constructed installations producing 10 TWh per year. In comparison: All installations in Switzerland which are currently implemented or planned only amount to 8.6 TWh per year. It thus seems to be much more attractive to plan and install such plants outside of the country.

Against this factual background the Federal Council is considering proposing a series of amendments to current the federal legal framework. The modifications, which are presently subject of a public consultation and could be debated by Federal Parliament by next year, feature the following main points:

- In future, not the cantonal authorities but the federal government should decide on the location and characteristics the most important installations for renewable energy. These installations would be included in a "Concept for Renewables Energies". The importance-threshold for such installations would be defined by the respective Ordinance (new art. 9a FEA).

- The Cantons would in general have to implement these decisions in their directional plans. The framework would however leave the door open for the Cantons to deviate from the decision of the Federal Council if based on an assessment of the interests at stake, they come to the conclusion that the location is not suited. With respect to the decision of the location, the directional plans could not be brought to the courts (which can currently be done by the concerned municipalities) (new art. 10a FEA).

- As far as the most important installations for the production of energy from renewable sources are concerned, the Cantons would have to foresee a concerted planning approval procedure. The procedure would include the amendment of the utilization plan, the construction permit, all required special permits on the cantonal level as well as possible concessions and expropriation permits. The power to grant this approval would be vested in the cantonal governments (new art. 14 FEA).
- There would only be one legal challenge open against this approval: It may be brought before the cantonal administrative court and finally before the Federal Tribunal

Whether these proposals find the consent of the consulted groups, the Federal Parliament and finally possibly the people, remains to be seen. In any case the proposal of the amendments is a clear manifestation of the fact that the current procedures are not as functional as they should be in order to allow for a more rapid pace of energy transition.

- *In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?*

The benefits of wind-energy in the context of the federal "Energy Strategy 2050" are taken into account in the context of the comprehensive weighing of interests. However, in a general vein the way that these requirements are considered is left open by the federal legal framework.

A notable exception to this rule is the fact that according to federal law, new wind turbines or wind farms of an average expected production of at least 20 GWh per year are considered to be of national interest (art. 12 FEA and art. 9(2) Federal Ordinance on Energy [FOE]). This qualification opens the door to the construction of such installations in areas of objects of national importance, which are qualified as such according to an inventory established by the Federal Council (art. 5 FPNCA). Yet, the qualification of national interest ex lege does not apply when it comes to biotopes of national importance as well as to waterbird and migratory bird reserves (art. 12(2) FEA). The legislative aim for this somewhat rigid qualification of such installations as of national interest was to enable a rapid transition towards renewable energy sources in the context of the energy turnaround ("Energiewende") decided by the Federal Council and the Federal Parliament in the aftermath of Fukushima. The effect of the provision has been fairly limited and energy transition proved to be much slower than expected and intended.

- *How are the local opinions dealt with in the permit procedure? Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?*

Under the current legal framework the municipalities usually play an important role in the permission procedure, as the amendment of the utilization plan is part of their competencies. As these modifications regularly require the consent of the local population, the citizens have a strong influence on the establishment of such procedures. Additionally, the municipalities can object to modifications in the cantonal directional plan by bringing such amendments before the courts, which provides them with yet another means to oppose unpopular projects. Further, the cantonal and national population also participate in many respects: The population accepted the "Energy Strategy 2050" in a national votation on the amendments of

the Federal Energy Act in 2017 by 58.2 % and thus supports the general energy transition process. The cantonal directional plans are elaborated with the participation of cantonal interest groups and citizens and are usually subject to a cantonal votation.

The financial local benefitslargely depend on the concrete circumstances of the case. In some instances, the municipalities participated directly in the wind farm projects, in others they remain owner of the land used and thus benefit from the rent, they obtain tax payments from the operating companies and in other cases they are granted monetary compensation by the operating companies. Finally, they indirectly profit because of the jobs created in the installations.

Given the strong objections against the establishment such installations it seems that currently the (perceived) local benefits of such infrastructures do not compensate for their (perceived) negative effects. It may constitute a coincidence, but currently the existing installations are mainly situated in the **less** wealthy part of the country/the cantons (Jura, Bernese Jura, Valais, Uri). The reason for this geographical allocation of the projects may be that the peripheral regions are both, more suited for such projects and at the same time financially less well off. But it may also be, that the financial incentives play more of a role in those less wealthy communities than in other parts of the country.

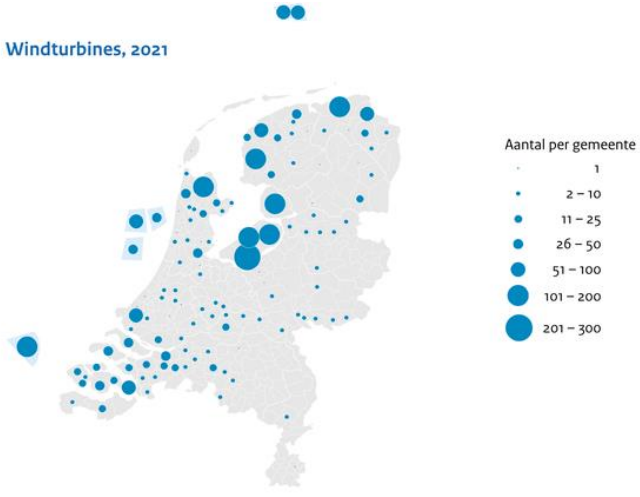
- *Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?*

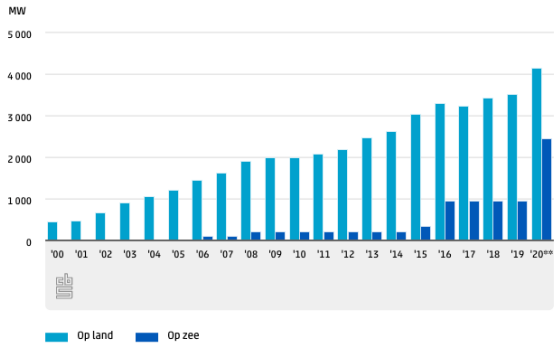
Even though I do not know of any such case, the consequence should be that first, the operating company is obliged look for instruments/mechanisms in order to remedy the unforeseen harm (e.g. bat detection instruments in case of collision with bats etc.). But if such measures remain unsuccessful and the conditions for granting the approval are not fulfilled in the long run, the permit could be revoked according to the conditions of general administrative law. This would typically include a weighing of the involved public interests with the protection of the confidence of the permit holder and his interests due to the investment that occurred on the basis of the permission. In some cases the territorial authority would have to compensate the permit holder for the damage resulting from the modification or the revocation of the permission.

Author:Markus Kern

The Netherlands

Dutch data on wind energy (1990-2020)





- How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure?

Building a large onshore windfarm in the Netherlands will require governmental permission. In many cases changing the municipal zoning scheme / land use plan to allow for the wind farm is required. The *Wro*,*Wet ruimtelijke ordening* (Spatial Planning Act) provides that the municipal council shall adopt zoning schemes with a view to 'good spatial planning' (Art. 3.1). When there is a provincial/national spatial interest the governmental bodies at the provincial or national level may also change the municipal land use plan. Alternatively, a project developer may apply with the Mayor and aldermen for a (spatial planning) permit on the basis of Article 2.1(1)(c) of the *Wabo*, *Wet algemene bepalingen omgevingsrecht* (General Act on Environmental Permitting) to deviate from the existing zoning scheme / land use plan.

The 2010 General Act on Environmental Permitting aims to provide a legal framework for all governmental permissions concerning projects that possibly have an effect on the (physical living) environment. Although the legislation provides project developers with the opportunity to apply for 1 permit for their entire project and the permitting system allows the consideration of all interest at once, the system should be characterised as the sum of (some 25) sectoral permits (that existed before 2010) that each have their own specific set of assessment criteria: a) the building permit (constructional safety; energy efficiency; usability), b) the environmental permit[113] for the installation (BAT) and c) the permit to deviate for the land use plan can be granted on the basis of one application. However, the integration within this Wabo is not complete. Permits and exemptions based on the *Wnb*, *Wet natuurbescherming* (Nature conservation act) are usually required for a large windfarm: a) Natura 2000 permit (see Art. 6 Habitats Directive) from the provincial executive and b) protected species permit (basically: favourable conservation status of the species) by the competent authority at the national level (minister). When none of these permits have been applied for at the moment the project developer applies for a permit on the basis of the Wabo, the applicant is required to 'complete' the application by also applying for the permits for both area and species conservation within the procedure for the Wabo-permit. The project developer is however allowed to apply separately for these permits when he applies for them before the Wabo permit is applied for. Besides these permits, a separate permit on the basis of the Water Act may be required (effects on quality and quantity; surface and ground water); coordination between the environmental permit and the water permit is required only when the permits concern an IED-installation.

[113] A windfarm is - according to Dutch legislation - defined as a collection of 3 or more wind turbines together. For a wind farm, an environmental permit is always required (although the permit is sometimes only related to the question whether or not the developer is obliged to have an EIA).

In order to further coordinate and accelerate decision-making the *Wet ruimtelijke ordening* (Wro, Spatial Planning Act) provides for an optional (municipal, provincial or national) coordination procedure. The competent authority may decide (or legislation may prescribe) the applicability of this procedure. For onshore windfarms the legislature provides that this procedure is applicable for windfarms with a generating capacity of 5-100 MW and that the provincial executive is competent public body; the national government is competent for even larger windfarms. If the coordination procedure is applicable, it provides a helpful instrument to coordinate decision-making (spatial planning decision and all permits based on all acts mentioned above). Although all competences remain where they are, draft decisions for all applications are made public together at the same time in order to allow for submitting views and complaints during a 6 weeks period. The final permits are all published on the same day and judicial review is allowed against all the different decisions in one procedure with the highest administrative court. Coordination and acceleration is provided by the procedure; one could even say that there is a coherent approach to the project. However, there is no integrated assessment of all sectoral environmental interests against the interest of the project developer.

An EIA is required for a wind farms that consists of 20 or more wind turbines. In most cases when a wind farm is being planned/build the competent authority is required to assess whether an (SEA or) EIA is required (and will mostly decide it is). Without providing an SEA the Dutch Government introduced (national) general binding rules for some of the environmental effects of wind farms. In light of the case-law of the ECJ the highest administrative law court ruled that those provisions no longer have effect see below).
On 1 January 2023 the Environment and Planning Act is due to come into force. The permit system within that new Act encompasses all permits mentioned above but does not integrate assessment criteria.

- Is there a difference between the permit procedure for land-based and sea-based windfarms?

Absolutely. The Offshore Wind Energy Act applies to offshore wind farms. The government designates areas for offshore wind energy in the National Water Plan (a document adopted on the basis of the Water Act). A number of ministers are authorized to take a wind farm site decision (*Kavelbesluit*), usually in the Exclusive Economic Zone (EEZ). In these decisions the ministers determine - exclusively within the areas designated for this purpose in the National Water Plan - the location where and the conditions under which a wind farm and the associated connection can be realized. After that, a tender procedure will determine who should be eligible to build their windfarm (and is entitled to a subsidy and the permit). Those who receive a subsidy are granted a permit that allows them to build and operate a offshore wind farm. A permit is applied for at the same time as the subsidy and is granted to the market party to which the subsidy is also granted. The preparation of a wind farm site decision will have to take into account the public/environmental interests central to Environmental Management Act, the Nature Conservation Act, the Water Act.

- Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development?

Onshore it is a combined decision-making procedure (the actual connection between wind farm and network is excluded here) as far as a permit is required. Offshore the Dutch grid

operator TenneT will provide all (new) wind farms at the sites designated by the ministers with connections to shore.

- Are there any planning instruments applicable?

For wind farms on land the Netherlands has had targets for generating capacity for a long time. Trying to plan allocation of wind farms on land has mostly been an attempt at a bottom-up approach. Influencing Provincial governments by the National government was first tried in spatial planning. The national government asked - on the basis of the national target for wind energy on land and negotiated provincial targets - all provinces to designate 'search areas' for future wind farms (threatening to adopt a national decree forcing provinces to designate sites). This has been successful to a certain extent.

Planning is furthermore based on the outcome of negotiations between stakeholders, government and societal partners. For instance, the Energy Agreement 2013 aimed to have 6000MW generating capacity on land in 2020 and 4450MW offshore in 2023 (but does not mention specific locations). The Climate Agreement 2019 aims to achieve the (international and European) 2030 goals for ghg emissions reduction. It aims to realize 11.5GW of offshore wind energy in 2030. The ambition to achieve more large-scale (>15 kW) renewable electricity production on land amounts to at least 35 TWh of production by 2030: a technology-neutral target. Local and regional authorities – and their social partners – have drawn up plans that are supposes to be supported by society: Regional Energy Strategies (RES), in which there is maximum focus on social acceptance of the energy transition within society and on the way in which it can best be realised within the region. The Climate Agreement has been an important document for the measures that make up the content of the first national Climate Plan (2021-2030), which was required by the Dutch Climate Act (since 2019), as well as the plans required by the Paris Agreement (NDCs) and the EU (NECPs).

The locations for new wind farms at sea is designated in great detail. This is not the case on land; there is a general/national policy to cluster wind turbines in wind farms and as a consequence building solitary wind turbines is not often approved (spatially).

- In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?

Municipal and provincial governments will have adopted spatial policy documents that stimulate projects that allow for renewable energy (including wind energy) on land and will try to designate search areas. This will increase even more once the Regional Energy Strategies will be implemented in the policy documents on the basis of the Environment and Planning Act (EPA, from January 2023). On the other hand those governmental bodies will in many cases also have implemented binding regulations for (many) locations where building wind farms is simply not allowed because of spatially relevant interest. Many implement some sort of tender procedure to grant the right to develop a renewable energy project (mostly solar energy fields) in a transparent manner. Assessment criteria for permits/decision-making do not (explicitly) take into account the positive effects of realizing (more) wind energy generating capacity. However, in the future (EPA from 2023) the municipal land use plan will be replaced by the municipal 'physical environment plan' (omgevingsplan) in which all interest of the physical living environment may play a role in the weighing of interest (including the interest of climate change mitigation).

- How are the local opinions dealt with in the permit procedure? Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?

For public law decisions that require an EIA or projects that affect the environment (Aarhus Convention) the procedure known as the 'uniform public procedure' of section 3.4 Algemene wet bestuursrecht (Awb of GALA, General Administrative Law Act) will apply. In most cases an EIA assessment will have to be carried out for the construction of a wind farm; this follows from the Chapter 7 of the Environmental Management Act (and the Decree on EIA). The applicable administrative procedures ensures that anyone can submit their views during a 6-week period in which a draft decision is made publicly available. The competent authority shall take into account all views submitted and respond to them by improving the decision of stating reasons for the draft decision. A final decision is due within a 26-weeks period when an permit was applied for. In general, when making a decision, the competent authority must always adhere to the principles of due care, proportionality and the duty to state reasons. Through these principles and others, the participation of local residents can be taken into account in the weighing of different interests by the public authority.

The owners of the land on which the wind turbines are placed generally receive a (significant) compensation for this. An entrepreneur who wants to build a windmill on his land can receive a subsidy under the regulation Stimulating Sustainable Energy Production and Climate Transition (SDE++). If local residents fear a decline in the value of their properties, they can apply for compensation at their municipality. In practice, this compensation is then charged to the initiator of the wind farm.

Process participation: before the formal/legal decision-making procedure there will be contact between government and project developers. Project developers are increasingly confronted with municipalities and provinces that have adopted policies stipulating that participation must take place and/or that support by local residents must be gained/achieved/realized. When such policies are in place, the project developer is obliged to make an effort to allow participation and ensure local support even before the application/formal procedure. If the developer fails to do so, the competent authority may indeed take into account this fact when deciding on the spatial approval that is required and that approval could be refused. However, the (efforts to achieve) support for the project is not an obligation to achieve a certain result. It follows from case law from the Administrative Jurisdiction Division of the Council of State that a lack of support from local residents cannot be a decisive factor in the balancing of interests by the competent authority. Local support is considered a spatially relevant aspect that may be taken into consideration, but not decisively. The competent authority will have to weigh the existence of local support against the interests of the project developer (of the renewable energy project such as wind farms in the context of the energy transition).

From 2023 the Environment and Planning Act will (most likely) be in force. Participation is one of the cornerstones of this new act; it is considered a shared responsibility of first the developer and second the competent authority (e.g. permit applications). The applicant/project developer shall state what has been done to gain support from the local community and what were the results. It is up to the competent authority (and after the final decision the administrative court) to assess whether this obligation was met. In certain cases this law actually prescribes participatory requirements. A specific instrument in the EPA for realizing

complicated large scale projects in the public interest (such as wind farms on land) is the 'project decision' (*projectbesluit*). At the start or even before the administrative procedure for the project decision the competent authority shall issue a 'notification of participation', which states how citizens, companies, societal organizations and administrative bodies will be involved in the exploration of a possible project decision. The competent authority must explain who it will involve in the project procedure, what it will consult these parties about, when it will involve these parties, the role of the competent authority and the project developer in involving the parties, where additional information is or will be available.

Financial participation: before the formal/legal decision-making procedure starts, the project developer is asked to think about financial participation and get in touch with the local community. Also in light of the statement in the Climate Agreement that the Netherlands will strive for 50% locally owned renewable energy projects. Several forms are stipulated in policy documents by government but also in 'industry guidelines': 1) Co-ownership, for example through an energy cooperative; 2) the local community may participate financially, for example through shares or bonds in a wind or solar project; 3) an environmental/neighbourhood fund may be set up; a part of the financial profits will be used for the benefit of environment/the neighbourhood; 4) with a contract/scheme for the local community/residents people living in the immediate vicinity receive an indirect benefit; for example a discount on electricity from the project or by investing in making their homes more sustainable. Which form is the most suitable depends on the project and the type of neighbourhood. Recently the phenomenon of the Environmental Fund has received much attention. The fund is usually filled with money from project developers for societal goals in the vicinity of the wind farm (solar field). In this way the local community benefits in an indirect way from a wind farm and it is also a way for initiators to increase support from the local community. However, problems regularly arise with such funds. For example, conflicts can arise over who has control and how money from the fund is distributed. In addition, the legal entities involved are governed by civil law, which means that many general principles of administrative law do not apply. This can lead to diminished local support, which is quite the opposite of what developers want to achieve with these Environmental Funds. That is why the project developer should always start by setting up a process, together with the neighbourhood, to look for feasible and desirable (financial) participation.

- Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects "in the aftermath" so to speak (cf. Article 6.2 of the Habitats Directive)?

In the permit several mitigating conditions are relevant in this respect. Choosing a location should include weighing negative effects for birds and bats. Also, some wind farms do have turbines that automatically stop rotating when large birds are detected (e.g. sea eagle) and a facility to stop the rotors at the time bird migration is at its peak. Furthermore, project developers are looking into research has been done to improve visibility of rotors, cables and turbines (referring to tests in Norway with painting one black). Of course each wind farm must comply with conditions set in the permit or face the possibility of enforcement (requests by ENGOs and the local community).

In theory the competent authority (the province) may decide that stopping the turbines in a wind farm is a/the appropriate measure to safeguard the duties enshrined in Art. 6(2) of the Habitats Directive. I am not aware of any such decision or a request to do so by an ENGO.

Frankly, I think providing solid reasoning that such a decision is appropriate to comply with Article 6(2) seems improbable.

The biggest reason for local communities and NGOs to ask the public authorities to revoke the permits for wind farms are the consequences of the (national) judgment by the Administrative Jurisdiction of the Council of State (ABRvS 30-6-2021, ECLI:NL:RVS:2021:1395). In that judgment it was decided that spatial decisions by local authorities may not rely on the general binding rules of a delegated act that provides regulations for wind turbines concerning sound/nuisance because no EIA (SEA!) has been at the basis of those regulations (as a result of ECJ 25-6-2020 (C-24/19), ECLI:EU:C:2020:503).

Author: Kars de Graaf

Turkey

A.1.Renewable energy:Potential, policy and legislation

-Potential and policy: Turkey due to its geographical situation is considered as a country who has a high potential to generate electricity from all renewable energy resources. The substantial demand for energy because of gradually increased population as well as needs, the high rate of energy dependence on foreign countries, and to carry out the commitments under international climate conventions are three additional significant facts that put the renewable energy at the top of the government energy policy. Consequently, all the prepared policy and strategy documents[114] aim to stimulate and promote the useof renewable energy sources as much as possible under the slogan "more local, more renewable"[115]. The main policy document is the National Renewable Energy Action Plan prepared according to EU Directive 2009/28/EC on the use of energy from renewable sources[116]. As concrete steps this plan includes specific targets to be reached according to the years as well as measures to be taken to reach these targets. The principal target is to increase the share of renewables to minimum 30 percent by 2023. Adoption of the new relevant regulations, that provide meaningful incentives for investors, amendments to existing ones and almost periodical amendments to all of them are the main examples of such steps. As a consequence of such policy the installed capacity of renewable energy power is gradually increasing. According to a recent official report, as of May 2022, wind power has the second largest installed capacity after hydropower, and solar power fallows them at the third rate[117].

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[114] ETKB 2019-2023 Strateji Planı (Strategy Plan), Ulusal Enerji Verimliliği Eylem Planı 2017-2023 (National Energy Efficiency Action Plan), Ulusal Yenilenebilir Enerji Eylem Planı (2013-2023) (National Renewable Energy Action Plan), Onbirinci Ulusal Kalkınma Planı 2019-2023 (Eleventh National Development Plan), and Enerji Verimliliği Strateji Belgesi 2012-2023 (Energy Efficiency Strategy Document) are the principal policy documents on the issue. See https://www.enerji.gov.tr. https://sp.enerji.gov.tr, www.resmigazete.gov.tr. (02.01.2018, no.30289). https://enerji.gov.tr//Media/Dizin/EVCED/tr/EnerjiVerimliliği/UlusalEnerjiVerimlililiğiEylemPlanı/Belgeler/NEEAP.pdf

[115] In this context, even a guidebook has been published in English for investors by the Investment Office of the Presidency of the Republic of Turkey. "Guide to Investing in Turkish Renewable Energy Sector" https://www.invest.gov.tr.

[116]For the English version of this plan see https://enerjiapi.enerji.gov.tr//Media/Dizin/EIGM/tr/Mevzuat/253490-national-renewable-energy-action-for-turkey.pdf

[117] Mayıs 2022 Kurulu Güç Raporu (May 2022 Installed Capacity Report). https:// www.teias.gov.tr/kurulu.güc.raporlari.

-Main legislation: The Law on the Use of Renewable Energy Resources for Generating Electricity[118], Electricity Market Law[119], the Law on Energy Efficiency, By-law on the Technical Assessment of Applications for Generating Electricity from Wind[120], By-law on the Connection of Wind Power Plants to the Wind Measurement Centre[121], By-law on the Audit for Preliminary License Applications for Production Facilities of Wind and Solar Energy[122], By-law on the Renewable Energy Resource Fields[123], By-law on the Certificating and Supporting of Renewable Energy Resources[124], By-law on Electricity Market License,[125] By-law on the Unlicensed Electricity Generation in Electricity Market[126], By-law on the Resource Guaranty Certificate for Renewable Energy in electricity Market[127].

A.2. Dealing with different interests in terms of wind farming (consideration of wider environmental interests): Possibilities and deficiencies

-Possibilities: At the legislative and decision-making level, there are several possibilities (ways or tools) particularly with regard to planning, permit procedure, and taking public opinions to consider wider environmental interests under all the related regulations with regard to energy and environmental protection. In this context the first important step is determination of renewable energy resource (RES) fields by the Ministry of Energy and Natural Resources (MENR)[128]. These areas are determined and published on the Official Gazette taking into account the legal requirements concerning prohibited areas (exclusion-unsuitable- infeasible zones) as well as the sound limit values and distances.The MENR has also to take the opinions of all related ministries and public institutions during the determination (determination is made by applying two technical methods together and using both the parameters and evaluation criteria). Military areas and harbour entrances are definitely within the excluded zone. “Protected areas” (national parks, natural resource areas, national monuments, nature park, wildlife protection and development areas, special protected areas, and biosphere reserve) are also within the excluded zone. Through the requirements with regard to distances from airports, urban areas, fault lines, agricultural areas etc. other environmental and social interests are considered in a certain extent.

It is also possible to consider environmental interests widely under the following stages: Legal requirements regarding obligations to be fulfilled by the applicants to obtain each of the relevant permission, licence and certificate as well as to operate the facilities, inevitably, either partly or more comprehensively, make possible to consider wider and conflicting environmental interests. Consequently, apart from several and different permits, documents concerning applications (for instance, management plans, monitoring reports, feasibility reports, environmental impact assessment reports) that are prepared according to these requirements are supposed to cover all these wider issues. In this context EIA is a very

[118] No.5346. Resmi Gazete 10.05.2005. www.resmigazete.gov.tr.
[119] No. 6446. Resmi Gazete 14.03.2013. www.resmigazete.gov.tr
[120] Resmi Gazete 20.10.2015. www.resmigazete.gov.tr
[121] Resmi Gazete 25.02.2015. www.resmigazete.gov.tr
[122] Resmi Gazete 13.05.2017. www.resmigazete.gov.tr
[123] Resmi Gazete 09.10.2016. www.resmigazete.gov.tr
[124] Resmi Gazete 01.11.2013. www.resmigazete.gov.tr
[125] Resmi Gazete 19.06. 2020. www.resmigazete.gov.tr
[126] Resmi Gazete 12.05. 2019. www.resmigazete.gov.tr
[127] Resmi Gazete 14.11.2020. www.resmigazete.gov.tr
[128] Article 4 of the Law on the Use of Renewable Energy Resources for Generating Electricity. (Resmi Gazete . 10.05.2005) and Article 5.2 of the By-law on Renewable Energy Resource Fields. Resmi Gazete 09.10.2016. Under the later determination procedure must be conducted through twelve steps (Article 5.2).

important procedure because at least in terms of three aspects. First, it is required almost (either directly-mandatory- or indirectly-screening-) all renewable energy facilities. Second, EIA regulation requires to inform the public, take their opinion, and consider them during the final decision. Third, it also requires to take the opinions of all competent public authorities during the process.

-Deficiencies: However, at both the legislative and decision-making level there are also some deficiencies that prevent to consider environmental interests in a broad context.For instance, in terms of the requirement with regard to the "protected areas" the related regulation[129] gives a certain discretion to the authorities responsible for the management of these areas on behalf renewable energy by stating that "renewable energy production facilities can only be installed in these areas if the competent authorities give an affirmative opinion". In practice it is not difficult to obtain such an opinion. Furthermore, under the recent amendment to the relevant by-law[130] the prohibitions related to install facilities in the protected areas were weakened on behalf of hydropower, solar power, wind power, electricity lines and fishing activities. On the other hand, the legal provision related to the determination of RES fields undermines the importance of consideration wider environmental aspects, because first, it indicates environmental impact assessment with regard to the determined field as a final step[131]. Second, it states that "if it is seen necessary", works related to EIA would be conducted. Lack of efficient strategic environmental assessment plan for renewable energy prepared under the holistic approach, and lack of integrated permit procedure for all renewable energy production are among other examples of legislative deficiencies.

There are also some deficiencies derived directly from the application process. The most important example is the "affirmative decisions" given for the projects subjected to EIA process although there are inefficient and inappropriate EIA reports. This fact (undermining the objective of environmental impact assessment procedure) is indeed the consequence of a highly politicized decision -making process for almost twenty years. Therefore, the interests of investors and development have been prioritised at the expense of other interests, let alone consideration of ecosystem services under wider environmental interests according to the holistic approach. For instance, it is not possible to find an official data or any analysis regarding the assessment about whether the RES sites are set as considering all interests or not, let alone reviewing them in the light of experiences. Additionally, the contribution of renewable energy resources on the reduction of greenhouse gas emissions is almost seen as an excuse to neglect or undermine ecosystems services let alone considering wider environmental interests under a holistic approach. Typical examples of this fact can be clearly seen in the construction and management process of hydropower plants. There are news and complaints underlining the loss of many streams and some parts of some rivers, and associated environmental interests as well as social and economic interests of local people as benefits from fishing and agriculture because of application such a policy. The main cause of this problem that derived from construction and operation is related to both determine and maintain the required amount of water for the sustainability of aquatic life[132].

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[129] Article 8.5 of the Law on the Use of Renewable Energy Resources for Generating Electricity. (Resmi Gazete.10.05.2005). www.resmigazete.gov.tr

[130]By-law on the Amendment of the By-law on the Procedures and Substances Related to the Determination, Record and Approval of Protected Areas. Resmi Gazete (Official Gazette)05.03.2022.www.resmigazete.gov.tr

[131]By-law on the Determination of the Fields of Renewable Energy Resources. Art.5.2. Resmi Gazete. 01.10.2013. www.resmigazete.gov.tr.www.resmigazete.gov.tr

[132]This problem has been observed, particularly for the rivers in the East Black Sea Region. See. EMO (Chamber of Electricity Engineers) *Doğu Karadeniz Bölgesi HES Teknik Gezisi Raporu 2011 (the Report on Technical Visit for Hydropower to the East Black Sea Region)*. https://kitap.emo.org.tr/genel/kitap_goster.php?kodu=126

A.3. Permit procedure

There isa sectorial and indeed, highly complicated and comprehensive decision -making procedurelet alone applying an integrated permit system. This system is established under regulations regarding both electricity and renewable energy as well asall other sectors of the environment as environmental impact assessment. All investors or developers (concretely, applicants who want to generate energy through wind farms or otherrenewable energy facilities) have to obtain several permits from different competent authorities before to apply for and receive the final permit that will be granted only by the main competent authority on energy and electricity (MENR). In this context the most important required affirmative decisionsand/or certificates are for environmental impact assessment(wind farms with a capacity 50 MW and more are subjected to the mandatory assessment; wind farms with a capacity between 10-50 MW are subjected to the screening procedure. Applicants have to take the decision of "affirmative EIA for the former, the decision of "EIA is not necessary" for the later from the Ministry of Environment, Planning and Climate Change); for the above-mentioned protected areas, and for the right to property or the right to land use.

-There is nodifference between land based and off-shore wind farms in terms of permit procedure. (Besides, currently all operational wind farms are land-based farms. The works regarding to build the first off-shore wind farm is still ongoing).

There is a separate decision- making process for the whole development. Applicants have to obtain separate permits for every activity (connection to the electricity network, connection to the wind measurement system, construction, production, operation, transmission, distribution and marketing), and every facility if the activities will be carried out through different facilities. However, the competent authority can consider unities that are subjected more than one project within a single pre-license or license taking into account the connection point and physical situation of the related facility. Furthermore, facilities that are related to the same renewable energy resources and installed on the surfaces of more than one structure are subjected only one pre-license or license with the condition to connect into the system through the same connection point. There are also several exemptions. One of them is provided for renewable energy power plants which have capacity up to 5MW or the cap determined through a presidential decree. These installations are excluded from the preliminary license and licence requirementunder certain conditions. This exemption has been provided for legal entities and natural persons who wants to produce electricity for their own consumptions. Therefore, the installation must be the same connection point as the consumption facility. Other exemptions are mostly related to the activities of municipalities and to situations having specific technical characteristics as well as emergency situations.[133]

A.4. Planning instruments

Binding planning instruments respectively are the spatial strategy plan, the environment plans and the zoning plans. At the level of the zoning plans there are conservation plans and integrated coastal areas plans. None of these plans explicitly mention wind farms. But following the final decision of the MENR regarding the determined renewable energy resource areas this date must be included into the zoning plans and environment plans.

Apart from binding planning instruments there are strategic environmental assessment plans for some coastal areas and river basins, the Guide on Wind Energy Power Plants and the

[133] Article 14 of the Electricity Market Law No.6446 (Resmi Gazete. 14.03.2013)and article 5 of the By-law on the Unlicensed Electricity Generation in Electricity Market (Resmi Gazete 12.05. 2019). www.resmigazete.gov.tr

Booklet on Environmental Impacts of Wind Energy Power Plants prepared by the Ministry of Environment, Planning and Climate Change[134]. While the Guide indicate both the possible negative effects of wind farms in every stage and the measures to be taken in a certain extent the Booklet only focuses on the effects. The Guide underlines measures to protect several environmental interests as the integrity of land, water quality, flora and fauna (particularly bird and bats) as well as landscape and protected areas apart from public health.

A.5. Deficiencies

Apart from the above-mentioned principal deficiencies (under A.2) there are several concrete deficiencies withregard to constructing and operation of wind farms as lack of comprehensive planning for wind farms, lack of proper assessments about the effects of installed and operated wind farms, inefficient environmental impact assessment's reports in terms of important aspects, disregarding some legal requirements, as well as court's decisions. All these problems cause undermining of several environmental interests as protection of species, particularly migratory birds as mentioned below (under A.8).

A.6.Taking into account the benefits of wind energy as a whole in relation to climate during the individual permit applications.

The benefits of wind energy as of others are considered according to the targets determined in the relevant official documents in terms of reducing greenhouse gas emissions in accordance with the commitments of Turkey specified according to international obligations. As mentioned above, in practice, the benefits of wind energy are overrepresented with comparison to other environmental benefits as protection of nature and biodiversity, to accomplish the international commitments of Turkey. The Government is very willing, indeed ambitious to use all renewable resources to produce as much as electricity. However, apart from economical costs, there are some other limits derived from geographical or technical situations, and these limits protect other environmental interests in a certain extent. For instance, the capacities of regions and provinces prevent to approve all the applicationsfor wind farms. In that context a special procedure is applied. First the competent authority determines the number of permits that will be allowed in a certain region taken into account the capacity, then he conducts a selection process through an auction for all applicants under the Circular on Tender for Pre-license Application for Wind and Solar Energy Generation Facilities.

A.7. The local communities, their opinions and provided benefits.

Local opinions mainly are taking into account during the EIA process. However, as above-mentioned, there are problems with regard to the efficient and proper application of the EIA process. One of these problems is related to public participation in terms of two aspects. Either public cannot attend the public participation meeting because of not being properly informed about it and its place, or public opinions presented at the meeting have not been properly taking into account during decision making. There are many legal cases dealing with theseissues and some other complaints (adverse effects on the productivity in agriculture production, visual impact and noise, violation if distance requirement for residential areas,

[134]https://ced.csb.gov.tr/sektorel-kilavuzlar-i-85878

fragmentation of lands) of local people apart from their environmental concerns as the violation of the requirement concerning protected areas[135].

There is no specific provision in the relevant legislation in terms of economic benefits provided for local people.The By-law on Resource Guarantee Certificate in the Electricity Market regulates Green Tariff for electricity generated from renewable energy resources, and entitles the consumers who wish to use this electricity to receive certificate. However, there is no provision regarding reduced price or any other benefit. Indeed, the opposite is valid; there are several meaningful subsidies and incentives as guaranteed feed-in-tariffs and tax exemptions under a special support system named as YEKDEM (Renewable Energy Resources Support Mechanism) provided for investors/producers under the renewable energy legislation. Besides, a certain amount of revenue of that mechanism will be obtainedfrom the extra wages that will be includedon the consumers' electricity bills[136].

A.8. Detection of unforeseen harm and birds' protection

There is no specific legal requirement on the issue in terms of species protection under either the related energy legislation or legislation on the protection of nature and biodiversity Indeed, Turkey is far from to fully transpose the EU regulations into the national legislation and ratify all international conventions concerningthe protection of species and wildlife. Thus, one of the important deficiencies in terms of wind farms is directly related to the protection of migratory birds. There are complaints by local people underlining birds' fatalities mostly as a result of inadequate evaluation of the possible adverse effects on birds. This issue has even been put forwarded in a complaint brought by a local citizen before the Standing Committee of the Bern Convention to which Turkey is a party[137].

The only concrete provision with regard to unforeseen harm under the legislation on renewable energy is related to the military purposes, areas and equipment, and it requires decommissioning of the alleged wind farm if it interfere with the aim of this provision. This requirement is clearly defined both in the Technical Permit and in the Commitment Certificate that are given before the installation.

Therefore, unforeseen harms to species can be only managed through the "complementary measures' requirement" determined mostly in monitoring reports provided for almost every installation during permit procedure under all regulations whether they are environmental or general. In this context, competent authorities can request further measures as changing its place, changing the location of turbines, shutting down the turbines in the migration season.
As mentioned above (under A.2) regulations on renewable energy and electricity require to take the "affirmative opinion" of all authorities that are authorized to protect different "protected areas" before to grant the main permit. Consequently, such an affirmative opinion should be given with some conditions taking into account unforeseen harms.

A.9. Recommendations

[135] Majority of the legal cases are related to the wind farms installed particularly in Karaburun -İzmir and in Çeşme-İzmir. Karaburun example is analyzed below (under title **D.1** of this report).

[136] Articles 5, 6.A, 6.B, 6.C and 11 of the Law onthe Use of Renewable Energy Resources for Generating Electricity (above note 5), and Articles 4 and 8 of the By-law on the Certification and Supporting of Renewable Energy Resources (above note 11).

[137] Complaint No. 2014/6.T-PVS/Files(2016)15 14/03/2016. Convention on the conservation of European wildlife and natural habitats - 36th meeting of the Standing Committee - Strasbourg, 15 - 18 November 2016 - Wind energy: Possible threats to an endangered natural habitat in Izmir (Turkey) - Report by the Complainant. https://search.coe.int/bern-convention/Pages/result_details.aspx?OjectId=0900001680746451.rm.coe.int/0900001680746451

-Turkey**:** As can be seen from the above explanations most deficiencies are arising from decision-making process, and politicization of the relevant decision -making processes. In terms of legislative aspect, it is necessary to adopt and apply integrated permit system and to require preparation of detailed specific planning toolsfor each renewable energy resource (RES) taking into account other environmental interestsand/or to include specific information concerning renewable energy power plants into the existent and future plans at every level (specifically in the upper- level plans) to consider ecosystems servicesunder the holistic approach that allows considering wider environmental interests.

General: There is a precondition and pre-step to ensure more extensive use of ecosystem services according to wider environmental interests. The policy makers, particularly in all leading developed countries, must see the necessity for applying such a holistic approach. Indeed, the concept of sustainable development, under its original meaning in the Brundtland Report -1987 indicates such a necessity because it challenges the traditional concept of development as well as its components associated with the established political systems as well as established production and consumption patterns. Unfortunately, this challenge which is the main reason behind the emergence of this concept has not been properly responded for years, and the meaning and formulation of the concept has been weakened through the steps taken by the United Nationsin the following years.

As to concrete steps, the main competent authorities in the field of energy must be required to re-evaluate all applications comprehensively and comparatively at the final stage of decision-making processes only in terms of their conflicting environmental impacts under holistic approach. EIA process must be conducted by giving priority to environmental concerns. The concept of sustainable development must be interpreted taking primarily into account the ecosystems services. The serious steps must be taken to raise awareness and knowledge of public and administrators as well as investors on ecosystems services and their importance in terms of several aspects for the survivor ofhumans. This inevitably will contribute to apply more comprehensive evaluations, and so more efficient and proper decisions at every level of administration.

Author: Nükhet Yilmaz Turgut

B. Aquaculture, fish stocks and water quality

Aquaculture, and in particular on shore or off shore fish farming can be associated with environmental pressures, such as emissions of nutrients and genetic contamination of wild stocks, as well as pharmaceutical contamination of coastal waters. However, well-designed, modern aquaculture has the potential to produce high-value protein with less environmental and climate impact then almost or all other forms of animal farming. Aquaculture plants with recirculating systems can also reduce emissions of nutrients quite drastically compared to traditional open-net pen ("cages") fish farming. However, any increased pressure on a water body may prevent the establishment of aquaculture facilities since they are typically subject to a permit requirement and cannot be authorized if they jeopardize the attainment of good water status according to the water framework directive (WFD), as construed by the CJEU in the *Weser case* (C-461/13).

- Does your system provide for an integrated or sectorial (divided) decision-making procedure for fish farms? Does it differ if it is an open-net pen or a recirculating system?
- To what extent, and if so how, have relevant authorities in your country been willing to factor in wider environmental benefits – such as the fish protein being produced substituting for other, much more polluting animal protein – in such permit assessments?
- Can this be done without infringing the WFD or otherwise undermining the environmental objectives of that directive?

Austria

Aquaculture is not a major industry in Austria.

The permit procedure is integrated in case of an EIA (intensive fish farms over 300t/y or 150t/y). Otherwise permits from water authorities will be required. For extensive fish farms that are considered less ecologically harmful the permit procedure is simplified. Separate permits by nature conservation and building authorities may be necessary.
Regarding water quality an Ordinance of the Federal Minister of Agriculture, Forestry, Environment and Water Management provides standards on the limitation of aqueous emissions from aquaculture facilities. I am not aware of benefits such as fish protein being substituted to be factored in. The EIA Act allows for an assessment of such benefits. The water act is not designed to be open for such a contemplation.

Author: Verena Madner

Belgium

Does your system provide for an integrated or sectorial (divided) decision-making procedure for fish farms? Does it differ if it is an open-net pen or a recirculating system?

Aquaculture is a relatively novel topic in Belgium. Several studies have already indicated hat seaweed cultivation and shellfish farming are economically feasible in our nutrient-rich North Sea. Moreover, the relatively rapid growth seems to allow us to compete with im-ported products. Getting mussels in suspension culture ready for market in the Belgian part of the North Sea takes "only" 18 months and produces meat values of 40-45%. For now, four possible functions for aquaculture have been distinguished: mariculture as a function of food and feed, mariculture as a function of coastal protection, mariculture as a function of pharmaceutical and biotechnological processing, and mariculture as a function of nature restoration.

The Royal Decree of 22 May 2019 establishing a marine spatial plan defines 4 aquaculture zones: Zone 1 for aquaculture (Eastern zone) (Art. 14§1), Zone 2 for aquaculture (Noordhinder Noord) (Art. 14§2), Zone 3 for aquaculture (Noordhinder Zuid) (Art. 14§3), Zone 4 for aquaculture (Fairybank) (Art. 14§3). It replaces the 2014 Marine Spatial Plan, which is included for completeness. The Royal Decree of 20 March 2014 establishing a marine spatial plan defines in its Art. 10, two zones for sustainable aquaculture: Zone 1 for sustainable aquaculture, Art. 10 § 2 Zone 1; Zone 2 for sustainable aquaculture, Art. 10 § 2 Zone 2. These zones are made available digitally in the resource described by this metadata document.

In order to implement such projects, as is the case with offshore windfarms, an environ-mental permit is required pursuant to the provisions of the Federal law on the protection of the marine environment (2019). A prior EIA is also mandatory.

In 2020 Colruyt Group received a first permit to construct a 'seafarm' aimed at the production of Belgian mussels. Several organisations contested the legality of the permit be-fore the Belgian Council of State. The cases are still pending. However, a recent civil suit was dismissed by the president of the competent court of first instance in West-Flanders.

To what extent, and if so how, have relevant authorities in your country been willing to factor in wider environmental benefits – such as the fish protein being produced substituting for other, much more polluting animal protein – in such permit assessments?

The importance of more sustainable forms of aquaculture is recognized in the applicable planning instruments. I have had no access to the recently awarded permits to check the extent to which these environmental benefits are weighed in.

Can this be done without infringing the WFD or otherwise undermining the environ-mental objectives of that directive?

It remains to be seen to what extent the WFD or, alternatively, the Marine Strategy Framework Directive is used as binding benchmark in the administrative practice. The pending cases before the Belgian Council of State might soon provide more guidance in this regard.

Author: Hendrik Schoukens

Croatia

[1] Permit procedures
Decision-making procedure for fish farms is not integrated. There is no special procedure for recirculating system.

The list of necessary permits/decisions is the following:

1. Aquaculture Permit - persons intending to carry out aquaculture activities (new fish farms) apply for an aquaculture permit in accordance with the Aquaculture Act and the Decree on Aquaculture Permit. However, in addition to aquaculture permit, the following acts are also required (see points 2 to 4).

2. Special acts depending on the type of aquaculture (marina or freshwater)

2A) Marina aquaculture - Concession contract for the use of maritime domain for the purpose of performing aquaculture activities under the Maritime Domain and Seaports Act.

2B) Freshwater aquaculture

- For farms owned by the Republic of Croatia - Lease agreement for a pond owned by the Republic of Croatia in accordance with the Agricultural Land Act
- For farms owned by natural or legal persons - Contract for the exercise of the right to use inland waters for the purpose of performing aquaculture activities in accordance with the Agricultural Land Act

3. Acts required in accordance with special regulations on zoning and construction:

3A) For buildings/constructions: a use permit must be attached to the application for an aquaculture permit.

3B) For interventions in space that are not considered construction: a location permit should be attached to the application for an aquaculture permit.

4. Documents required in accordance with special regulations on environmental protection and on nature protection:

- EIA decision or EIA screening decision
- Appropriate assessment decision (decision on the acceptability of the intervention for the ecological network)
- For fish farming of alien and locally absent species referred to in Annex IV of Council Regulation (EC) No 708/2007 which were not used in aquaculture on the territory of the Republic of Croatia before the entry into force of the Aquaculture Act, it is necessary to obtain the opinion of the Advisory Committee on the need to carry out a risk assessment in accordance with the provisions of Article 2(5) and Article 9 of Council Regulation (EC) No. 708/2007
- For the fish farming of alien and locally absent species in aquaculture not covered by Annex IV of Council Regulation (EC) No 708/2007, it is necessary to obtain a permit for the use of alien and locally absent species in aquaculture in accordance with Aquaculture Act
- For the use of strictly protected species in aquaculture, it is necessary to obtain permission for breeding in accordance with Nature Protection Act
- For placing on the market of alien species: silver prussian carp (Carassius gibelio), black catfish (Ameiurus molasses), dwarf catfish (Ameiurus nebulosus) and sunny (Lepomis gibbosus) appearing in ponds by spontaneously spreading through watercourses, and are not covered by the permit for the use of alien and locally absent species in aquaculture because they are not grown in a targeted manner, it is necessary to obtain a permission from the Ministry competent for environmental protection in accordance with the Act on the Prevention of Introduction and Spreading Alien and Invasive Alien Species and Managing Them

[2] Considering wider environmental benefits

In June 2020, an analysis was carried out concerning the use of recirculating aquaculture systems in Croatia. This analysis outlined the advantages of such a system (climate resilience, cost-effective waste management techniques) and the fact that most EU countries consider recirculating systems to be the future of this industry. However, high costs of infrastructure, and equipment, and very limited availability of domestic technology, equipment manufacturers and knowledge are highlighted as limits to using recirculating systems in Croatia. In addition, investors may be discouraged by the relatively high capital investments in technology that still has not been proven in Croatia.[138]
To my knowledge, when considering individual permit, wider environmental benefits are not taken into account. The only benefits that are stated in EIA studies are related to new

[138] Ministry of Agriculture, "More than a Fishpond" - Visions and Implementation Plan for the Strategy for Transformation of the Aquaculture Sector in Croatia 2020 – 2030, June 2020, p. 53.

employment possibilities and additional revenues for local communities and are stated in very broad and not specific meaning.

[3] Water Framework Directive (WFD)

Environmental objectives of the WFD are considered within the EIA procedure. The condition of the water body and the impact of the project are assessed in the framework of the EIA study. My review of several studies and EIA decisions in the field of mariculture showed that the studies always conclude that the proposed project will not cause a deterioration of the status of the water body, which is in very good or good condition. In mariculture EIA procedures, the public and the interested public very rarely participate. There are no different expert opinions in the proceedings, i.e. no one was challenging facts and conclusions indicated in the EIA study regarding the negative impact on the water body.

[4] Infringement procedure

There is one ongoing infringement procedure that was initiated in February 2022 concerning the lack of effective monitoring and control of bluefin tuna farms (Commission's letter of formal notice).

The Commission is calling on Croatia to comply with EU rules to ensure an effective monitoring, control and inspection system for Croatian bluefin tuna farms (Regulations 1224/2009, 1380/2013, 1005/2008 and 2016/1627). An audit and verification by the Commission identified serious shortcomings in monitoring the transfer and caging operations of bluefin tuna. National authorities should ensure that data are cross-checked, accurate and validated, and should investigate potential non-compliance cases and take administrative or criminal measures against those responsible for infringing EU law.[139]

Author:Lana Ofak

Czech Republic

- *Does your system provide for an integrated or sectorial (divided) decision-making procedure for fish farms? Does it differ if it is an open-net pen or a recirculating system?*

Firstly, it must be stated that the Czech Republic has a long history of pond fish farming (official records state that origins can be traced to the 14th century). We are not aware of any other aquaculture means in the Czech Republic.
The decision-making procedure can be divided into two parts. In the first part, the pond needs to be realized (built), and in the second part, fish farming activity needs to be allowed.

The Czech system offers sectorial decision-making procedures.

Summary:

[139] https://ec.europa.eu/commission/presscorner/detail/EN/inf_22_601

Like WF, the planning and construction of fish farming ponds is only a partially integrated process. Protection authorities issue opinions and binding opinions used in the land-use procedure (land-use decision) and construction procedure (construction permit). According to the Building Act, the land-use decision is issued either by the Building Authority or the Water Protection Authority. However, a construction permit is issued by the Water Protection Authority according to the Water Act together with water use permission. According to the Water Act, the change from general Building Authority to specialised Water Protection Authority is due to the fact that ponds are considered hydraulic structures.[140]
However, the commencement of fish farming operations is conditioned, to a large extent, by the Fishing Act (Act No. 99/2004 Coll) and by the Water Act. The farmer has to obtain permits enabling him to use the surface waters for fish farming (Water Act) and permit regarding farming activity (Fishing Act) and registration or approval of the Veterinary Authority. Furthermore, during the operation of the farming pond, some treatments, such as mowing of water weeds and cutting of bank vegetation, are precluded by permission of the Nature Protection Authority.

Extended version:

Realization (construction) part

To a large extent, the decision-making procedure is similar to count A (see above). It depends on the capacity of a fish farm. If there is a new project or current project that fulfils EIA criteria, it has to be assessed. There are thresholds for the number of fish and fish eggs. If the threshold is not reached, there can still be an EIA assessment if (as stated in count A) the intent reaches at least 25 % of the threshold and is located in the specially protected area or within the protection zone of such area set according to NLP; or if it can negatively impact Special Areas of Conservation (Habitat Directive) and Special Protection Areas (Birds Directive).[141]
The last option is also applicable if the Nature Protection Authority did not exclude any negative impacts on the Natura 2000 network.

The construction of a pond for fish farming or transformation of a current pond for fish farming is conditioned by (to a large extent) the same legal acts as WF. However, since ponds are hydraulic structures[142] according to the Water Act, their legal construction regime falls within the Water Act. This means that the Water Protection Authority can issue a land-use decision, construction permit, and permission for water use as a specialised Building Authority.
The Building Authority needs binding opinions (and, in some cases, decisions) of relevant competent authorities to allow the construction process (either for land-use decision or construction permit):

- Landscape character (Nature Protection Authority) according to NLP[143],
- significant landscape elements[144], ditto,

[140] § 55 Water Act.
[141] § 4 EIA Act.
[142] § 55 Water Act.
[143] § 12(2) NLP.
[144] § 4(2) NLP. These elements are ex lege: forests, peatbogs, ponds, lakes, watercourses. There can be other specially registered elements.

- protection of specially protected areas (excluding the Natura 2000 network) such as national parks, ditto[145],
- Natura 2000 network (Nature Protection Authority and subsequently EIA Authority) according to NLP and EIA Act[146],
- permission for water use (Water Protection Authority) according to Water Act[147],
- permission for exemption from good ecological status or potential (as stated in WFD), ditto[148],
- animal protection (State Veterinary Administration) according to Veterinary Act (Act No. 166/1999 Coll.)[149],
- soil protection (Soil Protection Authority) according to Act No. 334/1992 Coll., on the protection of the agricultural land fund (PALF)[150].

If the project can affect the protection of specially protected species, the Nature Protection Authority issues a decision to exempt the protected species at the specific location from the protection.[151] However, the legal act is a decision and not a binding opinion; therefore, it stands beside partially integrated procedures.

Fish farming activity

A person who wants to commence a fish farming operation must obtain several administrative acts. According to the Fishing Act, the first one is an administrative decision issued by the Fishing Authority. However, this decision only concerns issues regarding fish farming (e.g., way of fish farming, means of cultivating fish) and no other issues such as collateral activities (e.g., shore-cultivating activities).
However, the owner of the fish pond has to take care of the pond and surroundings so as not to infringe any other public interests (e.g., nature protection, water sources protection). This could, for example, mean that any adjustment of water level, cultivation of shore vegetation, or cutting the water weeds are conditioned upon approval of competent protection authorities (namely Nature Protection Authority).
Even though the fish pond owner has general obligations (as stated in the preceding paragraph), there have been several cases in which fishers destroyed bird habitats during mowing water weeds and reeds or endangered species living in banks or drained a pond and endangered or killed mussels.

Furthermore, before commencing fish farming operation, the responsible person needs to obtain registration and sometimes approval of Veterinary Administration according to the Veterinary Act. The fish farm cannot be operated without prior approval or registration of Veterinary Authority.[152] Furthermore, approval of the Water Protection Authority for the use of surface waters for fish farming is required (fish farming permission).[153]

- *To what extent, and if so how, have relevant authorities in your country been willing to factor in wider environmental benefits – such as the fish protein being produced*

[145] § 37 NLP.
[146] § 45c NLP.
[147] § 8 Water Act.
[148] § 23a Water Act.
[149] § 56(1)(a) together with § 77a Veterinary Act.
[150] § 9 PALF.
[151] § 56 NLP.
[152] § 5a(1)(a) Veterinary Act.
[153] § 8(1)(a)(4) Water Act.

substituting for other, much more polluting animal protein – in such permit assessments?

We do not have any knowledge of this issue.

- *Can this be done without infringing the WFD or otherwise undermining the environmental objectives of that directive?*

According to the Fishing Act, fish farmers have to farm in such a manner as not to infringe water quality, as stated in the Water Act.[154]

Furthermore, according to the Water Act, the Water Protection Authority postulates in its fish farming permission conditions for fish feeding if the fish farmer uses substances that can be qualified as unsafe or harmful. On top of that, if such substances are used, the fish farming permission is limited to four years.[155]

Water Act implements Water Framework Directive; therefore, the Water Protection Authority is bound by limits postulated in Water Act and EU legislation.[156] If Water Authority issues a fish farming permission with unsafe substances as feed material, it also needs to assess whether the environmental objectives of water protections are infringed. If so, the farmer needs to have an exception from good ecological status issued.[157]

Authors: Jiri Vodicka, Ilona Jancarova

Finland

Forest Act (1093/1996) does include special provisions that aim for safeguarding the biodiversity of forest. The Act includes declaration procedure (section 14) and special provisions of procedure for declaration concerning flying squirrel (sections 14 b and 14 c). In general declaration system there will not be decision made by the Forestry Center and there is no consideration of other interest, however the landowner or holder of the right of possession or other special right should take into account special provisions related to safeguarding the biodiversity (sections 10, 10 a and 10 b).

According to the section 10 of the Forest Act (1085/2013) forests shall be managed and used in such a manner that the general conditions for the preservation of habitats important for the biological diversity of forests are safeguarded. Habitats of special importance in terms of biodiversity are sites in their natural or semi-natural state which can be clearly distinguished from the surrounding forest nature. The characteristic features of such sites include:

1. the immediate surroundings of springs, brooks, rivulets constituting a permanent water flow channel, and ponds of less than 0.5 hectares whose characteristic features include the special growing conditions and microclimate due to the closeness of water and tree and shrub layer;

[154] § 12(7) Fishing Act.
[155] § 9(8) Water Act.
[156] § 39(12) Water Act.
[157] §23a Water Act.

2. the following mire habitats listed in points a–e where the shared characteristic feature is the natural or semi-natural water economy:

a) herb-rich and grassy hardwood-spruce swamps where the characteristic features include luxuriant and demanding vegetation, uneven-aged stand and shrub vegetation;
b) unbroken hardwood-spruce swamps with wood horsetail and cloudberry where the characteristic features include uneven-aged trees stand and dominance of uniform wood horsetail or cloudberry vegetation;
c) fens where the characteristic features include nutrient-rich soil, very little of tree stand and demanding vegetation;
d) wasteland and scrubland swamps with very little tree stand; and
e) flood meadows where the characteristic features include uneven-aged deciduous tree stand or shrub vegetation and permanent impact of surface waters;
3) luxurious herb-rich forest patches where the characteristic features include herb-rich forest soil, demanding vegetation and natural or semi-natural state tree stand and shrub vegetation;
4) heathland forest islets located in undrained peatlands or peatlands where the natural water economy has for the most part remained unchanged;
5) gorges and ravines in the bedrock or furrowed in mineral soil with steep slopes, as a rule more than 10 meters deep where the characteristic features include a typical vegetation deviating from the other surroundings;
6) steep bluffs as a rule more than 10 meters high and the forest lying directly underneath;
7) sandy soils, exposed bedrock and boulder fields with lower wood production potential than in heathland forest with extremely barren soil where the characteristic features include a sparse tree stand.

Section 10 a of the Forest Act include general principles of treatment of habitats and prohibited operations. In habitats of special importance referred to in section 10(2)cautious management and utilization operations may be undertaken where the characteristic features of the habitats are preserved orreinforced. In the operations the special water economy, stand structure, old holdover trees and dead and decaying trees shall be preserved and the vegetation, variability of the terrain and the soil type shall be taken into account. Management and utilization operations that reinforce the characteristic features include systematic nature management operations and operations to restore the site to its natural state. Management and utilization operations that preserve the characteristic features include cautious fellings by picking individual trees, digging of isolated patches with a hoe and planting of seedlings of trees that belong to the native flora of Finland and sowing seed of such trees. When exercising special caution timber may be transported in habitats of special importance and a channel of a brook may be crossed if this does not endanger the preservation of the characteristic features.

Action that may not be taken in habitats of special importance include regeneration felling, forest road construction, treatment of soil surface that may damage vegetation characteristic to the site, ditch drainage, cleaning of brooks and rivulets and use of chemical pesticides.

Rules of treatment of specific habitats are in section 10 b of the Forest Act. According to it in habitats of special importance referred to in paragraphs 1 and 2 of section 10(2) above cautious fellings by picking individual trees may be undertaken which preserve the stand in its natural or semi-natural state in a way that the natural or semi-natural water economy of the habitat does not change. In luxuriant herb-rich forest patches the structure of the stand in the habitat shall be preserved so that only cautious fellings by picking individual trees are under taken in connection with the management and utilization operations. No wood harvesting may be done in steep bluffs and the forest lying directly underneath. In sandy soils, exposed

bedrock and boulder fields cautious fellings by picking individual trees may be undertaken so that the old as well as dead and decaying trees are preserved. Where necessary, further provisions on the preservation of the stand structure and layers, viability of the shrub layer and soil water economy in the area of habitats of special importance referred to in section 10(2) are laid down by Government Decree.

Derogation from the rules of sections 10 a) and 10 b) are possible according to section 11 of the Forest Act. These rules are complicated, and they also include possibility to get compensation (in fact state aid). If fulfilling the obligations or complying with the restrictions referred to in sections 10 a and 10 b cause a reduction in forest yield or other financial loss or harm which is not minimal to the landowner or holder of the right of possession or other such special right, the Forestry Centre shall, upon application by the landowner or holder of the special right, grant a derogation allowing to carry out management or utilization operations in a way that the loss to the party concerned remains minimal. The loss is considered minimal if the financial loss caused by restrictions on the use of sites under section 10 is less than four percent of the value of the marketable stand of the party applying for the derogation in the forest property in which the treatment area is located, or less than 3,000 euros. However, a derogation may not be granted if environmental aid under the legislation concerning the financing of sustainable forestry or otherwise sufficient support from State funds has been granted or will be granted for the operation in question. If the financial loss is greater than minimal and the need for a derogation cannot be avoided by means of environmental aid, the habitat of special importance referred to in section 10(2) shall be treated in a way that its most valuable part is preserved.

To conclude, the Forest Act does not have procedures that involve public to the decision making. In fact, there is not real decision made and therefore not possible to appeal. The consideration according to the Forest Act takes into account only forestry and somewhat biodiversity matters.

For detailed planned areas there is permit obligation for felling a tree according to the Land Use Planning and Building Act (sections 128 and 140). The permit must be granted if the felling will not hinder use of the area for the purpose designated in the plan, or mar either townscape or landscape.

Author: Ari Ekroos

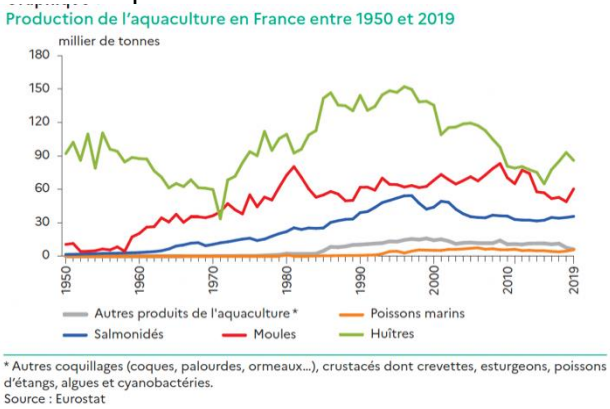
France

Brief contextualization

French aquaculture production (in volume) is in second place in the EU after Spain. Shellfish farming is the main production (3/4 of sales, main producer of oysters in Europe and 3rd place for mussels). Since 2018, fish farming production has been increasing (+28% sea fish, +9% caviar production, +3% salmon) as well as seaweed production[158]. But, the freshwater aquaculture production is decreasing in particular due to climatic conditions (3rd largest

[158] Aquaculture 2019, Ministry of Agriculture and Food, July 2021, No. 4. The diagram shown is taken from this document. https://agreste.agriculture.gouv.fr/agreste-web/download/publication/publie/Pri2104/Primeur%202021-4_Aquaculture2019.pdf

producer of freshwater trout in Europe). The organic aquaculture production represents only 2.8% of the total (i.e. 5500 tonnes in 2019, rainbow trout, sea bass, sea bream, oysters and mussels). The aquaculture sector is not very developed in the French ultra-peripheral regions and the aquaculture production is almost exclusively for the local market and is carried out by small companies.



French aquaculture production only covers a quarter of French consumption and France has a trade deficit of 4 billion euros due to the growth of imports (as for salmon from Norway or Scotland)[159]. fhe consumption of French farmed fish represents only 1.9% of fish consumed by the French people[160]. This situation is mirrored at the EU level which imports more than 70% of seafood products and european aquaculture represents less than 2% of world aquaculture production[161] .

Echoing the European strategy on aquaculture (2021-2030), the new French plan on aquaculture (2021-2027) advocates the strengthening of actions in favor of the development of this sector based on a high level of environmental and economic performances. Among general objectives, the strategy proposes an 45% increase in marine closerie production, a doubling of the production of sea bass, of sea bream by 2030 (i.e. 10,000 tonnes in 2030). It also proposes to reach an annual production of 20,000 tonnes of salmon and 3,000 tonnes for the following species (sea trout, sole, turbot), compared to the current 1,000 tonnes for these four species combined. Similarly, an objective of 1,000 tonnes by 2027 is set for the seaweed farming sector (currently 375 tonnes). These production targets require a precise assessment of both the positive and negative environmental impacts (pollution[162], damage to biodiversity, animal health and welfare (....)). It should also be underlined that several types of aquaculture are very sensitive to the quality of the environment[163] and consequently to the impact of climate change, to diverse aquatic pollution and to the development of epizootics (e.g. collapse of oyster French production due to an iridovirus).

[159] National Aquaculture Plan for the Future 2021-2027 https://www.mer.gouv.fr/sites/default/files/2022-03/20220311_PLAN%20AQUACULTURES%20AVENIR%20version%20finale%20signée%20post%20SIA.pdf

[160] National Aquaculture Plan for the Future 2021-2027 it gives way to the first 2014-2020 plan, which did not achieve all its objectives

[161] COM (2021) 236, Communication from the European Commission, Strategic guidelines for a more sustainable and competitive EU aquaculture for the period 2021-2030

[162] Eg. Recent consideration of plastic waste pollution. French study on reducing the environmental impact of plastics used in the fisheries and aquaculture sector France Agrimer, 2020, https://www.franceagrimer.fr/fam/content/download/65028/document/SYN-MER-DECH.pdf?version=1

[163] As Reminder: Council Directive 79/923 on the quality required of shellfish waters (repealed by the WFD in 2013 and therefore ultimately integrated into the WFD.

The 8 action sheets (fiches d'action) of the French aquaculture plan[164] show the complexity of reconciling interests and the potential conflict of extending aquaculture production sites and of locating new farming sites. The recent European communication on aquaculture underlines the crucial issue of spatial planning and the need to ensure "*social acceptance and consumer information*"[165]. The first French action sheet concerns the simplification of procedures and the spatial access for production sites; it reflects this challenge of guaranteeing the sustainability of the sector in the spirit of the Green Pact for Europe.
The complexity and lack of legibility of the national regulation of the aquaculture sector is also highlighted by the European Commission, which calls for the rationalization of national legislation through a single legislative text and a "*one-stop shop system for aquaculture licenses*"[166].

- *Does your system provide for an integrated or sectorial (divided) decision-making procedure for fish farms? Does it differ if it is an open-net pen or a recirculating system?*

Depending on the volume of production, the aquaculture installation is subject to the regime of classified installations for the environment (ICPE) (L 431 et seq. of the environmental code, ICPE nomenclature appendix 3 article R 511-9) of the environmental assessment, and of installations having an impact on water and aquatic environments (nomenclature known as IOTA – L 211-1 environmental code)[167].

- Declaration regime: sea water fish farms if the production is greater than 5 tonnes per year and less than or equal to 20 tonnes per year.
- Authorization regime: the environmental authorization regime (see developments on wind farming) applies to marine and freshwater fish farms above 20 tonnes per year (heading /rubrique 2130 for ICPE, other heading /rubrique for the IOTA nomenclature related to discharges into water and water withdrawals).

The aquaculture sector's professionals with the Interministerial Committee for the Sea would like to modify the ICPE and IOTA nomenclatures in order to ensure the development of the sector. They propose to create a registration ICPE regime for fish farms producing 20 tonnes or more per year and to increase the threshold of the authorization regime to 100 tonnes. They consider that such reform will reduce the costs of the procedure and simplify public consultation! ; they underline that the prefect could also decide to switch to an authorization regime rather than a registration regime according to the sensitivity of the site. In the recent national plan on aquaculture, the idea of creating an ICPE registration regime is one of the actions to be carried out by 2022.

Several aquaculture sites are present in Natura 2000 sites (unfortunately we don't find the exact number of aquaculture installation in such zones). According to the european Commission, more than 5% of the sites (i.e. more than 1200 SPAs and SCIs). The European

[164] 1) Simplification of administrative procedures and access to space, 2) Fish health and welfare, 3) Research and innovation, 4) Management of climatic, sanitary, animal health and environmental risks, 5) Promoting the economic development of the sectors, 6) Attractiveness of professions and training, 7) Increasing the added value of aquaculture products and the environmental performance of aquaculture enterprises
[165] COM (2021) 236, Communication from the European Commission, Strategic guidelines for a more sustainable and competitive EU aquaculture for the period 2021-2030
[166] COM (2021) 236, Communication from the European Commission, Strategic guidelines for a more sustainable and competitive EU aquaculture for the period 2021-2030
[167] See below relating the environmental authorization: point A of the questionnary

Commission's Aquaculture and Natura 2000 guidelines (2018)[168] provide a basis for Member States to assess the impacts of different types of aquaculture (extensive, semi-extensive, intensive) on the favorable conservation status of species and habitats. In addition to the environmental assessment of projects for aquaculture activities (Annex 2) in accordance with Directive 2011/92/EU as amended by Directive 2014/52/EU, the French legislation requires the environmental assessment for regional marine aquaculture development schemes set out in Article L 923-1-1 of the Rural and Maritime Fishing Code (see: R 122-17 of the Environmental Code)

- *To what extent, and if so how, have relevant authorities in your country been willing to factor in wider environmental benefits – such as the fish protein being produced substituting for other, much more polluting animal protein – in such permit assessments?*

The 2016/1087 Law on the reconquest of biodiversity, nature and landscapes enshrines new principles of environmental law[169] such the "*principle of complementarity between the environment, agriculture and sustainable forest management*" ; it recognizes that these activities "*can be vectors of ecosystem interactions guaranteeing, on the one hand, the preservation of ecological continuities and, on the other hand, environmental services that use the ecological functions of an ecosystem to restore, maintain or create biodiversity*" (Art. L 110-1, II-8 of the Environment Code). The concept of ecosystem services is now expressly integrated into the provisions related to the general principles of French environmental law; thus, it is specified that the "*common heritage of the nation*" is composed by diverse elements of the environment which "*generates ecosystem services*" and that the safeguarding of the services provided is of general interest. Similarly, the 2016/1087 Law on biodiversity introduces into the civil code provisions related to the compensation for ecological damage "*consisting of a non-negligible damage to the elements and functions of ecosystems or to the collective benefits derived by man from the environment*"[170].

The recent national plan on aquaculture confirms the multifunctional role of the aquaculture sector: "*provider of healthy, locally produced food*", insisting on the mission of "*sentinel of the quality of the environment*" of shellfish farming and its ecosystem services (carbon capture, water filtration, reef effect). Similarly, it underlines the role of freshwater fish farming in mitigating the effects of climate change on biodiversity while ensuring the circulation of fish and sediments.

These wider environmental benefits are highlighted in the report on European aquaculture and the provision of ecosystem services published by the Aquaculture Advisory Council's in 2021[171]. It highlights that the carbon footprint of carp production in European freshwater would be 4 times lower than the average greenhouse gas intensity of the ruminant and poultry farming sector. It mentions different studies on the evaluation of ecosystem services of several modes of aquaculture production (ponds, lagoons, estuaries, etc.) and the potential positive impacts concerning extensive or semi-extensive aquaculture.

[168]https://ec.europa.eu/environment/nature/natura2000/management/pdf/guidance_on_aquaculture_and_natura_2000_fr.pdf
[169] JORF n°184 du 9/8/2016.
[170] Article L 1247 of civil code.
[171]https://aac-europe.org/images/jdownloads/Recommendations/FR/FR_AAC_Recommendation_-_Ecosystem_Services_2021_08_revised.pdf

The recent French aquaculture plan emphasizes the necessity to ensure the coexistence of fish farms and the predators such as the Great Cormorant and other fish-eating species. Several monitoring and control measures are implemented in several highly exposed sites (the anti-spider crab plan in the Bay of Penestin, spider trapping in the Channel, acoustic repulsion of sea breams, the blue crab monitoring unit in the Gulf of Lion Natural Marine Park are mentioned). The plan provides for the identification of different types of predation and current prevention solutions to assist the operators.

A recent ruling by the CJEU following a reference for a preliminary ruling by the Latvian Supreme Court gives an interesting insight concerning the relationship between the financial compensation, granted by the public authorities to a fish farmer who was victim of predation by birds protected under the Birds Directive, and the article 17 of the Charter of Fundamental Rights. In this case, the Court considers that this article "*must be interpreted as not precluding the compensation granted by a Member state for the losses suffered by an economic operator as a result of the protective measures applicable in a Natura 2000 area under Directive 2009/107/EC (…) being significantly less than the damage actually incurred by that operator*"[172].

In France, the ministerial Order (arrêté) of 26 November 2010 sets out the conditions and the limits under which derogations may be granted by the prefects concerning the great cormorants[173]. Such derogations are aimed, in particular, at preventing significant damage to freshwater fish farms or the degradation of the conservation of natural habitats that they may help to maintain. Departmental quotas are determined by type of territory concerned. Unlike the compensation system for damage caused by large game to farmers (see: Environment Code), there is no specific provision for financial compensation for fish farmers at national level and the European fund for maritime affairs and fisheries is mobilized to help french fish farmers to protect their installation against predators. In 2018, the Poitiers administrative court ordered the State to compensate a fish farmer for the damage caused by predation by cormorants, grey herons and white egrets, but the Bordeaux Court of Appeal overturned this ruling in March 2021[174]. Since 2003, the Council of State has recognized the principle of no-fault liability of the State for damage caused by the proliferation of protected species. On 21 April 2022, the Council of State rejected the request of the association One voice related to the annulment of the ministerial decree of August 2019 fixing the departmental quotas (50,283 specimens) concerning the exemptions to the prohibition of destruction for great cormorants[175]. At the European level, several studies and a cormorant management toolkit promote a series of solutions to ensure population regulation and fish farm management[176]. In a March 2022 in its study on aquaculture and freshwater wildlife, the Aquaculture Advisory Council recommends, among other things, the establishment of a coherent economic compensation system to help farmers to "*maintain their good economic and ecological functionality*"[177], the simplification of derogation and restriction procedures in Natura areas

[172] Court of Justice of European Union of 27/1/2022, Satini SIA, C 238/20. Such compensation « confers an advantage capable of constituting state aid for the purposes of that provision where the other conditions relating to such a classification are satisfied"
[173] JORF n°288 of 12/12/2010
[174] CAA Bordeaux 23/3/2021, n°19BX00227, TA Poitiers du 15/11/2018, n°1701622
[175] CE 21/4/2022, Association one Voice/Ministère, n°435539
[176] https://ec.europa.eu/environment/nature/cormorants/files/Page_12-31_from_Cormorant_Toolbox_web_version.pdf
[177] https://aac-europe.org/images/jdownloads/Recommendations/FR/FR_10.AAC_Recommendation_-_Freshwater_aquaculture_and_wildlife_2022_10.pdf

and the development of scientific data on the population dynamics in relation to their impact on biodiversity and ecosystem services.

- *Can this be done without infringing the WFD or otherwise undermining the environmental objectives of that directive?*

Among the various conflicts against the extension or the creation of major aquaculture installations, the issue of discharges and water withdrawals is regularly put forward, especially if the site is in a protected area or if the project is located in an area where other aquaculture activities exist (with the risk of cumulative pollution); the type of installation (extensive, semi-extensive or intensive) and the volume of production are obviously determining factors.
For example, in 2021 an industrial salmon farming project in the department Côtes d'Armor (Brittany,Plouisy) has been contested by environmental associations, local residents and the Confédération Paysanne " (farmers' union). This closed-circuit breeding project of 10,000 tonnes per year, presented by the Norwegian group Smart Salmon, is causing great concern and controversy[178] with regard to the impact on water quality and the availability of water resources, but also in view of the company's poor environmental reputation. The request for the environmental authorization and the building permit have not yet been submitted. Other large-scale intensive projects are appearing in France and are the subject of stormy debates. Another example is the project of a salmon farm (10,000 tonnes) of the Pure Salmon company (supported by a Singaporean investment fund) in the department Pas-de-Calais; in 2021, the "Hauts de France" regional environmental authority pointed out numerous failures[179], in particular concerning the impact on water resources in the light of climate change (the estimated water needs are for more than 10,000 inhabitant, equivalent to 8% of the annual consumption of the Boulonnais agglomeration community).

With regard to derogations under the Water Framework Directive, it has not been possible to assess all the French aquaculture projects (installation or extension) subject to the environmental authorization regime. It is not known at this stage whether these derogations have been used. In October 2020 the Council of State requested the interpretation of the CJEU concerning Article 4 of the WFD in order to assess the compliance of the 2018/2018 decree on water development and management plans and water development and management plans[180]. This decree mentions that temporary impacts of short duration and without long-term consequences are not taken into account "when assessing the compatibility of administrative programmes and decisions" (e.g. regional development and management plans, regional water management plans and regional water management plans) with the objective of preventing the deterioration of water quality. Unsurprisingly, the CJEU considered that "*the article 4 must be interpreted as meaning that it does not allow Member States, when assessing the compatibility of a particular programme or project with the objective of preventing the deterioration of water quality, to not take into account the temporary, short-term impacts without long-term consequences for water quality*"[181]; "*unless it is clear that such impacts have, by their nature, little effect on the state of the bodies of water concerned and cannot*

[178] https://www.eau-et-rivieres.org/elevage-saumon-plouisy
[179] Deliberate opinion on the Atlantic salmon farming and processing project in Baincthun & Hesdin l'Abbé, n°2021/5289, May 2021. http://www.mrae.developpement-durable.gouv.fr/IMG/pdf/5289_avis_projet_icpe_aquaculture_baincthun.pdf
[180] Council of State of 14/10/2020, n°429341, Association France Nature Environnement/Ministère
[181] Court of Justice of European Union of 5/5/5022, Association FNE contre premier ministre et ministre de la transition écologique et solidaire, C 525/20. No officialy English translation of this judgement.

result in deterioration of that status". The Court concludes that if, "*in the course of the procedure for authorizing a programme or a project, the competent national authorities determine that programme or project is likely to cause such deterioration, the programme or project, even if the deterioration is temporary, may be authorized only if the conditions laid down in the article 4 §7 of the Directive are fulfilled*".

Furthermore, fish farming activities can also be confronted with the negative impacts of water withdrawals authorized for other economic uses. The owner of the Saint Genès l'Enfant freshwater fish farm, one of the oldest fish farms in Europe (1853), brought an action before the Clermont administrative court seeking the recognition of the State's responsibility for authorizing excessive water withdrawals by the Danone company for its Volvic mineral water plant; the fish farm had to stop its activities. At the beginning of May 2022, the public rapporteur of the Tribunal concluded that the prefect was at fault[182]; the decision of the administrative tribunal is still pending.

Author: Nathalie Hervé-Fournereau & Simon Jolivet

Germany

Aquaculture and fish farms only play a very minor role in Germany. The focus of aquaculture is still on the domestic trout and carp ponds, which are often designed more for sport-fishing. The number of systems has stagnated at a rather low level for years and is tending to decline. I could not identify any really relevant court decisions or further German literature. The few relevant articles mainly deal with foreign production sites and foreign (particularly Chilean) regulation.[183]

Author: Bernhard Wegener

Greece

Question 1:aa) The planning regulations:
The greek legal order has established a procedure for the authorization of fish farms[184] that is, to some extent, integrated. The first stage concerns the selection of the space to be reared and the type of farming method as well as the selection of the appropriate site. The applicable planning instrument is the Special Framework for Spatial Planning and Sustainable Framework for fish farming which sets out the directions and the criteria for the permissible location of the fish farms.[185]

[182] https://www.francebleu.fr/infos/faits-divers-justice/la-prefecture-du-puy-de-dome-devant-la-justice-pour-sa-gestion-de-l-eau-dans-le-secteur-de-volvic-1651770156

[183] Schmehl/Wack, Umweltfragen des Wachstums der Fischproduktion: Das Recht der Aquakultur in Küsten- und Meeresgewässern, ZUR 2009 Heft 10, 473.

[184] It is worth noting that Greece is a country with an important aquaculture production , including fish farming in marine and fresh water. In 2020 Greece ranked 1rst in volume and in value among the EU 27 Member States. For further information see https://fishfromgreece.com/wp-content/uploads/2022/01/HAPO_AR21_ENG-PRESS.pdf.

[185]The constant jurisprudence of the Greek Council of State that required coherent spatial planning for the sitting of the fish farms was the driving force for the adoption of the Special Framework for Spatial Planning for the fish farms. (Decisions of the Council of State 2434-2435/2008, 3972/2008, 565, 2917/2012, 3834/2013,

In accordance with the provisions of the special framework for spatial planning and sustainable development of fish farms, fish farms can be located in three categories of areas: a) the areas of organized development of the aquaculture with a leased area of at least 10 hectares and with the coordinated management and monitoring of the farms[186]. The exact determination of the areas of organized development of the aquaculture is subject to other planning instruments, such as the Regional Spatial Framework for each respective region, the General Planning Framework for the area in which the fish farm will be located or any other sectoral planning instruments. b)the areas of scattered concentration of fish farms with less than 5 farms, with a leasing area of less than 10 hectares and a distance between farms from 500 to 2000 meters and c) the individual farms mainly in remote areas which have specific limits placed on area and maximum production. The specific framework for spatial planning for fish farms includes also transitional provisions for the existing fish farms.

bb) Marine fish farms: It is worth noting that the marine fish farms can be located only in areas of organized development of the aquaculture.
Moreover, the delimitation of an area of organized development of the aquaculture is determined after the submission of a well-document study which is accompanied with a strategic environmental impact assessment study. The regulation which is set for an area of organized development of the aquaculture, as it is delimitated by the issuance of a Presidential Decree, determines the conditions under which a fish farm can operate in this area. (article 6 of the Law 4282/2014, as it is in force).

The operation of marine fish farms requires an environmental permit (issued in accordance with the provisions of the Law 4014/2011, as it is in force) and an installation permit which is issued in accordance with the provisions of the Law 4442/2016. Moreover, a notification to the competent authority for the beginning of the operation is required.
It is worth noting that marine farms that are not located in a Natura 2000 area and have an annual capacity that does not exceed 500 tonnes are subject to a notification procedure in terms of the environmental authorization legislation (declaration of compliance with the "standard environmental commitments" set for fish farming). Moreover, only a notification to the competent authority for the establishment in the chosen area and the beginning of the operation is required.

cc) Floating fish farms and land-based fish farms:
In the case of the floating fish farms, the investor has to submit an application for leasing to the Directorate for Rural Affairs of the Decezentralized Administration for the area to be leased. After the examination of the file and the opinions given by the authorities involved,

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4052/2015). In a series of decisions, the Court held that the environmental permits which were based on individual planning decisions concerning the location of the fish farms were not valid due to the lack of coherent and consistent planning regulations. It is also worth noting that the Special Framework for Spatial Planning and Sustainable Development of fish farming is under assessment, so that it can be decided whether it will be revised or not.

[186] In accordance with the provisions of the Special Framework for Spatial Planning for fish farms, the areas of organized development for aquaculture are classified into five categories on the basis of the priorities and the level of development: a)particularly developed areas requiring improvement, modernization of farms and infrastructure, and better environmental management b)areas with significant scope for development c)remote areas with significant scope for development d)areas with particular environmental sensitivity requiring the adaptation of existing farms to the specific characteristics of the aquatic environment and e) suitable areas for further development of aquaculture.

the competent authority grants an initial approval (pre-approval) for the lease of the respective area (article 21 of the Law 4282/2014, as modified by the 4711/2020). Furthermore, in the case of the land-based fish farms using **freshwater**, the investor has to submit to the competent authority a certification of property (in the case that the natural or legal person is the owner of the land), or the lease contract or the decision for the concession of the part of the lake or the river that will be used for satisfying the freshwater needs or the decision for the concession of the shore (article 22 of the Law 4282/2014, as modified by the Law 4711/2020).

The environmental permit is issued in accordance with the provisions of the Law 4014/2011, as it is in force. In particular, projects of A1 and A2 category are subject to the EIA procedure[187], while projects of category B are subject to a simple notification procedure. It is worth noting that although the environmental permit constitutes a distinct permit in relation to the installation permit, a rather integrated procedure for granting the installation permit is foreseen. In particular, in the case of the floating fish farms all the necessary documents for the issuance of the environmental permit are submitted to the Directorate for Rural Affairs of the Respective Decentralized Administration, which is designated as an one-stop authority (article 21 of the Law 4282/2014, as modified by Law 4711/2020). The Directorate for Rural Affairs transmits the file for the environmental authorization to the competent authority. In the case of the projects of subcategory A1, the Directorate for Rural Affairs transmits the file to the competent authority for the environmental authorization (Ministry for Environment and Energy) after the Directorate for Water Management of the Decentralized Administration gives its opinion on whether the use of water for the fish farm is compatible with the criteria set in the River Basin Management Plan (article 21 of the Law 4282/2014, as modified by Law 4711/2020). Furthermore, as the license for the establishment of the floating fish farm integrates also the veterinary license, the Directorate for Rural Affairs has to submit the file to the Directorate for veterinary affairs that has to examine the compatibility of the fish farm project with the provisions of the veterinary legislation. In the case that project fulfils the respective requirements, a certification is issued. After the issuance of the environmental permit and the certification concerning the compliance with the requirements of the veterinary legislation, the Directorate for Rural Affairs grants the authorization for the establishment of the floating fish farm (Article 21 of the Law 4282/2014, as modified by Law 4711/2020). A notification to the competent authority (Directorate for Rural Affairs) is required for the beginning of the operation of the floating fish farm (article 22A of the Law 4282/2014, as modified by Law 4711/2020).

Furthermore, a similar rather integrated procedure is foreseen for granting the authorization for the establishment of a land-based fish farm using fresh water, which also integrates the veterinary license. The authorization presupposes a valid environmental permit for the projects of subcategories A1 and A2 and a permit for water use, which is issued in accordance with the provisions of the water legislation. Also in this case, a notification for the operation to the competent authority is required.

[187] The EIA study should mainly contain the following elements: a)prediction of the potential environmental impact of the project b)an estimation of the type and quantity of the expected residues and emissions, also including details on farm effluent characteristics c) Review of the available environmental data: temperature and salinity profiles, current measurements, oxygen concentration, pH, concentration of nutrients, description of phytoplankton, zooplankton and benthic communities (d) description of fisheries and aquaculture activities. The environmental permit sets certain conditions for the operation of the fish farm (mooring system, lighting and marking of marine farm structures -placement of cage blocks -stocking density -sanitary measures -systematic monitoring of water quality etc.)

No specific provision is in place which regulates how the system of fish farming (open-net pen or recirculating system) is taken into account in the authorization procedure.

Question 2:
To my knowledge, there is no specific provision that requires the competent authority (Directorate for Rural Affairs of the Decentralized Administration) to take into account the environmental benefits associated with the fish protein in the permitting procedure.

Question 3:
As it is already mentioned, only for large-scale floating fish farms (classified in sub-category A1) the Directorate for Water Management of the Decentralized Administration gives an opinion concerning the compatibility of the water use with the criteria for the allowable water uses set in the River Basin Management Plan. Furthermore, also within the framework of the issuance of the water use permit required for land-based fish farms the achievement of the environmental quality objectives set in the River Basin Management Plan is taken into consideration.

Author: Vicky Karageorgou

Hungary

- Does your system provide for an integrated or sectorial (divided) decision-making procedure for fish farms? Does it differ if it is an open-net pen or a recirculating system?

In Hungary, both catches from natural water (mainly recreational) and aquaculture has an important role in supplying fish to the population. About 23 percent of the consumption of domestic fish comes from natural waters and 77 percent comes from aquaculture (although, fish from aquaculture has become exclusive on the market since 2016 when new reforms were introduced in the industry). Basically, the pond fish production with semi-intensive technology is dominant in the Hungarian fish production[188].

In order to estimate the importance of the sector in the national economy the most commonly used indicator is the contribution to the outputs and the GDP. According to these indicators, the proportion of the Hungarian fishery in the livestock farming was 1.69 %, and in the agricultural production 0.63 in 2018. The contribution to the GDP of the Hungarian fishing industry is minimal (0.02 % in 2018). The total income of the industry is gradually increasing, it was 21 billion HUF (approximately 60 million EUR) in 2018. The proportion of the Hungarian aquaculture production intended for human consumption is just over 1% of the EU's, while the share of Hungary in the freshwater aquaculture production is around 15%.

Due to the low economic influence of the sector and the poor recognition of its economic, environmental and social impacts, other sectors are generally given priority in the elaboration of spatial and developmental plans. The sector has no significant environmental or other conflicts of interests in Hungary.

[188] Multiannual National Strategy Plan on Aquaculture of Hungary (2021-2030)

The provisions of the recently adopted law on fisheries[189] re-regulated fish farming. In order to ensure the long term sustainability of the sector, it focuses on the ability of the fish stock to renew itself and on the conservation of its habitats. Ecological, selective fishing method targeting invasive species is permitted in natural waters as a key method of maintenance. The preservation of fishing traditions is served not only by recreational fishing (hobby fishing) but also by a so-called demonstration fishing that was introduced in 2017.

As to the decision-making procedure, in Hungary more than one authority is involved in the permitting procedure of new aquaculture facilities. The permitting procedure is regulated by several legal acts, all of which implement the provisions of the relevant EU legislation.

In general, a newly established fish farm – as a minimum - must comply with the following permitting, notification and/or registration obligations:
According to the provisions of 314/2005 Government Decree[190], a preliminary examination or an environmental impact assessment procedure must be carried out, depending whether the activity falls under Annex I or Annex II activities. An application for a permit for water establishment must be submitted in order to carry out water works or build a water related facility. During the permitting procedure, the applicant's technical solutions of the planned water use are examined. The possibilities of the development of the open-net pen or a recirculating system are also examined. This is followed by the issuance of the water operation permit, which entitles the holder of the permit to operate the water facility and use water during its period of validity.

The water related permits are followed by the permitting and registration of the fish farms. If foreign and invasive species are cultured in the aquaculture, a separate permit is also needed to practice this activity. Certain type of fish species (such as carp, catfish, pikeperch, brown trout and rainbow trout) may be farmed only by registered breeding organizations. In this case, another permitting procedure is required. For the activity of fish hatchery, a notification is required.

Some of the above permits (e.g.: environmental permits, water permits) are not sector specific, while others (e.g.: breeders' organization recognition, fish hatchery registry) are only relevant for certain, specific fish farming activities.

- To what extent, and if so how, have relevant authorities in your country been willing to factor in wider environmental benefits – such as the fish protein being produced substituting for other, much more polluting animal protein – in such permit assessments?

When issuing a permit, the authorities comply with the relevant national, EU and international legislation. The approach of the permitting authority is a „yes" or „no" evaluation – if the applicant meets the requirements prescribed by the law, the permit is granted. There is not much space for the evaluation of the authority. The evaluation competence is left to the legislator. The basic legal framework for water quality protection is laid down in the Act on Environmental Protection[191], according to which (also in accordance with the Water

[189] Act No. CII of 2013 concerning fisheries and the protection of fish
[190] Government Decree No. 314/2005. (XII. 25.) Korm. rendelet a környezeti hatásvizsgálati és az egységes környezethasználati engedélyezési eljárásról
[191] Act No. LIII of 1995 on the General Rules of Environmental Protection

Framework Directive) the utilization of surface water and groundwater must be managed in such a way that it does not adversely affect the quality and condition of the water body.

- Can this be done without infringing the WFD or otherwise undermining the environmental objectives of that directive?

As explained above, this question is not relevant in Hungary.

Authors: Erika Fiala-Butora, Eszter Zlatarov

Italy

- *Does your system provide for an integrated or sectorial (divided) decision-making procedure for fish farms? Does it differ if it is an open-net pen or a recirculating system?*

In Italy, there does not seem to be an integrated procedure for the authorisation for the operation of fish farms. For fish farm situated in sea-areas or in internal areas the operator needs to request and obtain a specific concession for the use of the relevant water areas (maritime concession for the use of state maritime property). This is regulated by the Maritime code. The competent authority for granting the concession is the Region, although in some Regions these have delegated the Municipalities. This means that the modalities for granting the concession may vary according to the Regions and, besides the main principles outlined in the Maritime code, are disciplined by apposite regional laws.

The concessions contain references to the applicable laws and indicate the terms and obligations that are binding for the operator regarding the use of the waters, including: the location of the installations and the boundaries of the areas for which the concession has been granted; the scope and duration of the concession; the forms, dimension and structure of the works; the modalities to operate the activities, as well as other relevant information and annexed technical details. With the granting of the concession, the operator commits to assume the relevant costs and burdens related to maintenance and management of the site in order to ensure: the protection of the environment and biodiversity, the conservation of ecosystem services, the conformity to the technical terms indicated in the concession, the safety of maritime navigation and the restoration of the site to the status quo ante once the activity has terminated.
If the concession concerns one of the Natura 2000 sites, the request needs to attach the environmental assessment.

Moreover, while the maritime concessions for the installations of fish farms are granted by the Region, the law also requires that for aquaculture installations situated beyond 1 km from the coast, the authorisation for the operation of the activity is granted by the Ministry of Fisheries Agriculture and Forestry. In these cases, such authorisation is granted together with the maritime concession.

- *To what extent, and if so how, have relevant authorities in your country been willing to factor in wider environmental benefits – such as the fish protein being produced substituting for other, much more polluting animal protein – in such permit assessments?*

- *Can this be done without infringing the WFD or otherwise undermining the environmental objectives of that directive?*

In Italy, the relevant normative frameworks regulating the granting of the permit for aquaculture activities is rather fragmented as it is often regulated at regional level. Having said that, the question of the balancing among the different interests appears to be addressed at the national level in the framework of Plans for the planning and management of marine space, elaborated in implementation of the relevant EU Directives and regulation (see in particular Legislative Decree 201/2016 implementing EU Directive 2014/89 establishing a framework for maritime spatial planning). Of particular relevance in this context are the Guidelines for the management of the maritime space, adopted by means of Ministerial Decree, and elaborated through a coordinated process among different ministries and in consultation with the Regions.

These Guidelines outline the main principles that should inform the governance in the maritime space planning process and the elaboration of the marine space management plans (*Piani di Gestione dello Spazio Marittimo*). The marine planning process is broadly defined as a process through which are identified and authorised the human activities in marine areas with a view to achieve economic, social and ecological objectives. The marine space management plans shall have an integrated nature and as such they shall act as reference in the elaboration of the various sectoral plans and strategies (see point 14 f the Guidelines).
In the elaboration of these management plans the Guidelines emphasise the importance of an ecosystem approach as a cardinal principle in this process (point 12 of the Guidelines). They also place emphasis on the need to better understand and promote and coordinate the land-sea interactions – that is the interactions whereby natural phenomena or human activities on land have an impact on the environment resources in the sea, and viceversa.

Relevance of the planning instruments and processes for the authorization:

The planning instruments are relevant to the authorization for aquaculture activities to the extent that the planning is aimed at identifying the marine areas suitable for aquaculture and to the subsequent assignation of the various sites to aquaculture activities (Allocated Zones for Aquaculture – AZA; see ISPRA Technical Guide for the Assignation of Maritime Areas to Aquaculture document, 2020, p 41).

This process of identification and assignation of the marine areas to various uses is carried out at Regional Level on the basis of the national plan for the management of maritime space. This is a quite complex process which takes into account on the one hand the strategic objectives of economic and social development identified by the Regions and on the other hand the environmental characteristics of the sites. The environmental quality objectives as established in the EU Marine Framework Directive and in the EU Water Framework Directive are integrated into this process.

In particular, the process for the identification of suitable areas for aquaculture is based on three phases:

1. Identification of suitable areas to be assigned to aquaculture: this is done on the basis of an analysis of the environmental and ecological characteristics of the areas and the quality of the water bodies, including through an analysis of the various environmental, physical and chemicals parameters.

2. Identification of sites to be assigned for the operation of fish farms: here particularly relevant is the characterization of the site, and the features of the water bodies (e.g. if there are water movements and dynamism which allows for the easier dispersion of residues, etc.). Health and safety considerations also play a role.

   The assignation of a specific site to the operation of aquaculture activities is in some cases subjects to mandatory screening: namely for intensive pisciculture activities over an area of more than 5 hectares, or for the realization of aquaculture installations in areas classified as protected or included in Natural 2000 (in these cases independently on their extension).

3. Finally, monitoring is an important phase for the identification of the impacts of the activities on the environment and on the water quality status. It is in this context that the provisions concerning the water status in the Water Framework Directive seems to find the primary application.

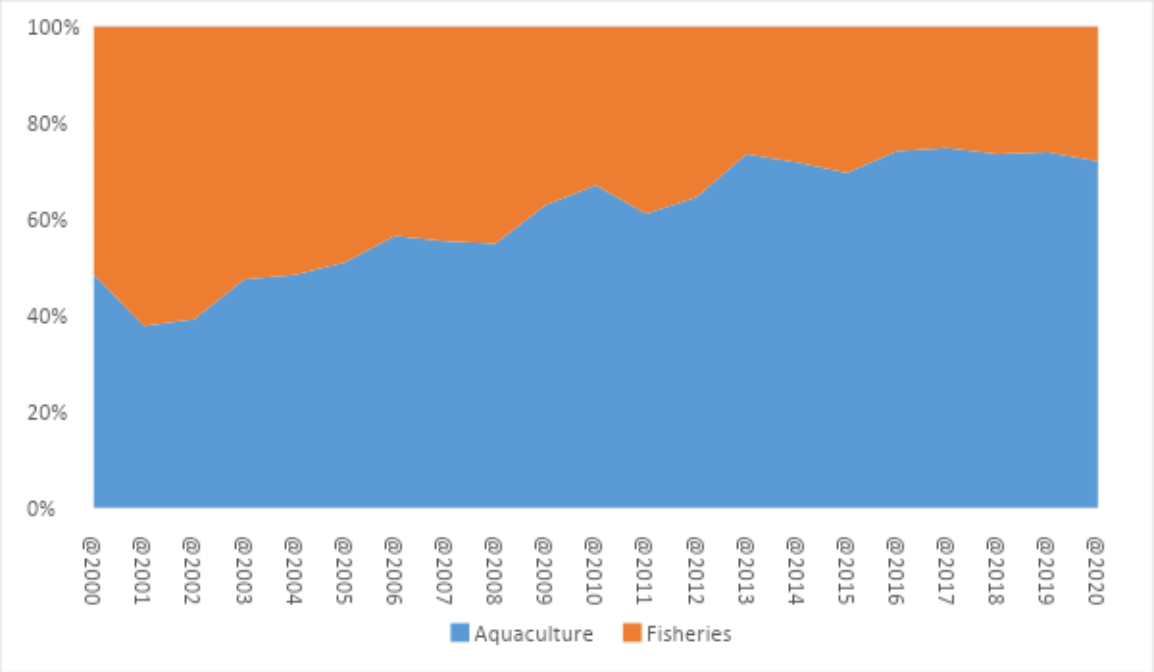
Article 111 of Legislative Decree 152/2006 (Environmental Code) provides that the Ministry for the Environment (now Ministry for the Ecological Transition) adopts a decree outlining the criteria related to the minimization of the environmental impact of aquaculture and pisciculture activities. So far, the decree seems not to have yet been adopted, but specific norms in this sense on the monitoring of the environmental impact have been adopted at the Regional level.

Authors: Massimiliano Montini and Emanuela Orlando

Norway

Aquaculture has become the dominating seafood product in terms of economic value in Norway (figure 3). In terms of export revenue, seafood is the second most important export goods of Norway, at approximately € 12 in 2021. Fossil fuel remains by far the most important Norwegian export good at approximately € 93 billion in 2021. Norwegian aquaculture is dominated by salmon farmingSalmon is by far the most important aquaculture species.

Figure 3, relative value of aquaculture and fish landed in Norway (including by both Norwegian and foreign vessels)



2) Decision-making procedure

a) Integrated vs. sectoral: The Norwegian decision-making procedure for fish farms is sectorial, in the sense that pollution permits are issued by the Norwegian Environment Agency and aquaculture cannot be established in violation of land use and zoning plans adopted by municipalities. In addition, salmon farming permits are composed of two decisions, one involving the amount of fish allowed to be produced which is decided by the Directorate of Fisheries, and a second regarding the location of production which is decided by regional councils of elected representatives.

b) Open-net vs. recirculating system: Public authorities have supported development of new aquaculture technologies through various iterations of special permits on favourable conditions the past decade, including various versions of "recirculating systems". So far, there has been no significant shift towards production based on recirculating systems in marine locations. In recent years, there has been an increase in the establishment of land-based aquaculture. However, there are no requirements that such production units must be based on recirculating systems.

3) Broader environmental benefits

The potential broader environmental benefits from aquaculture is not considered in relation to individual permits in the general regime for obtaining permits. Such issues, including in particular efforts to reduce negative environmental effects of feed used during production, might be relevant for special permits incentivising reforms of production in order to reduce negative environmental impacts and improve sustainability. On a more general level, broader environmental benefits are relevant for general policy objectives regarding volume of overall production.

4) Water Framework Directive

The effect of salmon farming on marine and river water quality is a major concern and a controversial issue in the Norwegian context. The main concerns are related to negative effects on three species of wild salmon (salmo salar, salmo trutta trutta, salvelinus alpinus), of relevance for both coastal waters and rivers, and local pollution from chemicals and organic waste, of relevance for coastal waters only. For these areas, one issue of particular interest is decisions to award a number of rivers and coastal waters the status of areas with particular importance at the national level for wild salmon. Such status has, however, not been awarded on the basis of the general legislation on protected areas, but through parliamentary decisions subsequently implemented through fisheries legislation. The status of such areas under the WFD remains somewhat unclear. Salmon farming threatens the three species of wild salmon through spread of illnesses and genetic impact.

Author: Ole Kr. Fauchald

Poland

In Poland there are no integrated procedures for implementation and operation of fish breeding ponds.

In general, construction and operation of fish breeding ponds is subject to the following requirements:

1) one has to obtain an EIA decision if, due to the size of a fishpond, it is required to conduct an EIA in accordance with the provisions of the Act of 3 October 2008 on providing information on the environment and its protection, public participation in environmental protection and environmental impact assessments[192],

2) one has to obtain a water law permit for the execution/construction of a fish pond and to determine the conditions of use of water in connection with the operation of ponds (water abstraction, discharge of sewage from fish farming, possible damming of water), in accordance with the provisions of the Act of 20 July 2017 - Water Law[193],

3) obtaining a building permit for the construction of a fishpond, in accordance with the provisions of the Act of 7 July 1994 Construction Law, is necessary[194],

4) conducting economic activity consisting in fish farming or fish breeding must be in accordance with the provisions of the Act of 18 April 1985 on inland fisheries[195].

1.Fishponds and the EIA

For fishponds, two groups of criteria have been introduced, the fulfilment of which result in the requirement to obtain "environmental decision" (because they are deemed to be operations that can potentially have a significant impact on the environment):

1) if the depth of the pond, albeit in a small area, reaches or exceeds 3 m;

[192] Journal of Laws of 2021, item 2373, as amended.
[193] Journal of Laws of 2021, item 2233 as amended.
[194] Journal of Laws of 2021, item 2351, as amended.
[195] Journal of Laws of 2022, item 883, as amended.

2) if the depth of the pond does not exceed 3 m but its surface area is at least 0.5 ha and it is located within the boundaries of forms of nature protection or their buffer zones and is constructed on existing non-agricultural land.

The absence of these criteria means that no EIA is carried out, subject to the possible need to carry out a Natura 2000 impact assessment (if such an obligation arises under the Habitats Directive).

2.Fishponds as water facilities - construction of ponds

Fish breeding ponds under the Water Law are treated as so-called „water facilities"[196]. This qualification is particularly important in the context of required permits (water permits).

Construction of ponds with an area not exceeding 500 m2 and the depth not exceeding 2 m from the natural ground surface is subject to a water permit notification. Such pond cannot be filled as part of water services (Art. 394(1)(9) of the Water Law). They may be filled only with rainwater, snowmelt or groundwater.

Fishponds used for sewage treatment, with an area exceeding 500 m2 and the depth exceeding 2 m from the natural ground surface, are subject to the procedure for obtaining a water permit (Art. 389(6) of the Water Law).

Making a notification or obtaining a water permit should take place before obtaining construction permit under the provisions of the Construction Law (Art. 388(2)(1) and (3)of the Water Law).

3.Fishponds and regulated water use - requirement for a water permit

The Water Law introduces a division into common water use, ordinary water use[197], special water use and qualification of activities as water services. It is important to determine who and to what extent may use waters without the need to obtain a water permit, and who and in what cases must obtain such a permit.

Common use of water is limited to satisfying personal, household or agricultural needs without the use of special technical facilities, as well as for recreation, tourism, water sports and, under the conditions specified in separate regulations, amateur fishing. Commercial use, such as the operation of fishponds, is treated as special water use, which in most cases requires an appropriate water permit.

As the operation of fishponds is, according to the Water Law, a special water use (Art. 389 par. 1-2 of the Water Law), such activity also requires a water permit for special water use.

[196] Pursuant to Article 16(65) of the Act on Water Law, the term „water faciliteis" should be understood as, *inter alia*, devices or structures used for shaping water resources or using these resources, including
- ponds, in particular fishponds and ponds used for sewage treatment or recreation,
- permanent installations for catching fish or other aquatic organisms,
- facilities for the rearing of fish or other aquatic organisms in surface water.
Ordinary water use is for the purposes of satisfying the needs of one's own household and those of a family.

[197] Ordinary water use is to satisfy the needs of private households and agricultural holdings and includes only
- abstraction of underground water or surface water in an annual average amount not exceeding 5 m3 per day;
- discharge of sewage into waters or onto the ground not exceeding a total of 5 m3 a day.
If the above parameters are exceeded, the relevant activities (water abstraction, sewage discharge) will be treated as special water use. Importantly, the right to ordinary water use does not, however, entitle to perform water services without the required water-legal consent (Article 33(1)-(4) of the Water Law).

If the operation of fishponds requires the damming, storage or retention of surface water and the use of this water, that also requires a water permit. The type and scope of the water permit depend on how the fish ponds are managed: whether they are farmed in earth ponds (carp management), farmed in flow-through systems (trout management), farmed in recirculation systems (pool farming) or farmed in cages (cage farming).

According to the provisions of the Water Law, water use must not cause deterioration of the status of water and water-dependent ecosystems (the requirement to achieve good water status in the meaning of the Water Framework Directive), except in cases specified in the legal provisions, in particular it must not violate the provisions of the river basin management plan, cause waste of water or waste of water energy, and must not cause damage.

A water permit, issued for the construction of ponds or for the use of the water, must not violate the requirements of the following planning documents (in accordance with Article 396(1) of the Water Law):

·findings of the river basin management plan,

·findings of the flood risk management plan,

·findings of the drought plan,

·findings of the marine water protection programme,

·findings of the national urban waste water treatment programme,

·findings of local spatial development plans, decisions on land development conditions or decisions on the location of public purpose investments,

·the requirements concerning protection of human health, the environment, protection of the nature and cultural assets entered in the register of monuments resulting from separate provisions.

If fish breeding requires the use of so-called water services, e.g. the damming up, storage or retention of groundwater and surface water and the use of these waters, the entrepreneur is obliged to pay appropriate fees for such services.

4.Fishponds and the requirements of the Inland Fisheries Act

The rules and conditions for protection, breeding, farming and catching of fish, in inland surface waters, in water installations and in installations intended for fish breeding or farming, are laid down in the Act of 18 April 1985 on inland fishery (hereafter: the Inland Fisheries Act).

The concept of fish farming should be distinguished from the concept of fish breeding. Pursuant to Article 1(2) of the Inland Fisheries Act, fish farming is defined as the activity aimed at maintaining and increasing fish production. Fish breeding, on the other hand, is the farming of fish combined with selection of fish in order to maintain and improve their utility value.

The holder of the fishing rights, i.e. also the operator of breeding ponds, has some obligations. Pursuant to Article 4a (1) of the Inland Fisheries Act, the holder of the fishing rights shall be obliged to:

1) document fisheries management activities in a reliable, systematic and factual manner,

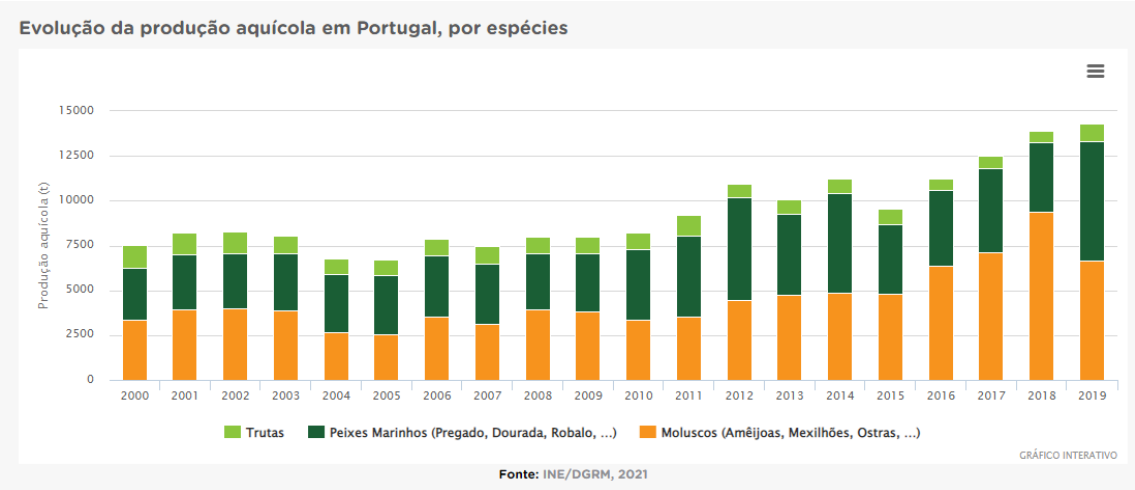
2) make the data on its activities available for statistical and research purposes to entities carrying out tasks assigned by the minister in charge of fisheries or in order to control compliance with inland fisheries regulations.

The person authorised to fish in a fishing district shall be obliged to conduct rational fisheries management. Rational fisheries management consists in using the productive potential of waters, in accordance with the fishing plan and in a way that: a) does not infringe the interests of those authorised to fish in the same river basin; b) maintains fish resources in biological balance and c) allows in the future to fish and to make economic use of waters (Article 6(1) of the Inland Fisheries Act).

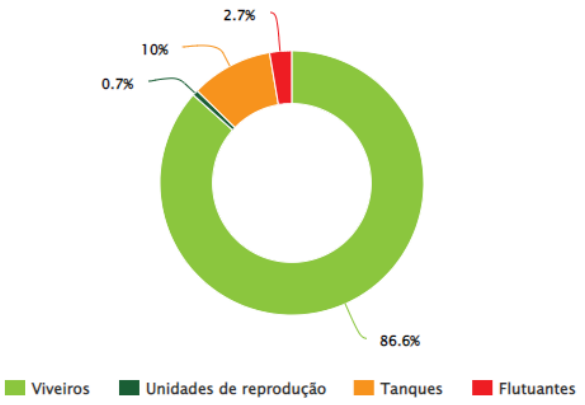
A breeding area is established by the marshal of the voivodship (*marszałek województwa*), by way of an administrative decision, at the request of a fishery farmer who conducts activities in the field of breeding aquaculture animals and fish reproduction, within the meaning of the provisions on the protection of animal health and combating infectious animal diseases (Art. 15 (2b) the Inland Fisheries Act).

Authors: *Barbara Iwańska, Mariusz Baran*

Portugal



The evolution of aquaculture in Portugal (https://rea.apambiente.pt/content/produ%C3%A7%C3%A3o-em-aquicultura)
About half of the aquaculture production is shellfish. The other half is divided between marine and river species.



Fonte: INE/DGRM, 2021

- The large majority (86,8%) of the 1265 aquaculture installations are aquaculture nurseries in the estuaries of rivers for bivalve species (clams, oysters, cockles, mussels, etc.). 10% are inland tanks and only 2,7% are floating sea cages. This happens because the conditions in this side of the Atlantic (waves, tides) are not good for floating structures.

- *Does your system provide for an integrated or sectorial (divided) decision-making procedure for fish farms? Does it differ if it is an open-net pen or a recirculating system?*

There is a strategic ocean strategy framing the development of aquaculture for 2030. The permitting procedure is different depending on whether the activities are conducted in oceanic areas or in inland waters. The procedure is performed in the same platform (https://eportugal.gov.pt/fichas-de-enquadramento/aquicultura).

- *To what extent, and if so how, have relevant authorities in your country been willing to factor in wider environmental benefits – such as the fish protein being produced substituting for other, much more polluting animal protein – in such permit assessments?*

When aquaculture is submitted to an EIA it is the wider environmental benefits are considered. The thresholds for mandatory EIA are: in estuaries or lakes , >5ha productive area, or >200 tons/year, or >80 tons/year if cumulative impacts; in marine areas >1000tons/year in coastal areas or 5000 tons/year in territorial waters; in inland waters >2ha or 200 tons/year; if cumulative impacts 0,8 ha/year or 80 tons/year; floating structures >100tons/year, if cumulative impacts >40 tons/year.

- *Can this be done without infringing the WFD or otherwise undermining the environmental objectives of that directive?*

Depends on where and how de aquaculture project is developed. If there is pharmaceutical (antibiotic) abuse the risk of water contamination is high.

Author: Alexandra Aragão

Slovenia

- *Does your system provide for an integrated or sectorial (divided) decision-making procedure for fish farms? Does it differ if it is an open-net pen or a recirculating system?*

Most Slovenian fish farms are small family businesses covering the local market's needs. There are about 80 fish farms with an annual production of about 900 tons. These are mostly smaller facilities. As a rule, aquaculture requires water from a natural source and it is not very easy task to bread certain sort of fishes. To my knowledge the latter reason is rather quite an obstacle for this kind of activities not being more popular in Slovenia. In conventional breeding, water flows. In semi-closed and closed recycling systems, water with pumps is returned and used several times via filters and ventilation systems, thus reducing water consumption. As a result, the load on wastewater streams is also lower in terms of production.

- *To what extent, and if so how, have relevant authorities in your country been willing to factor in wider environmental benefits – such as the fish protein being produced substituting for other, much more polluting animal protein – in such permit assessments?*

Rules in Slovenia are relatively simple and not very comprehensive. *Rules on detailed conditions for acquiring a licence for fish farming for restocking* are also not dealing with proteins. I tried to find whether proteins etc., are a problem in Slovenia, and I was unsuccessful. I cannot find any regulation in this respect. It might be that the reason is in small (family) productions mentioned above. We are more concerned about open waters; open waters, i.e. fishing districts and waters of particular importance, can only be stocked with fish from farms that have obtained a stocking permit. In addition to all administrative permits, the farm must also have the appropriate health status. The fish used for restocking must be of known origin, meet the characteristics of the species, subspecies, phenotypic and genotypic variants and be free from genetic defects and other deformations and damage.

Author: Rajko Knez

Spain

Does your system provide for an integrated or sectorial (divided) decision-making procedure for fish farms? Does it differ if it is an open-net pen or a recirculating system?

Fish farms are subject to different authorities. According to the Spanish Constitution, the Autonomous Communities are in charge of fishing in inland waters and aquaculture. However, the State is also competent in maritime fishing, without prejudice of the powers granted to the autonomous communities. In the light of the foregoing, fish farms are contemplated in different sectoral laws depending on whether they are onshore or offshore, whether discharges are necessary, and, last but not least, whether they are going to be located in the public domain, the regulation of this category is basically under the purview of the State (Water Law 1985 and the Coast Law 1989).

As regards onshore installations, the Water Law merely indicates that the protection, use and exploitation of fishery resources in inland waters, as well as aquaculture and fish restocking, shall be regulated by general environmental legislation and, where appropriate, by specific legislation. Broadly speaking, these installations are subject to:

(1) EIA (depending on the corresponding thresholds), Annex II, group 1,e) (projects subject to simplified EIA) refers to "Intensive aquaculture facilities with a production capacity exceeding 500 tons per year".
(2) An authorisation allowing discharges into continental waters.
(3) A different authorisation (concession or lease) regarding the abstractions of water (these two latter authorisations are granted by the river basin authority, which may belong to the central Administration, in inter-community river basins, or to the autonomous community, in intra-community river basins). In the event that, in addition to the discharge authorization, a concession for the private use of water (abstraction authorisation) must be requested, the documentation for the application and declaration of discharge shall be submitted together with the documentation required to obtain the concession. Since the authorization for discharge and the concession are linked, the refusal of one would result in the withdrawal of the other). A further concession may be needed if the installation is located in areas classified as public domain.

In addition to the foregoing authorisations, the autonomous communities may require the grant of an environmental authorisation (depending on certain thresholds). Finally, the works may also be subject to a municipal authorisation (*licencia de obras*).

In the case of offshore installations, Law 23/1984, of June 25, 1984, on marine crops, provides that the installation, exploitation and operation of any establishment for the cultivation of marine fauna and flora, and its corresponding water intakes and evacuations to the sea, requires the concession or authorization, as appropriate in each case, from the competent fisheries authority. When such concessions involve fixed works in the sea or in areas classified as maritime public domain, they also require a concession from the competent body for ports and coasts, in accordance with the Coasts Law. These installations may also be subject to EIA, as required by the Coasts Law or the EIA Law.

To what extent, and if so how, have relevant authorities in your country been willing to factor in wider environmental benefits – such as the fish protein being produced substituting for other, much more polluting animal protein – in such permit assessments?

Can this be done without infringing the WFD or otherwise undermining the environmental objectives of that directive?

It is rather difficult to provide an answer to these questions. The Natural Patrimony Law refers to aquaculture when contemplating the occupation or use of the maritime-terrestrial public domain by virtue of a concession or authorization. In this case, such activity shall accrue the corresponding fee in favour of the State Administration. However, in order to encourage better environmental practices in the aquaculture sector, the fee may be reduced by 40 % in the case of concessionaires who are permanently and continuously adhered to (EMAS). If they do not adhere to this management system but have the environmental management system UNE-EN ISO 14001:1996, they will have a reduction of 25%.

As regards litigation in this sector, it may be relevant to recall the judgment of the High Court of Aragón, of 18 April 2018, appeal 191/2013. An association for the study and improvement of salmonids challenged an authorisation for the purposes of the protection of the public hydraulic domain granted to a fish farm. The association argued that there had been a breach of the HD, since the statement of the authority responsible for supervising the sites of the Natura 2000 Network was manifestly insufficient, as it ignored the impact and the non-

assessed threats of the project on the site as well as the absence of environmental impact assessment. It also pointed out that the EU Commission should have been consulted. The Court held that the assessment had expressly stated that the defense works project was part of a project for the implementation of the activity, so that a large part of the compensatory measures and the conditions of the assessment itself referred specifically to the flood defense project. Unlike the allegations in the lawsuit, the assessment has taken into account the defense works against the flooding of the river and that these were part of the project for the implementation of the activity.

Authors: Agustín García-Ureta, Ángel-Manuel Moreno Molina

Sweden

In principle, both on shore and off shore fish farming activities fall under two distinct parts of the Swedish Environmental Code, namely Chapter 9 on environmentally hazardous activities and Chapter 11 on water operations. While partly different procedural rules apply in these areas, both kinds of operations are subject to the same general requirements (so-called General rules of consideration, set out in Chapter 2 of the Environmental Code) concerning e.g. protective and precautionary measures, siting of operations and conservation of energy and materials. In practice, however, most fish farms are only assessed according to the rules on environmentally hazardous activities. This is a consequence of fish farming being exempted from the general requirement to obtain a license for water operations. The reason for this is to avoid the same activity being assess twice in relation to largely the same substantive requirements. Small fish farming operations that use no more than 40 tons of feed do not need a license for environmentally hazardous activities either. In such cases a notification to the municipality suffices.

However, the exemption from the rules on water operations only covers the fish farming as such and associated emissions of polluting substances. To the extent that an operation also requires extraction of surface water or groundwater it needs a license for water operations. While fish farming using traditional open-net pens does not generally involve extraction of water – the operation is itself conducted in a water body - land-based farming operations, either they are recirculating or not tend to require water extraction and are thus in need of a license for water operations. In practice, however, the differences are not that great since cases arising from the Code may be dealt with at a single permit procedure if the applicant is the same and the cases relate to the same activity. With respect to fish farming it means that the case concerning environmentally hazardous activities, which would otherwise have been assessed by a Regional Licensing Board (hosted by a County Administrative Board) will instead be examined by a Land and Environmental Court, where permits for water operations are processed. This means that all environmental dimensions of fish farming operations are assessed in one procedure, even in cases where they require a license both for environmentally hazardous activities and water operations. However, fish farming generally also require other permits and licenses, including ones relating to food safety and animal welfare.

So far, the authorities responsible for assessing license applications concerning aquaculture operations have not shown any inclination to consider wider environmental benefits, e.g. by comparing the emissions caused by producing animal proteins through fish farming with those caused by comparable ways of producing such protein. There tends instead to be a

rather narrow focus on the environmental impacts in the immediate vicinity of the fish farm, in particular its potential implications for the ability to maintain or achieve the water quality standard required by the Water Framework Directive (WFD). The concept of ecosystem services do not feature in the reasoning of relevant authorities in relation to licensing for fish farming. (See e.g. judgments by the Land and Environmental Court of Appeal: MÖD 2017:22; MÖD 2017:21, and MÖD 2021-04-15; M 4726-19; https://www.domstol.se/mark--och-miljooverdomstolen/avgoranden/).

There seems to be quite limited room for taking broader environmental considerations into account, at least if allowing a fish farming operation would entail a deterioration of the quality of a surface water body or prevent the achievement of good ecological status. The relevant exemptions set out in the WFD allowing for a deterioration of the status of a water body or the failure to achieve good ecological status without that constituting a breach of the directive are not applicable to the situation except, possibly, if the fish farming operation would result in a deterioration from high status to good status of a body of surface water. Also in that case, however, demanding requirements would apply that are unlikely to be met by a fish farming operation. In Sweden, licenses for fish farming activities are currently mostly granted for nutrient poor water bodies or if state-of-the-art recirculating techniques are used for land-based operations.

Author: Jan Darpö and David Langlet

Switzerland

Factual background: Even though the production from fish farming now exceeds the quantity of fish caught by professional fishery (1'400 tons vs. 1360 tons), the importance of this sector is fairly limited given the fact that most of the fish consumed in Switzerland is imported (74'746 tons).
One of the most well know projects concerning aquaculture is a fish farm in the Valais and the Canton of Berne, which uses the spring water captured in the Lötschberg Base (Railway) Tunnel that has the welcome feature of offering a constant temperature of around 18 C in order to produce European perch, zander and sturgeon.

- *Does your system provide for an integrated or sectorial (divided) decision-making procedure for fish farms? Does it differ if it is an open-net pen or a recirculating system?*

The procedures for the establishment and the operation of fish farms mainly fall within the competence of the Cantons. It is therefore not possible to give a seamless picture of the current legal framework. Generally speaking, the Cantons foresee a sectorial decision-making process in this respect. The establishment of such installations requires a multitude of permissions: If it is in line with the requirements of the respective construction zone (cf. below) a construction permit, which in this case is usually delivered by the municipality, is required (art. 22 FSPA). Additionally, the operating company needs to obtain permissions for the use of water, the treatment of the water, the protection of wild animals, wild animal husbandry, handling of foodstuffs as well as a fish farm registration.
Even though the requirements concerning spatial planning seem less demanding than with regard to wind-farms, the coordination of the different permissions and their respective procedures on the different federal levels remains a challenge. In order to ensure cohesion, the

Cantons – under the applicable case law of the Federal Tribunal – are under the obligation to ensure coherence both in substantive and procedural terms.

In order to promote the different interests involved in aquacultures and to support the development of aquaculture in Switzerland, the competent federal office has proposed to establish a specialized coordination centre. Yet, its concrete tasks, the financing and the organisation of this structure remain unclear and still have to be determined. In any case, this initiative shows that the interest in fish farming is growing and that the institutional structures could soon follow this increasing interest.

The most hotly debated issue with regard to fish farming is the question whether it should be qualified as an agricultural activity. This categorization would have two important consequences:

- First, it would be conceivable to construct and operate such installations within agricultural zones, which would significantly reduce the costs for fish farms. Currently aquaculture facilities generally have to be situated in industrial zones, where real estate prices are comparably high. It is only under the restrictive condition, that the generated income is necessary to ensure the financial survival of their business, that farmers are allowed to use vacant buildings on their farm to operate small-scale fish farms (art. 40(2) Federal Ordinance on Spatial Planning). During the current reform of the Federal Spatial Planning Act the Federal Council has proposed to somewhat open this requirement in the sense that the farmers would not have to prove the financial necessity of the operation. However, the potential ambit of aquaculture facilities in agricultural zones would remain limited to existing vacant farm buildings.
- Second, and perhaps even more importantly, a more extensive interpretation of the term "farm animal husbandry" encompassing fish farming could extend the eligibility of the activity for federal subsidies. The current legal framework provides only for support in the form of investment credits for structural measures and facilities for animal welfare compliance in the production, for processing as well as for marketing (art. 45 Federal Ordinance on Structural Improvements in Agriculture).

- *To what extent, and if so how, have relevant authorities in your country been willing to factor in wider environmental benefits – such as the fish protein being produced substituting for other, much more polluting animal protein – in such permit assessments?*

Due to the comparatively low number of cases where permissions for aquaculture structures have been granted, it is difficult to assess whether and to what extent possible environmental benefits are taken into account in the context of decisions on fish farms.
More revealing are the political discussions in this respect: On the one hand, there are political parties/groups close to farmer interests showing the will to allow for structures of aquaculture in agricultural businesses. Their intention is to allow for additional income opportunities for farmers; on the other hand, there are political actors close to environmental interests, who seem generally open to the development of aquaculture but inquire into the environmental consequences of such installations (animal welfare regulation; treatment of waste water; origin of the feed; prevention of animal diseases etc.).

- *Can this be done without infringing the WFD or otherwise undermining the environmental objectives of that directive?*

The WFD is not applicable in Switzerland. With regard to the provisions concerning the discharge of polluted wastewater into water bodies or the public sewage system, which also apply to fish farms, the relevant Federal Ordinance provides that that the **requirements** have to be based on the characteristics of the wastewater, the state of the art and the condition of the water body in each individual case (annex 3.1 para. 1 Federal Ordinance on the Protection of Waters). In addition to this, some minimal requirements apply: Use of low phosphorus feed, desludging of the installations as well as a maximum threshold for undissolved substances with a discharge concentration of 20 mg/l.

Author:Markus Kern

The Netherlands

- Does your system provide for an integrated or sectorial (divided) decision-making procedure for fish farms? Does it differ if it is an open-net pen or a recirculating system?

The answer is practically the same as for wind farms on land except that the permitting system under the Water Act (Waterwet) plays a more important role when water extractions and/or wastewater discharges are involved. The Wabo requires that an environmental permit is applied for (for building and of course the fish farm shall have to be allowed either by changing the land use plan / zoning scheme or by way of a permit to deviate from that plan). As far as I know the Netherlands does not have open-net pens. Closed systems for fish farming are placed on land.

When both a Water Act permit and an environmental permit for an IPPC/IED installation is required, there is a mandatory form of coordination between those permits.

- To what extent, and if so how, have relevant authorities in your country been willing to factor in wider environmental benefits – such as the fish protein being produced substituting for other, much more polluting animal protein – in such permit assessments?

The importance of more sustainable fish farming is recognised in government documents and is subsidized. But when we focus on the decisions whether or not to grant a permit, my idea would be that wider environmental benefits shall not be included in weighing and balancing of interest (although the (economic) interest of the project developer is always included).

- Can this be done without infringing the WFD or otherwise undermining the environmental objectives of that directive?

My idea would be: no.

Author: Kars de Graaf

Turkey

B.1. Policy and legislation for fish farms.

As a country encountered by four seas Turkey has a great potential to develop its aquaculture sector rapidly taking into account the decrease in natural fish stocks. Therefore, promoting policies and support mechanisms have been adopted, and the existent laws have been gradually amended accordingly to increase the use of this potential. The followings are the major policy documents regarding fish farming: The booklet on environmental impacts of fisheries, the Guide on the establishment of environment friendly fish farming system, guides on marine monitoring, reports on integrated pollution monitoring programs in seas, action plans for the sea garbage prepared every sea side city[198].

The By-law on Environmental Management of Fish Farms Acting in Seas (Official Gazette. 28.10.2020), theFisheries Law (Official Gazette. 04.04.1971), the By-law on Aquaculture(Official Gazette.29.06.2004), and the By-law on Fisheries (Official Gazette. 10.3.1995) are the principal regulations.They include requirements regarding permits, conditions and prohibited areas and activities.

B.2. Decision-making procedure for fish farms.

There is a sectorial decision-making system and there is no difference between an open-net or a recirculating system. Indeed, the majority of farms are offshore (sea -cage) farms. Enterprises who want to operate fish farm have to obtain several permissions (like a permission from the Ministry of Health indicating that the farm poses no hazards to human health, a document from the Ministry of Transportation stating that the farm does not interfere with transportation, the required decision for EIA- mandatory EIA is required for fish farms 1000 ton/year and more; screening process is applied for fish farms 30 ton/year and more) from other competent ministries before to obtain both the main preliminary licence and license as well as the related certificate from the Ministry of Agriculture and Forestry (MAF). If there are several applications for the same area the related decision will be givenby a special commission after evaluation of all applications.

B.3. Considering wider environmental benefits such as the fish protein being produced substituting for other, much more polluting animal protein

There is neither a specific legal provision nor datawhich explicitly statesthe existence of such a substituting.

In general, the above-mentioned explanations (under title A.2) in terms of wider environmental interests are also valid for fish farms. For instance, to obtain each of the required permission, applicants have to determine through the scientific documents that their fishing activities will not pose any harm to or will not interfere with other interests such as human health, transportation, tourism, species etc. Several legal provisions (regarding the required distances from coasts and depth requirement, prohibition as to discharge the wastes of fish farm into the water, the measures as to use filtration systems to hold the wastes in the water, the production method that is based on the natural productivity of the water) protect several environmental interests.

Besides, applicants have to obtain the required decision for the EIA of their project, and this process has to take into account wider environmental, social and economic interests.

The by-law on fish farming in the seas requires the preparation of monitoring reports apart from environmental management plans for fish farms to consider possible negative effects such as rising of eutrophication risk, and to take measures to mitigate them. Furthermore,

[198]https://cygm.csb.gov.tr/su-ve-toprak-yonetimi-i-83470https://cygm.csb.gov.tr/deniz-ve-kiyi-yonetimi-dairesi-baskanligi-i-103133https://webdosya.csb.gov.tr/db/cygm/editordosya/KILAVUZ_final_2015.pdf

although Turkey didn't fully transpose either the WFD or the Marine Strategy Directive of the EU into the national legislation, the Ministry of Environment, Urbanization and Climate Change has prepared the above -mentioned policy documents in accordance with them. Consequently, these documents take consider quality analyses of ecological situations. For instance, the Booklet on environmental impacts of fisheries explicitly states the adverse effects of fish farms to other environmental interests as ecological problems, new diseases, genetic pollution.

On the other hand, legal provisions related to financial support of those who applies "good agriculture applications" aim to protect human and fisheries' health as well as environment.

B.4. Consideration of environmental objectives of Water Framework Directive

The provisions of the WFD are not completely transposed into national legislation yet. The complete transposition of this directive requires to adopt a law, and currently there is only a draft law on the issue. Some objectives of that directive are considered under separate regulations (the Coastal Law, the By-law on Prevention of Water Pollution, and by-laws regarding different types of waters as fresh waters and surface waters. Thus, there are considerable legal requirements as well as official documents with regard to control and treat diseases and wastes properly. The Ministry of Environment, Planning and Climate Change is the prime authority to implement the requirements of all these regulations through the effective monitoring and inspection systems and applying efficient sanctions for illegal activities.

However, as mentioned above (under the title A.2) the decision-making process is highly politicized and policy makers give priority to developers' interests over environmental ones. This fact inevitably causes associated problems as lack of enforcement (inspection and applying sanctions by public authorities).

Author: NÜKHET YILMAZ TURGUT.

C. Forestry and agro-energy cultures and the production of biofuels

Forestry and agricultures are crucial for the production of biomass and biofuel, bioenergy sources that surely will increase in importance with the upcoming Ukrainian crises. However, some of the methods used today for the harvesting of forests and agricultural biomass production are causing clear conflict with other environmental interests such as nature conservation and species protection, water protection and fighting soil erosion. In addition, in densely populated areas other interests may collide, such a cultural heritage and recreational interests. Both bioenergy agriculture and forestry may also cause ecological changes and the weakening of ecosystem services such as pollination, the cleaning of water, combating flooding and draught, access to nature and outdoor activities.

Here, you may choose either forestry or agriculture depending on which activity is the most relevant in your country:

- What kind of regulation covers these activities?
- Are there any integrated approaches in the regulation and decision-making?
- How are conflicting interests balanced against each other?

Austria

With regard to larger-scale clearances, conversion of wasteland or semi-natural land for purposes of intensive agricultural the integrated permit procedures of the EIA-Act will apply (see above). In other cases the regulation of agricultural activities is mainly regulated by the federal water act and respective ordinances and by state laws on building standards with no integrated approach being implemented. In the case of EIA the approach to weighing and balancing has been described above. In some cases (intensive live stocks or larger scale land conversion) the permit procedure may be partly integrated with regard to IPPC-requirements. In those cases however, no general clause for balancing is provided for in the permitting process.

In Austria, around 25 percent of agricultural land is farmed organically, and almost 80 percent of farms participate in the agri-environmental Program (ÖPUL). Nonetheless climate change and biodiversity issues arise with regard to agriculture, locally also issues of water and air quality are linked to agricultural activities. Around 94% of NH3 emissions come from agriculture, primarily from livestock farming and fertilizer application. In addition to the Nitrate Action Program Ordinance and other water quality standards, the voluntary measures of the domestic agri-environmental program ÖPUL are a central instrument for the reduction of harmful effects from agricultural activities.[199] A preliminary ruling by the CJEU has called for an update of the Austrian Nitrate Action Program, implementation is still pending.

The environmental program ÖPUL is to be updated in 2023. In the future, about 100 million euros of direct payments in Austria (i.e. about 15%) are supposed to be processed as organic schemes. The proposal for the new program is discussed broadly and controversially.

Author: Verena Madner

Belgium

The regulations on agro-enery and the production of biofuels are laid down in Vlarem and the Omgevingsvergunningsdecreet (see above). In essence, the construction and operation of such activities requires a prior single permit. No separate permit applications are thus necessary. Such activities are often highly contested, especially installations aimed at the production of biofuels. I have limited knowledge as to the weighing or balancing of the conflicting interests. Generally speaking, however, the recent case-law indicates that the overarching environmental benefits cannot be used as an excuse not to effectively deal with the local impacts of such installations.

Author: Hendrik Schoukens

[199] Guidebook for good professional practice in agriculture concerning limitation of ammonia emissions (2018).

Croatia

The basic legal act promoting the use of biofuels is the Biofuels for Transport Act, adopted in 2009. Under this law, in 2010 a National Action Plan was prepared promoting the production and use of biofuels in transport for the period from 2011 to 2020. The plan set out a policy that promotes the increased production and use of biofuels in transport in the Republic of Croatia. The plan included an overview and assessment of the market situation for biofuels in transport and long-term objectives, including the measures to promote increased production and use of biofuels in transport.

However, in 2019, only 5.26% of the share of biofuels was placed on the market in the Republic of Croatia, and the target under the National Action Plan was not met.

In order to analyze the possibility of meeting the target of 3.5% of advanced fuels by 2030 (Article 25, paragraph 1 of the Directive 2018/2001 on the promotion of the use of energy from renewable sources), research and analysis are yet to be carried out regarding the possibilities for the production of advanced biofuels. The aim of this analysis will be to identify possible capacities for domestic production based on the availability of raw materials and technical parameters.[200]

Currently, there is no second-generation biofuel production plant in Croatia. An environmental impact assessment has just been initiated for the construction of one such plant in Croatia.
Although Croatia has significant biomass potential, it has very small share in the production of primary energy from biomass. The rate of biomass use in Croatia is still below the scenario envisaged by the European Union.[201]

Due to limited number of cases, it is not possible to provide any example of balancing conflicting interests in this field. There is no integrated (combined) decision-making process for the development of such projects. According to data for 2019, in the structure of electricity generation from renewable sources in Croatia, the largest share of 74 % was the water power that include electricity generation from large hydropower plants. This was followed by wind energy with a 15% and biomass energy at 5%.

Author:Lana Ofak

Czech Republic

Here, you may choose either forestry or agriculture depending on which activity is the most relevant in your country:

We chose forestry

- *What kind of regulation covers these activities?*

[200] Ministry of Environmental Protection and Energy, Integrated National Energy and Climate Plan for the Republic of Croatia for the period from 2021 to 2030, December 2019, p. 125.
[201] Biljuš H., Basarac Sertić M., Potential and Role of Biomass in Croatian and European Energy Transition, Drvna industrija, Vol. 72 No. 3, 2021, https://hrcak.srce.hr/file/379436.

Several possible scenarios apply in the Czech Republic. Both scenarios have different regulatory conditions. The first scenario includes fast-growing tree plantations (such as poplars or willows), and the second scenario includes forest trees.

Forest

The scenario is connected to forest harvesting. According to the Forest Act, forest owners with vast areas of forests are legally (according to the Forest Act) required to manage their forests according to forest planning instruments. Instruments provide overall plans on how the owner and authorised person should take care of the forest (in particular, instruments can set how many trees can be harvested and how, how to cultivate trees, when to harvest, etc.). The Forest Act sets directly the requirement regarding the minimum age of harvested trees and the duty to establish a new forest stand within a specific time period.

However, according to NLP, forestry planning instruments cannot be issued without the binding opinion of the Nature Protection Authority. In the binding opinion, the authority assesses the possible impact on Special Areas of Conservation (Habitat Directive) and Special Protection Areas (Birds Directive).

The authorised person or owner needs to follow planning instruments. However, once trees are harvested, it is up to the timber owner to decide what to do with harvested trees (sell to someone else as biofuel, make paper or make wooden boards, etc.).

Fast-growing trees

Fast-growing trees can be planted in agricultural soil. The concerned authority is the Soil Protection Authority, according to PALF.
The Building Authority needs to issue land-use permission (a lighter version of the land-use decision) to change land use and land character if the plantation covers 300 m2 – 1000 m2. If the plantation covers a more extensive area, the Building Authority issues a land-use decision. Nevertheless, the Nature Protection Authority needs to issue a decision regarding permission to grow nonindigenous plants.

Furthermore, other protection authorities can issue binding opinions on these interests:

- Landscape character (Nature Protection Authority) according to NLP,
- protection of specially protected species, ditto,
- significant landscape element, ditto
- Natura 2000 network (Nature Protection Authority and subsequently EIA Authority) according to NLP and EIA Act,

- *Are there any integrated approaches in the regulation and decision-making?*

Every protection authority can only issue a decision or a binding opinion on an interest covered by their respected legal act. There is no integrated approach for fast-growing plantations or forest harvesting. There are usually two or more various protection authorities, and applicants need to obtain decisions or binding opinions themselves.

- *How are conflicting interests balanced against each other?*

The forests fulfil various functions. The management of forests designated to serve nature protection is subject to special regulations and restrictions in their economic use. These forests are protected under the NLP Act, and they might be used for economic purposes under the condition that harvesting would not infringe their primary function. In specially protected areas, harvesting can be prohibited, and the owners are entitled to financial compensation. Furthermore, the Forest Act postulates a general preventive obligation not to harm or damage forests.[202]

The Forest Act recognises three main forest categories according to their functions. Production forests (mainly designated for economical use), protection forests, and special-purpose forests. Only production forests can be used for economic purposes, and owners are limited by policies issued by the State Forest Protection Authority. Protection forests are ex-lege protected because these forests usually protect surroundings and provide shelter in hostile environments (rock formations, steep slopes, etc.)

The conflicting fundamental interests (e.g., forest protection[203] v. nature protection) bear the same weight.

Therefore, other supporting interests are needed to tip the balance scale. However, not all supporting interests are viable or have enough weight to be accepted as supporting. For example, pure economic interest will not help forest protection prevail over nature protection. On the other hand, if forest protection means harvesting trees because of bark beetle infestation and making a profit from selling wood as biofuel (another supporting interest in renewable energy production), that can be considered as prevailing over nature protection (e.g., species protection).

However, nature protection authorities will not issue a positive binding opinion if the activities intended for forest protection could harm specially protected species or negatively affect Special Protection Areas or Special Areas of Conservation.

Authors: Jiri Vodicka, Ilona Jancarova

France

Forestry and agricultures are crucial for the production of biomass and biofuel, bioenergy sources that surely will increase in importance with the upcoming Ukrainian crises. However, some of the methods used today for the harvesting of forests and agricultural biomass production are causing clear conflict with other environmental interests such as nature conservation and species protection, water protection and fighting soil erosion. In addition, in densely populated areas other interests may collide, such a cultural heritage and recreational interests. Both bioenergy agriculture and forestry may also cause ecological changes and the weakening of ecosystem services such as pollination, the cleaning of water, combating flooding and draught, access to nature and outdoor activities.

Brief contextualization: Wood energy is the leading source of primary renewable energy in France (40% of production, compared to 26% for hydropower (26%). It contributes to the

[202] § 2(e) Forest Act.

[203] Forest protection includes forest farming or harvesting since almost all of the Czech forests are forests designated for commercial use.

achievement of the objectives of decarbonization of the French energy production with a high growth forecast mainly in the field of collective heating installations. Uncertainties remain particularly concerning long-term availability of wood[204], impacts of the land use changes and the functioning of the installations in terms of environmental efficiency and reduction of atmospheric pollution[205]. The increasing use of forest biomass for energy raises many questions and concerns, as illustrated by the recent mobilization of several associations against European commitments in favor of bioenergy[206]. The risks of exacerbating conflicts of use and interests, within the wood industry itself, between forest production and the preservation of forest ecosystems, old forests and their multiple ecosystem services are far from insignificant. The 2021/2022 French forest and timber conference (assises de la forêt et du bois) stresses the necessity to prevent and regulate the conflicts of use that are could arise[207]. In accordance with the 2015/992 Law on energy transition, the national biomass strategy[208] (L 211-8 of the energy code) and the regional biomass plans aim to define the orientations and actions for the development of the energy use of biomass, particularly from the forestry sector. These regional plans (L 222-3-1 Environmental Code) are subject to environmental assessment by the environmental authority.

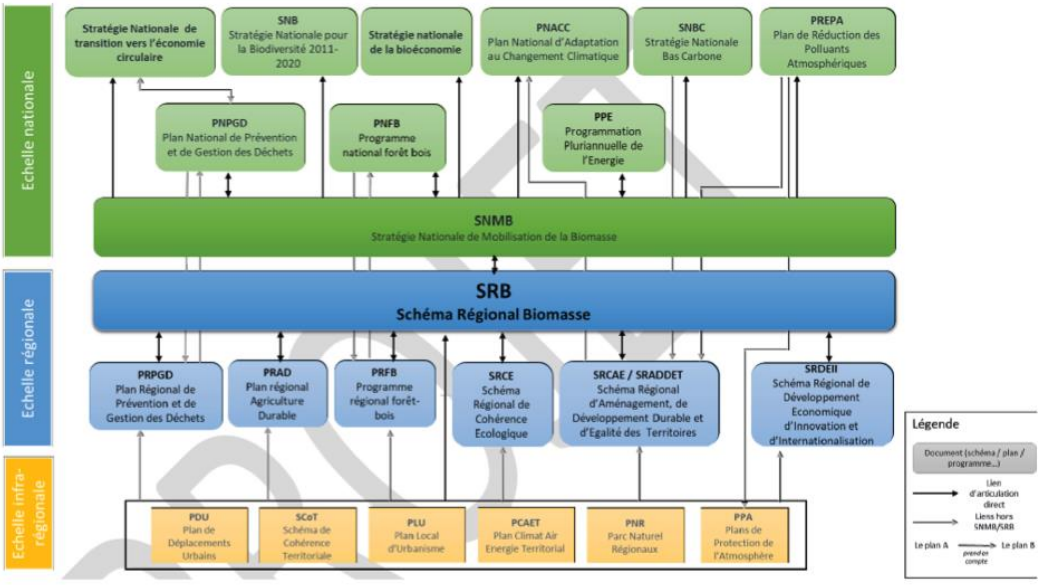


Figure 1 : articulation du SRB avec les autres plans et programmes (source : dossier)

Diagram extracted from the deliberate opinion of the environmental authority on the regional biomass plan for the Provence-Alpes-Côtes d'Azur Region 2017-2023[209]

[204] Agreste - Survey - Forestry and sawmills : The harvest of marketed wood in France amounted to 38.9 Mm in 2018, including 8.5 Mm of "energy wood" (compared to 3Mn in 2008).

[205] Cour of auditors, The structuration of the forest-wood sector, its economic and environmental performances, 2020. https://www.ccomptes.fr/fr/publications/la-structuration-de-la-filiere-foret-bois

[206] Several mobilizations, including the open letter to the European Commission in May 2021 "Forests must be protected and not burnt to produce energy, https://sosforetfrance.org/index.php/2021/05/20/biomasse-lettre-ouverte-a-la-commission-europeenne/

[207] https://www.codifab.fr/uploads/media/62337eac98a4c/synthese-des-travaux-des-assises-de-la-foret-et-du-bois-v2.pdf

Several mobilizations, including the open letter to the European Commission in May 2021 "Forests must be protected and not burnt to produce energy». https://sosforetfrance.org/index.php/2021/05/20/biomasse-lettre-ouverte-a-la-commission-europeenne/

[208] Decree 2016/1134 of 19/8/2016 on the national biomass mobilization strategy and regional biomass plans, JORF n°194 of 21/8/2016

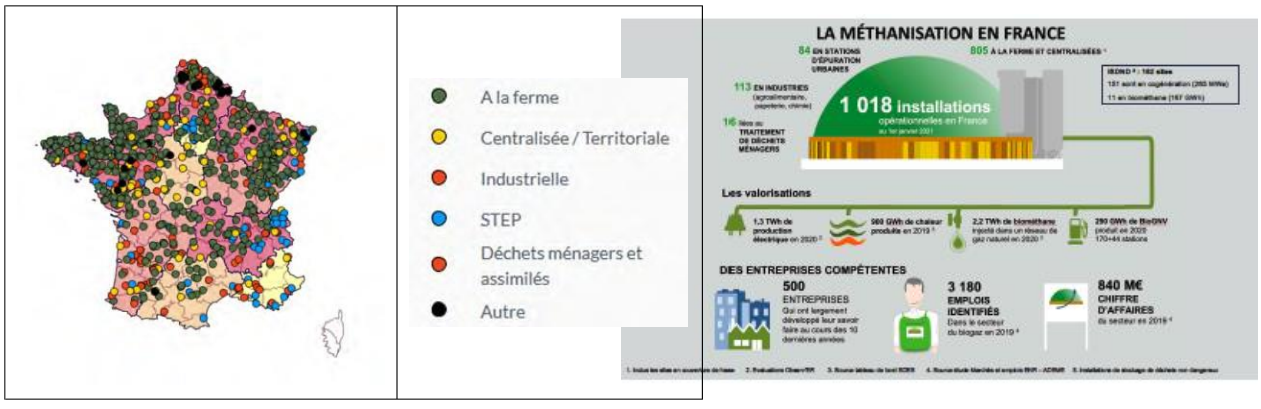
[209] https://oreca.maregionsud.fr/fileadmin/Documents/Donnees/SRB/doc43_SRB_PACA_avis_AE.pdf

Other non-forest resources contribute to the implementation of these biomass for energy strategies. Intermediate crops for energy, livestock effluents and other organic agricultural waste are important sources of biomass in several French regions, including the potential of using aquatic biomass (green algae, etc.). The development of biomass energy is a complex challenge at the crossroads of multiple uses of resources (food, energy, waste management, etc.) and environmental and landscape protection. The environmental impacts are far from insignificant, especially if the production models are not questioned in depth in terms of sustainability. The opinion of the environmental authority concerning the regional biomass plan for the Brittany region (2018-2023)[210] precisely points out several gaps in the assessment of the impacts on water, soil, air, landscapes and the reduction of greenhouse gas emissions. The environmental authority also highlights the inadequacy of the Natura 2000 impact assessment and the lack of an inventory of the main biomass installations and a comparison of the impacts on water and soil of the spreading of livestock manure compared to the spreading of methanisation digestate.

The development of the methanisation sector (production of biogas & digestate for fertilization) is already accompanied by a series of challenges and conflicts brought before the French courts. Large-scale methanisation projects (e.g. in Corcoué sur Logne in the Loire Atlantique) and the accident of a methanizer in Brittany (Finistère) in august 2020, which led to more than 180,000 people being deprived of drinking water, amplify the tensions and concerns.

The Confédération Paysanne (farmers'union) has therefore requested a moratorium from the public authorities in order to obtain a complete assessment of the life cycle analysis of the sector (environmental, agronomic and land use change, competition between agricultural crops). The 2019/1147 Law on energy and climate provides that at least 10% of gas would beof renewable origin by 2030 and thus to gradually reduce our high dependence on gas imports[211]. The French Senate's recent report on methanisation calls for a "clarification of public policies"[212].

At the end of 2020, there were nearly 1,075 methanisation installations (861 for electricity production, 214 for gas injection into the networks), most of these installations use agricultural biomass (86% of the installations)[213] and are small in size;



[210]https://www.bretagne.developpement-durable.gouv.fr/IMG/pdf/srb_bretagne_-_avis_de_l_autorite_environnementale.pdf

[211] Report of the Senat (n°872/2021) on Methanisation in the energy mix : issues and impacts. 36% Norwegian gas, 20% Russia, 8% Netherlands, 8% Nigeria, 7% Algeria, 4% Qatar. Biogas accounted for 3.4% of primary energy consumption from renewable sources in 2019.

[212] Report of the Senate (n°872/2021)

[213] Other sources: urban sewage sludge, household waste, urban green waste.

Map taken from the Senate 2021 report & Diagram Ademe (Methanisation in France)[214]

However, agricultural income from methanisation varies greatly depending on the economic model chosen, as the 2021 Senate report points out. France ranks second in Europe related to the number of installations for injected biomethane. The decree 2016/929 implementing the 2015 Law on energy transition limits the use of crops dedicated to energy to 15% of the total supply tonnage of methanisation installations. This choice distinguishes France from other Member States such as Germany (75% dedicated crops according to the French Senate).
The main agricultural sources are livestock manure, crop residues and intermediate crops. The installation are mostly located in 5 regions: Grand Est (20%), Hauts de France (16%), Bretagne (13%), Ile de France (9%), Pays de la Loire (8%). The "Energy Methanisation Autonomy Nitrogen" national plan launched by the government in 2013 aimed to reach the target of 1,000 on-farm methanisation plants by 2020, compared to 90 installations in 2012.

- *What kind of regulation covers these activities?*

The legislative and regulatory framework provides financial support and assistance for the deployment of the methanisation sector, including research projects and specific tax regime. This support strategy has been developed since the "Grenelle 1 and 2" Laws (environmental Laws) and has been reinforced by the Laws on energy transition and climate (2015, 2019) and the energy programming (programmation énergétique). The ministerial ordinance (ordonnance) of 3 March 2021 and the climate and resilience Law of 2021 set sustainability criteria which are now integrated into the specifications of investment aid managed by the agency "ADEME".

Methanisation installations are subject to the ICPE regime (specific heading/rubrique) since the decree 2009/1341 of 29 October 2009. Since 2010, several installations previously subject to authorization regime are now subject to the simple registration regime; and from 2018, in order to support the development of the sector, the thresholds for the authorization regime has been raised from 60 tonnes to 100 tonnes per day (decree 2018/458).
Heading/rubrique 2781 ICPE regime for methanisation installations for non-hazardous waste or plant matter, excluding methanisation installations for wastewater or urban sewage sludge methanised on the production site:

- Declaration if treatment of less than 30 tonnes of agricultural and/or plant inputs: i.e. 55% of existing installations (mainly on-farm methanisation plants)
- Registration for 30 to 100 tonnes/day: 27% of existing installations
- Authorization beyond (including a hazard study and impact study with a public enquiry: i.e. 18% of existing installations

[214] https://www.sinoe.org/thematiques/consult/ss-theme/29#access-popin

	Déclaration	Enregistrement	Autorisation
1. Méthanisation de matière végétale brute, effluents d'élevage, matières stercoraires, lactosérum et déchets végétaux d'industries agroalimentaires	La quantité de matières traitées étant inférieure à 30 t/j	La quantité de matières traitées étant supérieure ou égale à 30 t/j et inférieure à 100 t/j	La quantité de matières traitées étant supérieure ou égale à 100 t/j
2. Méthanisation d'autres déchets non dangereux	/	La quantité de matières traitées étant inférieure à 100 t/j	La quantité de matières traitées étant supérieure ou égale à 100 t/j
Procédure	Pas d'étude d'impact	Examen au cas par cas	Étude d'impact systématique

Diagram[215]

Following various accidents and risks presented by methanisation installations, the government has strengthened the legal framework: As of 1 July 2021, new ICPE orders for methanisation installations apply:

- Order (arrêté) of 14 June 2021 amending the order of 10/11/2009 setting out the technical rules to be met by methanisation installations subject to authorization
- Order of 17 June 2021 amending the order of 12/8/2010 relating to the general requirements applicable to classified methanisation installations under the registration regime (heading 2781 of the ICPE nomenclature)
- Decree of 17 June 2021 amending the decree of 10/11/2009 on the general requirements applicable to classified methanisation installations subject to declaration under heading 2781.

These texts require a distance of 200 meters (instead of 50 meters) between the neighbours and installations subjected to registration and authorization regime, and 100 meters for those subjected to declaration regime. They reinforce other requirements and impose, in particular, the obligation to cover digestates to limit odours, a preventive maintenance programme for gas leaks, retention capacities for digestate storage and rainwater collection with permanent site monitoring.

- *Are there any integrated approaches in the regulation and decision-making?*

Methanisation projects fall within the scope of the environmental authorization instituted by the 2017 ordinance in application of the 2015 law on growth, activity and equal economic opportunities (see below POINT A). They must also submit applications for building permits

- *How are conflicting interests balanced against each other?*

Conflicts and debates on the environmental and socio-territorial impact of important projects of methanisation appear. The issue of their carbon footprint is also debated in view of the risks of biogas leakage (from 1 to 25% of the biogas produced by existing installations) according to the INERIS (national institute for the industrial environment and the risks)[216].

[215] https://dervenn.com/projets-de-biomethanisation-quelle-reglementation-environnementale/
[216] See the report of the Senate on methanisation, 2021.

Other criticisms are also exposed, such as the risk of undermining the efforts to reduce agricultural waste and bio-waste (resources for biogas producers). The environmental associations question the risk that methanisation will serve as a "green caution" for industrial agriculture without questioning the intensive agricultural model (source of numerous environmental impacts such as water pollution and the proliferation of green algae (which also could be a major source of methanisation!). Recent accidents have amplified discussions particularly following the accident at the Kastellin methaniser (Brittany - Finistère) in August 2020, which led to the overflow of the digestate recovery tank (400 m3 of liquid digestate) into the environment[217].

The strengthening of the legal framework for methanisation plants (ICPE) in 2021 aims to respond to certain criticisms and opposition (risks, pollution, including odours) against the installation of such activities. Several compagny of the sector are reserved about these new obligations because of the additional financial costs, particularly for large methanisation units. The prevention of litigation risks methanisation projects is highlighted by the Senate report and by several authorities such as water agencies. The necessity to improve the quality of the projects, to guarantee the involvement of citizens as early as possible and to strengthen the monitoring of compliance with regulations is presented as a sine qua non condition for the "acceptability" of projects in the territories.

In addition to conflicts relating industrial and large projects of methanation, others conflict of interests of energy production and the "food vocation of agriculture and food sovereignty" is considered to be of primary importance in the Senate report. The 15% gross tonnage cap on inputs to supply methanisation plants is one response to this issue of developing crops for energy. The senators recognize that vigilance is required in "a context of increasing density of methanisation units". Another economic risk is also identified: the risk of a loss of control by farmers to the benefit of the methanisation industry.
The development of large-scale methanisation projects face strong opposition, such as the one in Corcoué sur Logne, south of Nantes (Loire Atlantique), with a volume of 1,366 tonnes per day. The Commune voted out against such a gigantic project in May 2021, even though its opinion cannot in itself block the procedure[218].

Some case start to be brought to administrative courts against methanisation plants. In a ruling of 26/5/2021, the Council of State considers that the methanisation unit intended to replace a pigsty causing strong olfactory nuisances "meets a reason of general interest by allowing the production of renewable energy through the recovery of bio-waste" and that "the economic viability of the project depends largely on the possibility of starting its activity as early as 2022"[219]. The Council also considers that "the nuisance, particularly the odour nuisance, that this project is likely to create for the applicants is no greater, and should even be *substantially* less than that which the applicants suffer from the spreading of slurry from the nearby piggery, which is due to close". It concludes that the request for suspension of the prefectoral order authorizing the operation of the unit should be rejected.

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[217] https://www.eau-et-rivieres.org/pollution-de-l'aulne-et-méthaniseur,https://www.actu-environnement.com/ae/news/centrale-biogaz-kastellin-36266.php4

[218] The municipality and the departmental Council are against this project. https://www.20minutes.fr/planete/3166119-20211105-loire-atlantique-conseil-departemental-dit-non-projet-methaniseur-xxl, https://www.debatpublic.fr/construction-dun-methaniseur-corcoue-sur-logne-44-1408, https://latetedanslegaz44.fr

[219] CE du 26/5/2021, n°436902, M.A, Mme B et association Ovide

Author: Nathalie Hervé-Fournereau & Simon Jolivet

Germany

The questions raised by the questionnaire here are too extensive to be answered in a meaningfully comprehensive manner. The presentation must therefore be limited to a sketch-like overall assessment of the situation of the internal ecological conflicts raised by agriculture and forestry. German law traditionally reacts to the multitude, intensity and complexity of the ecological effects of agriculture and forestry with the "agricultural privilege" (§ 14 II 1 Federal Nature Conservation Act – Bundesnaturschutzgesetz - BNatSchG). The "proper" agriculture and forestry on existing agricultural or forestry land is defined normatively - and counterfactually - as non-interference with nature. Agriculture and forestry is "proper" if it corresponds to certain normative content requirements of "good professional practice". The normative definition of this good professional practice therefore determines in fact whether a certain agricultural or forestry practice is permissible or not. Insofar as such a practice is normatively determined as permissible, it is no longer considered an encroachment on nature and is therefore not subject to any approval or notification requirements in particular.

The effects on nature and the environment associated with agriculture or forestry that meet the requirements of "good professional practice" are also to be regarded as non-existent and therefore do not have to be avoided or compensated for. The legislature and the secondary norm maker try to decide the conflicts between agriculture and forestry on the one hand and nature and environmental protection on the other hand on an abstract basis in advance and at the same time try to avoid corresponding disputes at the level of individual permits.

In order to facilitate the enforcement of nature conservation measures and to increase the acceptance of such measures among farmers and foresters, § 68 IV BNatSchG provides that the federal states can enact regulations on the appropriate compensation for use-restrictions for which no compensation is due according to constitutional property law. The conflicts resulting from restrictions on use are thus at least partially mitigated by monetary payments. Overall, it should be emphasized that with a view to adequately overcoming the internal conflicts between agriculture and forestry on the one hand and nature, environmental and climate protection on the other hand, the creation of a separate agriculture law and the adaptation of the forest laws are currently being discussed politically.

Author: Bernhard Wegener

Greece

The permitting procedure for the production of biofuels is the following: a) the environmental permit for the biofuel production installation, which is issued in accordance with the provisions of Law 4014/2011, as it is in force, and the Ministerial Decisions specifying the legislative framework. In the case that the biofuels production installation is going to be installed in a forest or in a forest area, an approval for intervention is integrated in the environmental permit.[220] b) the installation license and c)the operation license. The latter are

[220] In accordance with article 56 par.6 of the Law 2637/1998, as it is in force, the cultivation of energy plants, being classified as agricultural activity, is permissible in land which is classified as land of high agricultural

issued in accordance with the provisions of the Law 3892/2011, as modified by Law 4442/2016. Furthermore, in accordance with article 5A of the 3054/2002, as it is in force, a permit is required for launching biofuels on the market. It is worth noting that the pro-RES stance which characterizes the jurisprudence of the Greek Council of the State is ascertained also with regard to energy produced by biomass. In particular, the Court ruled that the Decision of the Minister for the Environment which annulled the environmental permit for a biomass energy producing installation in an area which was characterized as land of high agricultural productivity was not valid (Council of State Decision 225/2020). The Court's reasoning was based on the assumption that the installation of an industry producing energy by biomass in land of high agricultural productivity does not contravene the provisions of both the Specific Framework for Spatial Planning and Sustainable Development for RES and the provisions of Regional Framework for Spatial Planning and Sustainable Development of Crete. In addition, the Court took into consideration that the installation would also contribute to the maximization of the penetration of the various sources of Renewable energy which is considered a matter of high environmental and energy priority.

Author: Vicky Karageorgou

Hungary

The housing stock of Hungary is approximately 4.4 million. According to the Hungarian Statistical Office, more than 660 thousand dwellings - 15% of the housing stock - received district heating in 2020 in Hungary. District heating providers consumed 4 991 382 GJ energy from biomass. Furthermore, the Statistical Office reports that 38% of non-district heated residential buildings are heated by firewood. This means that approximately 1.5 million dwellings use directly firewood for heating.

The Hungarian regulation on biomass is based on the REDII Directive[221]. It comprises of a law and several decrees, all of them regulating biomass both from agriculture and forestry. The national strategies also play important roles as they indicate Hungary's long-term plans in this field.

The regulation on biomass, biofuels and bioenergy in Hungary follows the requirements set by the European Union. The REDII Directive was implemented in the Green Transport Act[222] and three decrees[223].

The Green Transport Act contains the main definitions on biomass, biofuel and bioenergy. Also, the sustainability criteria and the rules on the verification on compliance provided by

productivity and is constitutionally protected (article 24). Moreover, the installation of small-scale RES projects is also permissible.

[221] Directive (EU) 2018/2001 of the European Parlaiment and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources

[222] 2010. évi CXVII. törvény a megújuló energia közlekedési célú felhasználásának előmozdításáról és a közlekedésben felhasznált energia üvegházhatású gázkibocsátásának csökkentéséről

[223] 821/2021. (XII. 28.) Korm. rendelet a bioüzemanyagok, folyékony bio-energiahordozók és biomasszából előállított tüzelőanyagok fenntarthatósági követelményeiről és igazolásáról; 34/2021. (X. 6.) AM rendelet a megújuló energia előállítására szolgáló biomassza fenntartható termesztésére vonatkozó egyes szabályokról; 68/2021. (XII. 30.) ITM rendelet a bioüzemanyagok, folyékony bio-energiahordozók és biomasszából előállított tüzelőanyagok fenntarthatósági követelményeknek való megfelelésével kapcsolatos üvegházhatású gázkibocsátás elkerülés kiszámításának szabályairól

the REDII Directive are also implemented in this Act. The further specifications and requirements are implemented in three decrees, enacted by the Government, the Agriculture Ministry and the Ministry for Information and Technology respectively. The Government Decree further implements the Green Transport Act. The decree enacted by the Agriculture Ministry contains rules for the sustainable cultivation of biomass for renewable energy. The decree by the Ministry for Information and Technology provides the computational, technical side on biomass production and use. An important question is the permitting procedure of biomass power plants, which is discussed in our answer below.

The National Energy Strategy stresses the importance of solar power followed by the use of biomass[224]. The strategy sees great potential in the efficient use of biomass both in individual heating installations and in district heating[225].

- Are there any integrated approaches in the regulation and decision-making?
- How are conflicting interests balanced against each other?

The permitting procedure should be the forum where integrated approaches are maintained and conflicting interests are balanced. Therefore, in order to answer the above two questions, we have to analyse the Hungarian law on the environmental permitting system.

As I explained in my report of 2016, the Hungarian permitting system is complex and complicated, requiring several different steps and permits. New operations or substantial modification may obtain an (1) environmental permit based on an environmental impact assessment (EIA), an (2) IPPC permit, or a (3) unified environmental permit (exists only on paper yet). Ongoing activities will need an operation permit based upon an environmental review. Of course other types of permits may also be necessary e.g.: building permit, water uses permit, permit from the Energy Office. Hereinafter, we will focus on the environmental permits only and on the integrated approaches in this area.

Depending on the capacity of the biomass power-plant and the material that it incinerates, either an environmental permit based on an EIA (Annex I activities), an IPCC permit (Annex II activities), or a combination of the two should be obtained (when an activity falls under both Annex I and Annex II). There are cases where the capacity of the biomass-power plant falls below the thresholds set by Annex I and Annex II, hence it does not need an environmental permit under 314/2005 Government Decree.

From the viewpoint of the questions, the permitting procedure is important for two reasons. First, it sets crucial environmental requirements that the permitting authority must consider when issuing a permit. We will also discuss the evaluation of ecosystem services under this part. Second, it provides for rules on public participation.

1.Pursuant to Section 68 (1) of the Act on Environmental Protection, an environmental impact assessment must be carried out before the commencement of an activity that has a significant or expected significant impact on the environment. The results of the assessment must be presented by the applicant in an environmental impact assessment. In the environmental impact assessment, it is necessary to examine the baseline without the planned activity and to calculate and take into account the expected environmental impacts of the activity during the construction, operation and decommissioning periods.

[224] page 70
[225] page 44

An environmental impact assessment is therefore a method and procedure that provides an answer to the likely environmental risks of the planned investment and how we can try to reduce those risks.

According to the provisions of 314/2005 Government Decree, the environmental impact assessment procedure assesses the activitiy's impact on wildlife, biodiversity, landscape, land, air, water, climate, the built environment and cultural heritage elements, systems, processes and structures of environmental elements. The 2014 amendment to the EIA Directive has been incorporated into the Hungarian legal system; accordingly, the 314/2005 Government Decree already contains a certain level of biodiversity protection regulations.

The annexes of the 314/2005 Government Decree contain a number of requirements for investors to protect natural resources, in particular soil, land, water and biodiversity.

It can be seen from the text of the law that in many places it deals with the protection of biodiversity and natural resources, however, this is not exactly the same as requiring the assessment of ecosystems and ecosystem services. The assessment of the effects on biodiversity and the living world is obligatory according to the legislation, but the assessment of the ecosystem and the services it provides, which are also vital for people, is not actually required by the Decree.

The most important question to be decided in the environmental impact assessment of investments is whether or not the new environmental condition resulting from the practice of a particular human activity is acceptable to us, which may require an assessment of ecosystem services. The law, and most importantly the EU law based on which the Hungarian enviromental permitting law is founded, should be modified and extended to ecosystem services in order to apply a more integrated approach to nature evaulation.

As explained above under question B, right now the approach of the permitting authority is a „yes" or „no" evaluation – if the applicant meets the requirements prescribed by the law, the permit is granted. The balancing of different interest, a truly holistic approach that would be ideal from the viewpont of the environment and the ecosystem, is not dominnant in the permitting procedure.

2. According to the Government Decree, after an application to EIA has been submitted, the authority shall make public the fact that the impact assessment has been initiated and inform the public how they can make comments and ask questions. Simultaneously with the publication of the notice, the environmental protection authority shall send the notice, an electronic copy of the application and its annexes to the notary of the municipality, where the activity is located and presumably affected. The notary of the affected municipality shall ensure that the notice is published in a public and local manner without delay, but no later than five days. A public hearing should be held with the participation of the associations representing environmental interests if their intention to participate in the procedure has been announced and their status as a client has been confirmed to the environmental authority.The environmental protection authority shall examine the comments received from the public and include a summary and evaluation of the comments of the public in its decision. Similar regulation is applicable to the IPPPC permit procedure, with the difference that a public hearing is not mandatory, only an option.

As an Ombudsman for Future Generations I have seen many cases, where an environmental association participated in the permitted procedure and in some of the cases tried to enforce the environmental interest in a court proceeding. A legal system which enables the participation of the environmental association is highly desirable from an environmentalist perspective, because these associations can represent the environmental interests against other, mainly economic interests.

Authors: Erika Fiala-Butora, Eszter Zlatarov

Italy

Background and state of the art:

According to a recent report published by ENEA (the National Agency on new technology, energy and sustainable economic development) (source: ENEA, 'Considerazioni sullo stato dell'arte e le prospettive di sviluppo delle bioenergy in Italia, September 2020), bio-energies, both in the form of biofuels and as fuels used for the production of electricity and thermal energy, currently represent the main renewable energy sources in Italy. A statistical analysis by the GSE (*Gestore Servizi Energetici*) confirmed that in 2018 bioenergy covered the 49% of the gross final consumption of renewable energy and 8,7% of total consumption. The report also identifies the agricultural sectors as the main source of biomasses for energy production.

Therefore, according to the findings of the 2014 Bioenergy Sectoral Plan (i.e. *Piano di Settore per le Bioenergie*, drafted as a coordinated effort by the representatives of the various administration involved, see below), both agro-energy and the use of biomasses are considered as an opportunity for the Italian agricultural sector under two main aspects:

- First, they allow the implementation of more sustainable processes of production which feature the use of bioenergy and agro-energy sources for the agricultural companies' own uses.
- Secondly, they are also an opportunity to address some of the challenges that are currently affecting the agricultural sector, including in particular the progressive reduction of areas devoted to agriculture and their consequent degradation.

- *What kind of regulation covers these activities?*

Most legislation addressing biomasses and biofuels consist of provisions aimed at regulating the authorisation processes for the building and operation of energy installations using those fuels for the production of electricity or thermal energy, and the relevant economic incentives.

In that respect, the primary regulatory frameworks are represented by:

Legislative Decree 387/2003 and Legislative Decree 28/2011, which contain provisions governing the authorisation of installations for the production of energy from biomasses and biogas. Those installations require the so-called *Autorizzazione Unica* if their overall power is above 200 kW (for biomasses) and 250Kw (for biogas). For power threshold below 200Kw, the installations are instead subject to more simplified procedure.

The applicable legislation provides that, prior to the granting of the authorisation, the proponent needs to demonstrate to have the availability of the land where the installations will be situated. It also provides that the biomass plants can be situated in area which urban planning classify as devoted to agriculture. Nevertheless, the identification of the localisation of the plant shall take into account the norms on support of agricultural sector, with specific respect to the promotion of local agro-food tradition, the protection of biodiversity, rural landscape and cultural heritage.

Provisions concerning the traceability of the agro-energy supply chain: under Italian law, the use of certain types of biomass materials for the production of electricity is linked to specific economic incentives. In 2008, the legislation introduced in this context the concept of short production and supply chain (*filiera corta*) referring to the raw materials deriving from agriculture or forestry located within 70 Km from the energy production installations. The energy produced from those short-supply chain materials could benefit from additional economic incentives and a longer duration of the green certificates.

Provisions concerning the sustainability for biofuels and bioliquid: Legislative Decree 28/2011, implementing Directive 2009/28 on the promotion of the use of energy from renewable sources, introduced the concept that only biofuels regarded as sustainable ones, according to specific criteria may be considered for the achievement of the renewable energy targets and the relevant economic incentives. Pursuant to art. 38 of the said legislative decree, energy produced by installations plants using biofuels can benefit from the incentives only if complying with certain sustainability criteria. This aspect has been further implemented through Legislative Decree 55/2011 which, transposing Directive 2009/30, introduces the sustainability criteria for biofuels. Among these criteria are the requirements that lands used for crops and plants grown for use as biofuels location should not consist of areas with high biodiversity or high carbon stock. The said decree also introduces the obligation for the operators in the supply chain to provide relevant documentation demonstrating the respect of the sustainability criteria. A national system for the certification of the sustainability of biofuels and bioliquids was set up by a ministerial decree in 2012 and subsequently in 2019.

Legislative Decree 152/2006 (Environmental Code)

Provisions of the Environmental Code regulate the environmental impact assessment of installations producing energy using biomass or biofuels, defining the thresholds above which EIA is mandatory or screening is mandatory. EIA is mandatory for installations producing thermal energy with a power above 300MWt, and a mandatory screening for installations producing thermal energy with a power between 50MW and 150 MWt.

The Environmental Code also regulates the permits for the atmospheric emissions from combustion plants. According to these provisions, combustion plants using biomass are exempted from authorisation if their nominal power is below 1MW, whereas those using biofuels are exempted if they are below 3MW.

Qualification of biomasses as waste: of a certain relevance are also some of the provisions of the Environmental Code which apply to waste to the extent that biomasses can, according to certain interpretation, be considered as waste.

- *Are there any integrated approaches in the regulation and decision-making?*
- *How are conflicting interests balanced against each other?*

As noted above, with respect to the regulation of biofuels and biomasses, the existing legislative instruments are aimed primarily at regulating the economic incentives connected to the production of renewable energy from these sources. This legislation has been mostly adopted in transposition and implementation of EU Directives. Additionally, the interests related to the impact of biomasses and biofuels on the environment and the landscape are taken into account in the context of the EIA procedure and in the authorisation procedure, despite the fact that these provisions are more specifically related to the impact arising from the building and operation of renewable energy plants, including those fed by biomasses and biofuels, and do not seem to specifically address the biodiversity and other impacts connected to agriculture and land uses for the production of the raw materials.

Thus, so far there seems not to be a specific legislative instrument which addresses in a systematic manner the environmental or biodiversity impacts arising from growing crops and plants for the production of biofuels and/or biomasses. Nevertheless, it is possible to discern a number of recent initiatives of programmatic and planning nature which seek to integrate the aspects related to the production of renewable energy from biomasses and biofuels with the management of agriculture and forestry. With respect to the relationship between bioenergy and agriculture, of a particular relevance are the setting up of a specific entity for the agroenergy production chain (*Tavolo di Filiera per le Bioenergie*) established in 2012 by Decree of the Ministry of Agricultural and Forestry [DM 9800 of 27.04.2012] and the subsequent adoption of the Sectoral Plan for Bioenergy in 2014.

The *Tavolo di Filiera per le Bioenergie* sits within the Ministry of Agriculture and Forestry and is composed of national representatives in the fields of production, transformation and trade of agricultural and forestry products, representatives of the central administrations involved (i.e. several competent Ministries) and regional representatives. As part of this entity, specific working groups have also been established, each one addressing specific aspects, including among others a working group on legislation and simplification of the normative framework, and a working group on biomasses, biofuels, bioliquids, biogas, biomethane and green chemistry.

The drafting of the Sectoral Plan for Bioenergies (*Piano di Settore per le Bioenergie*) is probably the most important output of the work of the *Tavolo di Filiera per le Bioenergie*. The Plan was adopted in July 2014 through the Conference of State-Regions and is considered as the first step towards the realisation of a unified legislative text on agro-energies (*Testo Unico per le Agroenergie*) – https://www.rinnovabili.it/mobilita/piano-di-settore-bioenergie-666/.

The aim of the plan is to identify and highlight the main opportunities as well as the current shortcomings of agroenergy and bioenergy production chains and outline possible strategies. It also seeks to identify further actions which may demonstrate that it is possible to achieve coherence between the production of energy from biomasses and the sustainable development of the agricultural and forestry sector. The plan considers the development of bioenergies as

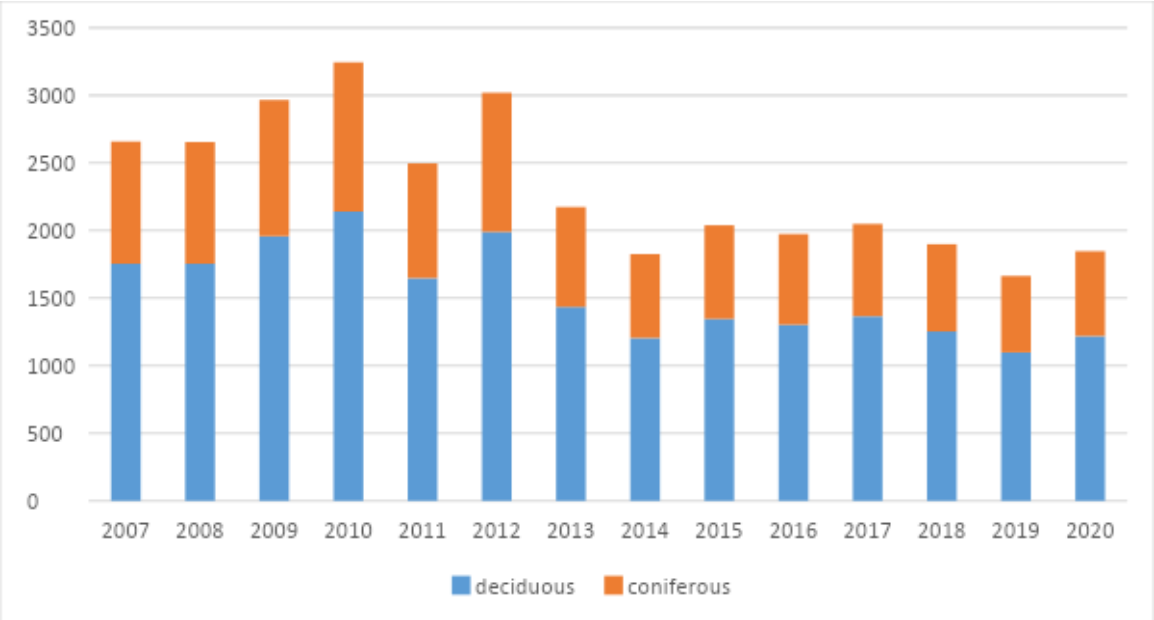
an opportunity for the agricultural sector to the extent that it allows to further differentiate not only energy sources but also the uses of the land so that it may eventually represent a win-win solution for both the energy and agriculture sectors, as well as in terms of land uses. The plan seeks to promote the idea of a multifunctional agriculture, that is an agricultural sector that besides the production of food also includes production chains aimed at producing renewable energy. It also seeks to outline the conditions necessary to ensure that bio-energies contribute effectively to achieve and even going beyond the objectives established by the National Renewable Energy action plan.

Authors: Massimiliano Montini and Emanuela Orlando

Norway

Almost all liquid biofuel sold in Norway originates abroad (99 %). The remaining 1 % (i.e. 5.4 million litres) is essentially derived from forestry. This, together with firewood, thus represents almost all biofuel produced in Norway, and is the reason why I will focus on forestry. Figure 4 provides an overview of commercial production of firewood in Norway since 2007. In addition, we may assume that considerable amounts of firewood is harvested by forest owners for their own consumption.

Figure 4, firewood for sale, 1000 m3, 2007-2020



In the five years from 2016-20, firewood has been at approximately 15 % of the total harvest of forests for commercial purposes.

2) Regulation of firewood harvest
a) Regulation: The Forestry Act (2005) as well as the Regulation concerning Sustainable Forestry (2006 no. 593), which implements the Norwegian PEFC Standard, do not distinguish

between forestry for industrial purposes and forestry for energy purposes. EU Regulation 995/2010 applies to Norway.

b) Integrated approaches: There is no duty to obtain any permit before cutting trees for the purpose of producing firewood. The only permit requirements are related to the planting of alien species.

c) Conflicting interests: Some conflicting interests are balanced through rules prohibiting certain practices (destruction of wetlands, introduction of alien species in some circumstances, protection of surface water) and rules imposing a duty of caution upon the property owner (safeguarding recreational usage). Such rules are set out in the Act and Regulation.

Author: Ole Kr. Fauchald

Poland

Forests in Poland occupy nearly one third of the country's area[226] and perform a number of extremely important functions:

1) economic (production and reproduction) and

2) non-economic functions, including ecological (beneficial effects of forests on human habitat) and social (forest as a place of recreation) ones[227].

In 2018–2020, approximately 7.5 million m3/year of wood assortments used for energy production were harvested in Polish forests, accounting for 17–18% of the total wood harvest[228]. Between 2004 and 2020, the annual consumption of woody biomass for energy production increased in Poland by 9.5 million m3 (69%) from 13.8 million m3 to 23.4 million m3[229]. This increase was almost entirely due to growing consumption in the energy sector and the wood and paper industry. This indicates the potential scale of the collision between economic and ecological interests in relation to forest management.

It should be pointed out that a special type of forests are „protective forests", which are subject to special protection (Art. 15 of the Forest Act).

„*Protective forests are a specific type of forests that perform non-productive functions (in particular, ecological and social functions), whose primary purpose and condition of existence is to protect certain animate and/or inanimate elements of the natural environment or to be protected in situations indicated in the Forest Act. In other words, protective forests are forests that require special protection due to their functions or an existing threat, whose closed catalogue of types is specified in Article 15 of the Forest Act*"[230].

[226] According to the Report on the State of Forests in Poland in 2013, compiled and published by the Information Centre of the State Forests, the forest area is 29.4% of the country. The report is available at:http://bip.lasy.gov.pl/pl/bip/raporty_i_prognozy (access date: 12 September 2022).
[227] R. Jaszczak, Funkcje lasów, [in:] W. Kusiak, R. Jaszczak, Propedeutyka leśnictwa, Poznań 2009, p. 62-63.
[228] https://pracownia.org.pl/upload/filemanager/pracownia.org.pl/Publikacje/Lasy-do-spalenia-raport-2022.pdf, p. 13 (access date: 12 September 2022).
[229] https://pracownia.org.pl/upload/filemanager/pracownia.org.pl/Publikacje/Lasy-do-spalenia-raport-2022.pdf, p. 13 (access date: 12 September 2022).
[230] Judgment of the Supreme Administrative Court of 6 December 2017, II OSK 508/17, LEX No. 2411593.

1. *Forest management*

The concept of forest management is central to the functioning of forests and the resolution of conflicting interests. Pursuant to Article 1 of the Forest Act, the act in question „*lays down the principles of preserving, protecting and increasing forest resources and the principles of forest management in connection with other elements of the environment and with the national economy*".

Thus, forest management cannot - by the intention of the legislator - abstract from other elements of the environment (e.g. nature) and at the same time it is an important element of the economy (e.g. woody biomass). This is reflected in the definition of this concept, according to which forest management means „*(...) forestry activities in the field of management, protection and management of forest, maintenance and extension of forest resources and crops, game management, extraction - except purchase - of timber, resin, Christmas trees, stemwood, bark, needles, game and undergrowth, as well as the sale of these products and the implementation of the non-productive functions of forest*""(Art. 6 (1)(1) of the Forest Act).

"*Forest management shall be carried out according to the following principles: 1) general protection of forests; 2) sustainability of forest maintenance; 3) continuity and balanced use of all forest functions; 4) expansion of forest resources*" (Art. 8 of the Forest Act). This catalogue is referred to as the general principles of forest management, these principles are interrelated and meet each other[231].

Sustainable forest management is carried out according to a forest management plan or a simplified forest management plan (Art. 7 (1) of the Forest Act). The concept of sustainable forest management means "*(...) activities aimed at shaping the structure of forests and their use in a manner and at a rate ensuring the permanent preservation of their biological richness, high productivity and regeneration potential, vitality and capacity to fulfil, now and in the future, all important protective, economic and social functions at local, national and global levels, without detriment to other ecosystems*".

2. *Forest management plans*

Forest management plans are documents that constitute the basis for forest management in the area for which they have been adopted, and at the same time serve to resolve conflicting interests, including those between different environmental interests[232]. The achievement and pursuit of sustainable use of all forest functions is implemented on the basis of forest management plans. The legislator introduces their dichotomous division into:

1) forest management plans prepared for forests owned by the State Treasury, and

2) simplified forest management plans prepared for forests that are not owned by the Treasury, as well as for forests that are part of the Agricultural Property of the State Treasury.

[231] Cf. J. Pakuła, J. Pakuła, Pojęcie i zasady gospodarki leśnej, [w:] B. Rakoczy (red.), Wybrane problemy prawa leśnego, Warszawa 2011, s. 94.

[232] According to Article 6 (1) (6) of the Forest Act, a forest management plan is understood as "a basic document of forest management developed for a specific object, containing a description and assessment of the condition of the forest and the objectives, tasks and methods of forest management". The forest management plan shall be drawn up, as a rule, for 10 years, taking into account: 1) natural and economic conditions for forest management; 2) objectives and principles of forest management and ways of their implementation, defined for each stand and managed object, taking into account protection forests (Article 18 (1)).

The essence of both types of plans, as emphasised by the jurisprudence of administrative courts, is *"(...) to define the principles of forest management. They determine the evaluation of forest resources, and the findings of forest management plans are incorporated into local spatial plans and land and building registers*"[233].

The Act on Forests (Art. 22 (1) and (2)) stipulates that the minister responsible for the environment, in relation to forests owned by the State Treasury and those forming part of the Agricultural Property of the State Treasury, and a public authority in relation to other forests, approve forest management plans/simplified plans.

Differentiation of planning documents in the forest management was made by the legislator according to the criterion of ownership rights, which, according to the jurisprudence of administrative courts, determines the legal nature of the procedure under which forest management plans are subject to approval.

Simplified plans (concerning private forests) are approved by a decision of the public authority (*starosta*), which is not preceded by an EIA but can be preceded by Natura 2000 assessment.

The adoption of forest management plans concerning forests owned by the State Treasury requires SEIA procedure which involves, *inter alia*, public participation.

As regards the possibility of judicial control of plans, in the case of simplified forest management plans approved by an administrative decision, administrative courts may control them from the point of view of legality.

In the case of the forest management plans approved by the minister responsible for the environment (concerning forests owned by the State Treasury) the prevailing view is that such a plan „*is an action of an internal nature undertaken in connection with the performance of tasks of an owner, so it is an activity in the sphere of dominium, and not imperium. Therefore, the administrative court has no jurisdiction to review minister's*[234] *approval of a forest management plan*"[235] (no cognition of an administrative court).

This in turn means that administrative courts, in the case of simplified plans issued in relation to forests owned by private entities, are competent to carry out their control (also from the perspective of obligations under the Habitats or Birds Directives), whereas in the case of plans issued for forests owned by the State Treasury, there is no judicial procedure to control their legality.

3. Content of forest management plans

Sustainable forest management based on forest management plans (regardless of the form of ownership) must take into account a number of objectives and conflicting interests, which are indicated by the legislator in the form of an open catalogue. These are - according to Article 7 (1) of the Forest Act – the following objectives: „*1) the conservation of forests and their beneficial effects on climate, air, water, soil, living conditions and human health, and the balance of nature; 2)protection of forests, especially forests and forest ecosystems*

[233] Cf. the judgment of the Supreme Administrative Court of 12 April 2012, III SA 2312/01, CBOSA.

[234] Cf. the judgment of the Supreme Administrative Court of 12 March 2014, II OSK 2477/12.

[235] Cf. the Supreme Administrative Court in its decision of 17 October, 2017, II OSK 2336/17; similarly, the judgment of the Supreme Administrative Court of 12 March 2014, ref. II OSK 2477/12.

constituting natural fragments of native nature or forests especially valuable due to: (a) preservation of natural diversity, (b) preservation of forest genetic resources, (c) landscape values, (d) needs of the science; (3) protection of soils and areas particularly vulnerable to pollution or damage and of special social importance; (4) protection of surface and deep water, retention of catchment areas, particularly in watershed areas and in areas of recharge of underground water reservoirs; (5) production, on the basis of rational economy, of timber and raw materials and by-products of forest use".

Forest management in forests that are nature reserves and those which are part of national parks shall also take into account the principles set out in the provisions on the Nature Conservation Act (Art. 7(2) of the Forest Act).

The forest owner is obliged to comply with the requirements of good forest management practice in the preparation and implementation of forest management (Art. 52b (1) of the Nature Conservation Act). The requirements of good forest practice shall take into account the need for protection of species listed in Annex IV of Habitats Directive, including protected bird species.

Under the relevant law, the minister responsible for the environment should lay down, by regulation, the requirements of good forestry practice, guided by the need to ensure the protection of species, in particular species of Community interest and protected bird species. However, no such regulation has been issued to date.

Authors: Barbara Iwańska, Mariusz Baran

Portugal

- *What kind of regulation covers these activities?*

There are different regulations applicable to forestry:

  - For "production forests" (composed of alien species like the eucalyptus) the regulation applicable is mainly aimed at preventing wild fires.
  - For "conservation forests" (composed of endogenous Mediterranean species, such as oak, cork oak, holm oak, carob tree, holly, etc) the law applicable restricts clear cuts and is aimed at ecosystem protection and defence against risks (invasive species, fire, forest pests and diseases)

- *Are there any integrated approaches in the regulation and decision-making?*

Yes. In the 90's legislation was adopted to make replacing traditional forest with planted forest more difficult. In the 2000's administrative simplification was adopted to facilitate any activities of reforestation, regardless of the forest species. Now the reforestation activity is more controlled regarding the species and the areas to prevent continuous areas of monoculture. The objective is to create a mosaic landscape.

In 2018 a pilot project to reconvert burned areas with autochthonous forest species was adopted. https://www.cense.fct.unl.pt/news-events/new-policy-provision-and-remuneration-

ecosystem-services-rural-settings-portugal-report It was based on the concept and methodology of ecosystem services and resulted in a triangular contract signed between the Portuguese Environmental Agency, the land owner and specialized forest management companies to last for 20 years.

- *How are conflicting interests balanced against each other?*

In the moment of authorisation, the reforestation project is analysed.
In the case of the project for payment of ecosystem services the balancing occurred when the pilot areas were chosen. One is an area of international importance (SPA, ZEC, binational biosphere reserve) and the other was emblematic because it was the only piece of forest that did not burn during a severe wildfire. This served as a demonstrator that autochthonous species resist better to forest fires than planted forest (softwoods and eucalyptus).

Author: Alexandra Aragão

Slovenia

- What kind of Regulation covers these activities?

From the outset, I point out that there is currently no production of biofuels in Slovenia. To my information biofuels are not so popular in Slovenia. Although the prevailing opinion follows warnings that biofuels are causing negative effects to the environment, the interest for biofuels is growing. Slovenia is still among the less ambitious countries. Although Slovenia is otherwise very concerned with how to achieve the goals of sufficient shares of renewable energy sources in transport. But since electrification is progressing too slowly, we rely more and more on biofuels as well. Since we do not have refineries, we import ready-made mixtures of diesel fuel and gasoline.

Slovenian suppliers annually report the amount and type of both fossil and biofuels sold on the Slovenian market, but they do not have to report the origin of the biofuel. There are no official data on the country of origin. Available information for the year 2020, in the case of biodiesel, is about the composition that meets sustainability criteria, and among the raw materials for individual units are rapeseed, sunflower oil, palm oil, used cooking oil, waste animal and vegetable oils and other oil plants. All biofuels are certified to meet sustainability criteria. The suppliers mostly use voluntary systems recognized by the European Commission to obtain certificates on sustainability criteria.

Last year adopted *Regulation on sustainability criteria for biofuels and greenhouse gas emissions in the life cycle of transport fuels* transposes the requirements of the EU Directive on the quality of petrol and diesel fuels. The Regulation is very technical, but I understand there is a limit to when it is worth using natural resources for biofuels.

The principle in the Regulation is restricted use of crops primarily used for human consumption. To achieve the GHG emission reduction target, a limitation to the use of biofuels produced from high-starch crops is set to 70% of the total energy value of biofuels used in a given year. Also, to accelerate the transition to the production and use of advanced biofuels, a 0.5% share of advanced biofuels (for example, biomass waste, algae, and sewage

sludge) should be used. Furthermore, to promote the use of electric vehicles, the contribution of electricity consumed in road transport is weighted by a factor of 2.5.

- *How are conflicting interests balanced against each other?*

The integrated national energy and climate plan does not provide for significant imports of wood biomass for energy purposes. Its policy is the following: "Maximizing the share of Slovenian wood processed domestically for products with the highest added value (strengthening value chains), using only wood that is not suitable for industrial processing into semi-finished or finished products and using wood for energy purposes (including as a source for synthetic fuels). Wood biomass from Slovenian forests is an essential factor in mitigating climate change, sustainable development, the security of the heat supply, positive economic effects, synergistic effects throughout the wood processing chain and reducing dependency on imports. The economic aspect is also essential since using lower quality wood for industrial and energy purposes greatly improves the economics of wood processing chains."
And it continues: "Wood biomass waste is essential in producing heat and electricity in district heating systems, using the latest technologies to reduce air pollution. However, it will only be possible to use wood biomass for energy purposes in a controlled and environmentally friendly manner to not cause excessive particulate and volatile matter emissions. This challenge is feasible from both educational, legislative and technical perspectives."
"Increasing the use of biomass in modern (BAT) individual, collective and industrial installations for heating and generating heat and power is essential for Slovenia. It makes it possible for the country to improve reliability and competitiveness in the energy supply, reduce greenhouse gas emissions, and protect the environment."

Author: Rajko Knez

Spain

Currently, the remuneration for renewables, cogeneration and waste is contemplated in Royal Decree 413/2014, of June 6, which regulates the activity of electricity production from renewable energy sources, cogeneration and waste. This regulation establishes the remuneration regime for renewables, based on the receipt of income obtained from the sale of electricity to the market, plus an additional remuneration that is calculated through a series of standardized parameters in accordance with the technologies existing in the market.

Law 45/2007, of December 13, 2007, for the sustainable development of the rural environment, creates a Sustainable Rural Development Program. The Program may include measures aimed at:

(a) The production of energy from biomass and biofuels, providing incentives for agricultural energy crops that meet sustainability criteria and the prevention, reuse and recycling, in this order of priority, of waste, favouring energy recovery for those that cannot be reused or recycled.
(b) The production of energy from biomass, particularly from fire prevention operations and sustainable forest management plans, and from forest, agricultural and livestock waste.

(c) The production of energy from biofuels, provided that it is from agricultural energy crops adapted to local circumstances and compatible with the conservation of biodiversity.
(d) The substitution of public and private consumption of non-renewable energies, the maintenance and increase of the performance of vegetation cover as a CO2 sink, the reduction of carbon dioxide emissions and other greenhouse gases, and the adaptation of the activities and uses of rural inhabitants to the new environmental conditions resulting from climate change.

The programme for the period 2014-2020, approved by Royal Decree 752/2010, of 4 June, included measures for the promotion of agro-energy crop production. This refers both to sugar-producing crops (cereals, Jerusalem artichoke, etc.) for the production of alcohol and oilseeds for the production of biodiesel by transesterification of the oil, and to tree crops (poplar, willow, elm, ash, paulownia, etc.), with high density plantations (20-40. 000 plants/ha), cutting shifts of 2-3 years and obtaining wood chips for combustion and production of thermal and electric energy. The Programme also included actions related to the use of biomass from forestry residues or plantations. However, protected natural areas and Natura 2000 Network sites whose management plans do not expressly authorize and regulate this type of action, are excluded.

The National Integrated Energy and Climate Plan 2021-2030 foresees the promotion of biomass energy with sustainability criteria.

(a) Regulatory development throughout the biomass value chain.
(b) Strategy for the energy use of pruning in the agricultural sector.
(c) Adaptation to the obligations related to air quality in both new and existing biomass installations.
(d) Promotion of certification and the principle of proximity of origin in the use of biomass.
(e) Dissemination and promotion of high efficiency and low emission local heating equipment.
(f) Specific training for installers and other professionals in the biomass sector.
(g) The establishment of consensual bases for the harmonized implementation (and creation, if necessary) of the tax on the deposit of municipal and industrial waste in landfills will be favoured, as it already exists in different Autonomous Communities.

The judgments of the High Court of Cataluña provide some illustrative examples regarding biomass installations.

(a) Judgments of 22 November 2017, appeal 107/2014 and of 9 March, 2018, appeal 105/2014, concerned the appeal against the final approval of a special urban development plan for the regularization of a 14 MWe biomass plant. The court held that the plan was subject to SEA and quashed the authorisation.
(b) In judgment of 14 December 2016, appeal 211/2012, it held that the annulment of the definitive approval of a special urban development plan for the construction of a biomass power plant was correct, owing to the lack of studies justifying other installation alternatives.
(c) In Judgment of 21 December 2016, appeal 72/2014, an NGO and the government of the autonomous community of Cataluña challenged an amendment to an urban plan authorizing the installation of an electric energy production plant using biomass on specially protected undeveloped land. The plan classified the area as urban land and allowed that the remaining area (which would maintain its status as undeveloped land) be

used as a fuel storage area. The reasons given for such amendment did not contain a real weighting focused, as the main premise, on the sacrifice or diminution of the values that have led the territorial planner to classify the land as protected. Beyond seeking the most convenient and beneficial option for the company operating the plant, the other reasons that were offered to justify the decision were far are far from justifying the need to locate the activity precisely on special protected land.

Authors: Agustín García-Ureta, Ángel-Manuel Moreno Molina

Sweden

In Sweden (and Finland), forestry is undertaken by way of large scale clear-cutting operations, covering anything between a couple of hectares to more than 100 hectares.[236] The latter is however rare today and the average size is between 4 and 8 hectares depending on the region (larger to the north of the country). Clear-cutting operations have a significant impact on the environmental, most importantly on species and waters.

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In most regions, a clear-cutting operation does not require a permit according to the Forest Act (1979:429, SVL). Instead, it suffices with a notification to the Forest Agency six weeks ahead of the operation. These notifications are made on the web and the authority's processing of the case is "automatic". The meaning is that if not a map layer alerts that the area is sensitive in any aspect (species, Natura 2000, waters, erosion, cultural heritage or ancient remains, etc.), the notification simply runs through the system without any control from an officer at the Agency. This happens in about 10-20% of the cases, the rest are controlled "at the desk" so to speak. Actual visits to the site for the operation rarely occurs (at the most 1% out of 70,000 notifications per year). There is no obligatory planning for the forestry, although a "forest plan" is one of the conditions for certification through FSC or PEFC. In areas with mostly certain broad leaf trees (south part of the country), areas sensitive to soil erosion (Baltic islands, coasts) and with tougher conditions for regeneration (mountains), there is a permit requirement. However, in practise the case handling at the Forest Agency does not differ very much in these cases compared with the handling of notifications, at least in substance.

It should also be noted that Sweden and Finland take the position that irrespective of the size of an operation and what kind of environmental impact is has in the forest, the EIA Directive does not apply. This interpretation rests upon that the project description *Initial afforestation and deforestation for the purposes of conversion to another type of land use* (Annex II; 1(d)) does not cover forestry, as these operations do not change the type of land-use (continued forestry). Be that as it may, the result is that major projects are undertaken in the forests without any preceding investigation as to the impacts on the environment or any other interests.

The Forest Act and the Environmental Code is both applicable on forestry in parallel. However, according to case-law under the Forest Act (HFD 2020 ref. 12), no one can appeal an omission (a decision not to make a formal decision, a so-called 0-decision) by the Forest

[236] During 1970s-1980s a clear-cutting area could even amount to 1,000 hectares thus creating climatic deserts in the forests.

Agency. Thus, if the Agency does not intervene to a clear-cutting operation with anything but advice, this standpoint cannot be challenged in court. This standpoint concerns not only the environmental interests, but also the Sami villages and their cultural and land-use rights according to EU law, ECHR and international law (Article 27 ICCPR, ILO169, etc.). As for the ENGOs, they may use the Environmental Code to get access to the courts instead (MÖD 2021:11). When alerted about a notification (published on the web), they demand that the Agency handles the case under the Code. When the Agency so refuses, that standpoint is actionable in the Land and Environmental Court. Recent years, these courts have to an astonishing extent stopped clear-cutting operations in sensitive areas and demanded further investigation. Most commonly, these cases have concerned the protection of species and birds. But obviously, compared with the huge amount of notifications (70,000/year), such interventions (10-15/year) represent merely a minor spit in the ocean.

The overarching aim of the Forest Act is production. Truly, the legislation also includes a wide catalogue of other interests that shall be taken into account when undertaking different forestry operations. However, considerations to these "counter-interests" are expressed as recommendations only. Even so, they are allowed to impact the operation in a very limited extent and commonly only if the landowner is compensated for these measures. Accordingly, there is not "weighing of interests" in the forest. Thus, the most important instruments for giving more importance to other interests in the forest is by way of market instruments. Even though both the FSC and PEFC brands are rather weak and do not have effective control functions, the picture may differ in other situations. For example, in densely populated areas with lot of people hiking, the landowner is way more restricted in the land-use activities. Even if s/he is strictly speaking allowed to perform large scale clear-cutting operations in those areas, the negative PR effect would be devastating to the business. In that way, at least certain eco-system services are taken into account in the forests. The environmental authorities may also intervene under the Code to protect certain water bodies or in order to avoid soil erosion, but this happens rarely. All in all, the ecosystem services have no legal avenue for becoming a part of a "weighing of interests".

Author: Jan Darpö and David Langlet

Switzerland

Factual background: Energy from renewable sources amounted to around 27 % of total energy consumption in Switzerland. As for electricity, 62 % is produced from renewable sources (mainly hydro power [55 %], solar power [4 %], but also from waste [2 %], biogas from sewage [0.2 %] and biomass [1 %]. As for heat, the renewable part is split in the following manner: biomass [51 %], waste [14 %], environmental heat (geothermics, geothermal heating) [30 %] and sun [4 %].
Biomass amounts to roughly 8 % of total energy consumption in Switzerland or 35 % of the renewable part of energy. Biomass mainly stems from wood [52 %] and the biogenic fraction of garbage and industrial waste [32 %]. A smaller fraction is constituted by biofuel [9 %] and biogas [7 %].

Currently there are 640 biogas plants operating, most of them being part of water sewage installations. In total they produce 372 GWh in electricity and 345 GWh in heat. For energy

production they only use farmyard manure as well as organic waste products, which cannot be used for human or animal food. Therefore, no products based on "energy corps" are being used.

- *What kind of regulation covers these activities?*

At first sight, biogenic fuels could play an important role in Switzerland, given the fact that they can be exempt from mineral oil tax. As the tax currently amounts to 73 cents for benzene and 76 cents for diesel, the exception could constitute a decisive advantage for biofuels. The crucial regulatory aspect of biofuel taxation however resides in the (cumulative) conditions applicable for the exemption (art. 12b(1) Federal Mineral Oil Tax Act; for details cf. art. 19c s. Federal Mineral Oil Tax Ordinance):

1. They need to produce significantly less greenhouse gas emissions than fossil gasoline from the time the feedstock is grown to the time it is consumed,
2. they must not pollute the environment significantly more than fossil gasoline from the cultivation of the raw materials to their consumption,
3. the cultivation of the feedstock may not have required the conversion of land with high carbon stocks or with high biodiversity,
4. the feedstocks have to be grown on land that was legally acquired and
5. the biogenic fuels were produced under socially acceptable conditions.

As these restrictive conditions apply both for imported and for locally produced biofuels, the conflict with agricultural interests and food security is somewhat defused. Conditions 1-4 are deemed to be fulfilled when biogenic fuels are produced from biogenic waste or production residues (art. 12b (2) Federal Mineral Oil Tax Act) and thus, in practice these are the only sources of biogenic fuels used. Fuels from rapeseed or sugar cane only receive the tax relief if proof of the named conditions is provided in the individual case. So far, this has apparently not been achieved in practice. As for fuels stemming from palm oil, soy or cereals, they are considered to constitute a threat to the rainforest and biodiversity. Therefore, these do not receive any tax relief. The general slogan for this restrictive approach is "plate – trough – tank".

Generally, manufacturing plants which intend to sell or use biofuel within their undertaking need to obtain a permission granted by the Federal Office for Customs and Border Security. In addition to this, they may also need a permission to process waste subject to control as well as a permission to deal with animal by-products which are both granted by the Cantons.

- *Are there any integrated approaches in the regulation and decision-making?*

There seems not to be any explicit coordination or integration. This is quite understandable given the subordinate nature of this sector.

- *How are conflicting interests balanced against each other?*

When it comes to biofuels, there is a strong political will to limit agro-forestry or the production of biogenic fuels from other sources than biogenic waste or production residues in general.

As for forestry, conflicts of interest seem not very virulent because forest is traditionally afforded a very strong legal protection in Switzerland (close to an absolute protection when it

comes to any conflicting interests in spatial planning). Therefore, the production of wood is somewhat shielded from other interests. At the same time there is no ambition to further increase the surface covered by wood in the country. Even in this context of a stable surface for wood production, the use of wood for energy purposes has steadily increased since the 1980ies and currently amounts around 5 % of total energy end-use.

Author: Markus Kern

The Netherlands

The discussion on the use of biomass has been rather intense in the Netherlands, both for reasons of nuisance of (smaller) installations for producing green gas / heat / electricity and for reasons related to production of biomass (mostly for harvesting methods related to for forests in the Netherlands, but predominantly in other countries).

Large amounts of subsidy have been granted to use biomass in (large) power plants, also to add biomass to the fuel in coal-fired power plants.[237] Legally, the conditions for receiving the subsidy was that the biomass must be sustainable. These sustainability requirements are - according to government - among the strictest in the world and relate to, among other things, carbon debt and indirect land use change. For the use of biofuels for transport, the sustainability criteria from the European Renewable Energy Directive (RED) apply. For biomass for energy applications without subsidy and for chemicals and materials, there are currently no legal sustainability requirements. However, many parties voluntarily (sometimes after negotiations with NGOs) use private certification schemes, such as FSC, PEFC or Better Biomass, to demonstrate the sustainability of the biomass used.

The sustainable use of biomass for the transition phase (2030-2050) depends not only on guaranteeing the sustainable production of biomass, but also on the balance between supply and demand and the high-quality use of biomass. Moreover, it is deemed important to take into account the effects of biomass use on (local) air quality when deploying sustainable biomass. That is why the Climate Agreement (2019) includes agreements on all aspects of the sustainable use of biomass: 1) to establish an integral sustainability framework for biomass, 2) increasing the supply of sustainable biomass, and 3) the high-quality deployment of sustainable biomass. Of course, implementation and enforcement of EU (new) uniform regulations on the sustainable use of biomass is relevant in that respect. Sustainable bioenergy relies on natural capital and must maintain or enhance ecosystem conditions and the delivery of ecosystem services.

In many concrete cases it is up to the project developer to monitor the use of biomass and allow for checks on its sustainable (production) and use. And therefore a question of enforcement by government.

Author: Kars de Graaf

Turkey

[237] At the moment no subsidy for using biomass is made available for producing only electricity.

C.1. Policy and legislation for agro-energy production

The government's policy to maximize the use of renewable energy resources is also valid for biomass because it is explicitly placedamong the renewable energy resources under the above mentioned (title **A.1**) several regulations regarding electricity and renewable energy, and enjoy the same support mechanism provided for them. Agro-energy production is significant particularly in terms of existence of huge amount unused agricultural area. These areas are expected to use to grow energy products. Therefore, it is not surprising that, in a recent Presidential decision, biomass is entitled more income support then wind and solar power[238].However, currently installed biomass capacity is far from the expected amount.
The main regulations regarding production of biomass through agriculture are the above mentioned (title A.1) two laws on renewable energy and electricity market and related by-laws. Under these laws "biomass" has been cited Other major regulations are as following:- The Law on Environment. – The Law on Petrol Market. -The Law on Agriculture. -The law on Organic Agriculture. – The Law on Land Use and Soil Protection. - By-law on the Control of Vegetable Waste Oils. -By-law on the Management of Vegetable Oils. - By-law on the License for Petrol Market. -By-law on the Technical Criteria for Petrol Market. – The Circular on Technical Aspects of Benzene Types. – By-law on Waste Management. – By-law on the Protection of Waters Against Nitrate from Agriculture Resources. - By-law on the Animal Products not Used for Human Consumption. - By-law on Market Monitoring and Inspection of Fertilizers Used in Agriculture.

As to non-binding documents, apart from the above- mentioned (under the title A.1) policy documents with regard to renewable energy the main specific document is the Report on Evaluation of Necessary Conditions for Biogas Investments in Turkey (2011) prepared according to Turkish-Germany Biogas Project(most of existing biogas facilities are constructed under this project). This report includes data regarding Turkish agriculture, industry, animals, existing biogas facilities as well as information concerning energy policies, biogas potential, legislation, and technical issues as conditions and processes to produce and use biogas. The second document prepared in the context of the same project is the Biogas Guide[239]. However, this guide includes information based on German legislation and experience.

C.2. Integrated approaches in the regulation and decision-making

There is not an integrated approach. The applicants have to obtain several permissions and licences including the related decisions for EIA (either EIA is not necessary or EIA is affirmative. Recycled facilities of oil wastes which have a production capacity 2000 ton and more per year are subjected to the mandatory assessment; screening process is required for the same kind of facilities which have a production capacity less than 2000 ton per year).

Integrated approach can be applied in an extent thorough the cooperative protocols signed ween two mains competent (the Ministry of Energy Natural Resources, and the Ministry of Agriculture) ministries. However, this is just an assumption because it was not possible to reach either such protocols or any data regarding application of them.

C.3. Balancing the conflicting interests

[238] Yenilenebilir Enerji Kaynaklarına Uygulanacak Fiyatlar ve Süreler. (Tariffs and times for renewable energy resources). Resmi Gazete. 30.10.2021.www.resmigazete.gov.tr
[239]https://cygm.csb.gov.tr/sifir-atik-ve-atik-isleme-dairesi-baskanligi-i-85454.

Above mentioned explanations (for scenarios A and B) are also valid for biomass because there is not a specific legal provision or procedure on the issue. There is not either any available official document as guide or scientific analyses indicating both conflicting interests and the adverse effects of existing biomass facilities as the weakening ecosystems services. The above- mentioned report does not either include any information. As parallel to increase of installed biomass facilities, complaints from local people are also increasing. The main reason of complaints is, as for wind power and hydropower, the affirmative decisions giving for the related environmental impact assessments despite illegalities particularly in terms of public participation process and assessment reports. Since both public participation as a principle and environmental impact assessment as a tool are significant to consider wider environmental interests neglecting them during the decision-making process will inevitably cause conflicts among several interests. Therefore, interests other than energy produced by biomass are considered by the administrative courts under the cases brought by local people. For instance, in a case regarding a biogas power plant installed to produce energy from animal manure, the court underlined the existence of productive agricultural fields and important water resource in the area of the alleged facility[240]. In another case the court annulled the decision of "EIA is not necessary" under the ground that it did not consider all possible adverse effects of the alleged facility on the environment of the relevant town which has of significance particularly in terms of olive production[241].

Author: *Nükhet Yilmaz Turgut*

[240]Danıştay, 6. D. E. 2021/570. K. 2021/3710. https://karararama.danistay.org.tr
[241]Danıştay, 6. D.2020/9545. 2020/10807. https://karararama.danistay.gov.tr.

D. Illustrating with an example

Please provide us with an example of a case involving a debate about integrated permits and environmental conflicts (e.g. climate neutrality v. traditional environmental interests) in the industrial or energy field which may be of a particular relevance for the general discussion at the meeting.

Belgium

I think the most relevant ruling is the decision of the Belgian Constitutional Court of 25 February 2021 (case no. 30/2021), in which the Court had to assess to what extent the Validation Decree, in which the Flemish Parliament decided to temporarily maintain the legal effects above-mentioned Circular and Vlarem-provisions which laid down criteria for the authorization of wind turbines on the Flemish territory. As already indicated, the CJEU held that both instruments should have been subject to a prior SEA since they qualified as plans or programmes within the meaning of Article 2 of Directive 2001/42/EC. The CJEU indicated in its 2020 decision that, the competent national courts may nevertheless maintain the effects of these instrument and consents on the condition that the national law permits it to do so in the proceedings before it and if the annulment of that consent would be likely to have significant implications for the energy supply of the whole of the Member State concerned, and only for the period of time strictly necessary to remedy that legality.

In the meantime, the Flemish government decided to initiate the SEA procedure for the future Vlarem sectoral criteria for windfarms. Yet, the ruling of the CJEU called into ques-tion the legality of hundreds of permits that had been delivered for windfarms during the past decades, reason why the Parliament decided to provisionally validate (for a timeframe of three years) the sectoral criteria. This validation decree was challenged before the Con-stitutional Court. With reference to the CJEU case-law, the Court nevertheless sided with the arguments raised by the Flemish authorities. It accepted that the validation decree was used as a last resort, and also underlined the major environmental repercussions to which an annulment of the validation would lead. The Court held, in its paragraphs B.24.3 et seq. that there exists a serious concern that the Belgian energy supply would be compromised if the existing permits for the windfarms that had been authorized with reference to the 'flawed' sectoral norms (flawed and illegal since they had not been made subject to a prior SEA). It referenced the fact that the halting of 424 wind turbines (representing 1.1 MW) in a time when the competent federal government also contemplated a nuclear phase out, has a clear impact on the energy supply. However, the Court also explicitly referred to the EU Renewable Energy Directive (2009/28/EC), and stipulated that wind turbines are in-strumental in the shift towards renewable energy, which represent a clear policy goal of the EU (par. B.24.1).

Author: Hendrik Schoukens

Czech Republic

In the Czech Republic, wind energy is vastly undervalued. However, there have been a few cases where the Supreme Administrative Court balanced public interests. Cases are similar; therefore, only one will be described here.

The decision of the Supreme Administrative Court, 2 As 207/2016 – 46[242] (www.nssoud.cz)

The essence of the whole case lies in the balancing of public interests. Firstly, the court ascertained whether the construction and operation of a wind farm could be identified as public interest. The court stated that currently (the year 2017), there is a common consensus (European and international) that renewable sources can secure high protection of the environment. Furthermore, the court identified political and scientific discourse acknowledging the use and need for electricity made from renewable energy sources.

Therefore, the court concluded that such a project could be, under adequate conditions, considered a public interest. Furthermore, the court reiterated that the issue in question (construction of WF) had been subjected to biological assessment according to EIA. The result of the EIA assessment had concluded that the impact on fauna in the vicinity of WF had been insignificant.

The court also agreed with Nature Protection Authorities and acknowledged that nature protection had been correctly identified as opposing public interest in preceding administrative procedures. The public interest was embodied in special species protection (more specifically, protection of the common raven). However, the court (based on the previous instance and administrative procedures) did not find that the theoretical possibility of a bird's collision with WF could preclude WF construction. Therefore, the public interest in producing renewable energy and connected environmental protection outweighed nature protection in this case.

Nevertheless, the court also referred to its previous case law and stated that if the impact on specially protected species had been more intensive, the result of balancing would have been different.

Authors: Jiri Vodicka, Ilona Jancarova

France

Please provide us with an example of a case involving a debate about integrated permits and environmental conflicts (e.g. climate neutrality v. traditional environmental interests) in the industrial or energy field which may be of a particular relevance for the general discussion at the meeting.

The chosen example is about a land-based wind farm project due to be located in a forest. A company called "Les Moulins du Lohan" has a project which consists in the realization of a wind farm composed of sixteen or seventeen wind turbines, according to the model, with a total power of more than 51 MW, in the south-east zone of the forest of Lanouée, on the territory of the municipality of Les Forges (department of Morbihan, region of Brittany) The company requested, in application of article L. 411-2 of the environmental code, the authorization to derogate from the prohibitions mentioned in article L. 411-1 of the same code of capture, removal, transport, intentional disturbance, destruction of specimens of protected species and destruction of habitats of protected species, for the duration of the operation of the

[242] Available only in the Czech language.

wind farm. The prefect of Morbihan granted the derogation by an order dated February 4, 2015[243].

A landscape protection association (Société pour la protection des paysages et de l'esthétique de France) and a nature protection association (Bretagne Vivante) challenged the derogation, and obtained its annulment by a judgment of the administrative tribunal of Rennes on July 7, 2017. The Company les moulins du Lohan requested the annulment of this judgment to the administrative court of appeal of Nantes. The latter issued its ruling on March 5 2019 (CAA Nantes, 5th march 2019, 17NT02791- 17NT02794, Société pour la protection des paysages et de l'esthétique de France et a.). The judgment of the administrative tribunal of Rennes is annulled by the administrative court of appeal.

This case law shows quite well how is assessed the reconciliation of conflicting environmental interests (i. e. renewable energy production versus biodiversity protection) in France, before the administration and before courts.

Firstly, the judge checks the characterization of the imperative reason of overriding public interest. According to him, the project: 1) takes part in the realization of national and European objectives of development of renewable energies and reduction of greenhouse gases emissions and 2) is registered in a particular local context marked by the fragility of Brittany as regards electric supply and the weakness of local electricity production.

Secondly, the absence of a satisfactory alternative solution must be demonstrated. This could mean the use of other renewable energies, which the decision of the administrative court of appeal briefly mentions, and above all the search for another location, in another forest massif than the forest of Lanouée, then in another sector than the south-east of the forest of Lanouée. The judge explained that "The forest of Lanouée has the advantages of being large and of a single block, of not having any Natura 2000 areas, nor classified wooded area (espaces boisés classés) pursuant to the urban planning code, nor wetlands at the location of the selected site, of having an important network of forest roads (130 km in total), of allowing the implementation of a wind farm at more than 1 km from the houses and of having connection capacities." He adds that "it is not seriously disputed that the company considered several locations for its wind farm before choosing the southeast zone, which presents a less sensitive landscape and is part of the Wind Development Zone of the Community of Municipalities of Josselin Community, approved by prefectural order of March 15, 2012".

The third condition to be met is the absence of harm to the maintenance of protected species in a favorable conservation status. The derogation request file has made the effort to describe the impact species by species, distinguishing between the building phase and the operation phase, and taking into account the planned reduction measures. In addition, a series of compensatory measures have been planned by the company to offset the adverse residual impacts. According to the judge, "These consist of improving the functionality of the forest ecosystem at the scale of the Lanouée massif, following an extensive management of grasslands at the edge of the forest massif, proceeding to the maintenance and restoration of moors, to restore and create breeding sites for amphibians, by creating ponds, and to carry out compensatory afforestation, in order to compensate for the clearing of 11.4 ha, thanks to the

[243] Please note that this project predates the introduction of the environmental authorization by the order of January 26, 2017. The "ICPE" authorization required for the operation of the wind farm and the "protected species" derogation were then independent of each other.

planting of 12.25 ha, by providing for hardwood afforestation in continuity with the existing forest. It does not follow from the instruction that these measures (…) would be insufficient or unsuitable". Interestingly enough, the judge also takes into account accompanying and follow-up measures in the aftermath of the project's authorization. As mentioned earlier (in relation with the implementation of Article 6.2. of the Habitats directive, see point A above, last question), it may help to anticipate unforeseen harms of the wind farm and define the way to react in such a case. Indeed, the court states that "The company has planned accompanying and monitoring measures (…). The company is thus committed to carrying out long-term monitoring of potentially sensitive biological communities, which should continue throughout the operation of the wind farm, monitoring of avifauna and chiropteran mortality, awareness-raising activities for the preservation and promotion of biodiversity in the forest, the capture and transfer of protected amphibians, and to studying the activity of chiropterans at high altitude in the event of detected bat mortality. The company also undertakes to communicate the data collected. These reduction, compensation and accompanying measures are taken up and completed by the contested prefectoral order" granting the derogation. Eventually, the administrative court of appeal concludes that: "considering the residual impacts of the project, after reduction, compensation and accompanying measures, the derogation granted to the company les Moulins du Lohan cannot be considered as detrimental to the maintenance, in a favorable conservation status, of the populations of the species concerned in their natural range".

This solution was confirmed in cassation by the Council of State (Conseil d'Etat) in a ruling dated April 15, 2021 (CE, 15th April 2021, n° 430500, Société pour la protection des paysages et de l'esthétique de la France et a.). The appeal against the decision of the administrative court of appeal of Nantes was rejected.

Author: Nathalie Hervé-Fournereau & Simon Jolivet

Germany

Instead of another case study (besides the prime example of the use of wind energy) I would like to refer to the newly emerging debate in Germany about the use of nuclear energy. Even if the overwhelming consensus is still that of phasing out civilian use of nuclear energy, the voices of critics who consider the phasing-out-decision to be wrong, have increased recently, given the climate neutrality debate and the energy crisis triggered by Russia's war against Ukraine. Instead of ending the use of nuclear energy first, according to these critics, it would have been better to scale back coal-fired power generation and dependence on Russian gas. A real renaissance of nuclear energy however seems unthinkable for Germany at the moment. On the other hand, a further increase in the import of nuclear power from neighboring countries is more likely. This appears to be unavoidable, at least in the medium term, because the problem of storing electricity is still largely unsolved. At this point, the promises and plans made by Germany and the EU to achieve climate neutrality do not seem anyhow close to reality. At the global level, the whole Paris-Accord-Process seems highly endangered by the emergence of a new sharply divided bipolar world-order.

Author: Bernhard Wegener

Greece

The Council of State ruled that the environmental authorization for the installation of wind farms and the accompanying works in Special Protection Areas and Special Areas of Conservation does not violate the respective provisions of the EU and national **nature** protection legislation, because within the framework of the Special Ecological Assessments (the greek term for Appropriate Impact Assessment) which constituted an integral part of the EIA Study, the impact of the wind farms on the protected areas was examined and the conclusion was reached that the installation and operation of the wind farms and the accompanying works would not jeopardize the conservation objectives and the integrity of the protected areas (Decision 47/2018 of the Council of State, para. 34). It is worth noting that the Court came to this conclusion in spite of the fact that the area chosen for research field with the aim to examine the impact of the wind farms on the protected areas was 500meters from the limits of the area in which the wind mills will be installed and not 1km, as it is required by the 170225/20.1.2014 Ministerial Decision. This thesis was justified on the ground that this decision of those who have conducted the assessment was well-reasoned and that the technical assessments cannot be subject of the (cassatory) judicial review (paras.37-38). The Court also re-affirmed its pro-RES stance by placing emphasis on the need for the increase of the penetration of RES in the national energy mix, so that the respective national targets for RES set at the EU level can be achieved. The Court ruled also that the non-consideration of the anticipated impact of the wind farms on the forest eco-systems does not exert influence on the legality of the environmental permit, because the impact on the Fiona and flora as well as on the landscape was examined in the context of the EIA Study.

Author: Vicky Karageorgou

Hungary

As the Ombudsman for Future Generations I can participate in investigations upon complaints, which conclude with reports containing recommendations to any public authority including the Government. Based on these complaints I believe that the following two are good examples of the current “hot” debates in the environmental scene:

One of the emerging conflicts is between solar power parks and agricultural land. Solar power parks are very often installed on agricultural land, which can be questioned by environmental standards in itself. Arable land is a finite natural resource, protected by the Hungarian Constitution. On the other hand, solar power parks contribute to the reduction of greenhouse-gases, hence help to tackle climate change. When solar power parks are installed on arable land, two constitutional values are in collision: the right to healthy environment and the protection of arable land in itself. The conflict is further intensified if not only the land required for the solar power park is affected, but the surrounding agricultural lands also suffer due to the necessary infrastructural developments. Then, the right to property also plays role in the constitutional debate. My experience is that the various authorities competent to issue the relevant permits are not in the position to deal with the different interests and to mitigate the environmental dilemma.

Another conflict is between the residential solar power installations and the cultural heritage protection of a residential building. The use of residential solar power is promoted in the National Energy Strategy, hence financial support is also available to home owners to install solar panels. From an environmental perspective, this is a beneficial approach, because the

use of renewables decreases the use of power generated in conventional, coal and gas power plants. Also, the use of solar power contributes to achieving cleaner air quality on a local level. Poor air quality is a huge problem throughout Hungary, reaching unhealthy level in many areas of the country. On the other hand, installing residential solar panels may be contrary to the requirements of cultural heritage protection or the broader requirement – the townscape requirement. Solar collectors or solar panels have a marked impact on the building's appearance strongly affecting the townscape and the heritage value of a settlement. The Hungarian Supreme Court delivered its decision in a case, where the above conflict arose and said that in a conflict of two constitutional values – such as the right to healthy environment and the protection of cultural heritage – the legislator must appreciate the principle of proportionality. The legislator may restrict the use of solar panels and determine where a panel may be installed on a visibility criteria, but shall not completely ban the use of solar power. According to the Supreme Court, the conflict is ought to be resolved by the legislator.

Authors: Erika Fiala-Butora, Eszter Zlatarov

Italy

Presentation of an on-going Italian case-study

We would like to report an on-going Italian case regarding the production of geothermal energy. This case may be considered a paradigmatic situation of conflict between energy and climate interests on the one side versus traditional environment interests on the other side. The project, located in the Region of Tuscany, in the Province of Siena, foresees the construction of a geothermal power plant in an area which is characterised by the presence of geothermal fluids, which are being already used in neighbouring areas for geothermal energy production. Close to the area where the plant should be located, geothermal fluids are currently used for touristic and health purposes in dedicated thermal baths, which are a traditional activity in the area, that has a high value from a landscape point of view and is very close to the Val d'Orcia UNESCO World Heritage site.

There is obviously and energy and business case for the construction of a geothermal power plant in the area. However, the competent authorities for landscape protection have consistently expressed negative opinions on the project. Such opinions have been overcome by the competent proceeding authority, namely the Region of Tuscany, which has recently approved the project. Currently, an opposition to the project has been filed by the Ministry of Culture and the matter will be resolved soon at State level by the Council of Ministers. Beside the landscape protection interests that are at the centre of the opposition by the Minister of Culture, the realisation of this project, which is based on a new technology which foresees the extraction and underground forced re-immission of the geothermal fluids, foresees no emissions in the atmosphere, but a possible risk of interference with underground water bodies, as well as a feared risk of microcosmic consequences induced by the re-immission of fluids, which has been sometimes observed in connection with power plants using the same technology.

In sum, it may be said that there is an urgency to develop projects for the production of renewable energy, in tune with the climate objectives imposed by the Paris Agreement and the European Union legislation, reinforced by the financial support provided by the Next

Generation EU through the National Plans for Recovery and Resilience and by the energy supply crisis caused by the Ukrainian war, which can be observed and which is currently shaping many initiatives of the State and the Regions in Italy. This trend is combined with the recent revision of many national administrative procedures related to the authorization of renewable energy power plants, including procedures in the fields of EIA and SEA, which under the name of "legislative simplification" goes in the direction of reducing the length of the authorization procedures and consequently limiting the possibility for public participation. As the consequence, there is a high risk that, within this context, traditional environmental and landscape protection interest may be "systematically" overcome by energy and climate considerations. This tendency requires a careful examination from a legal point of view and may be common to the current experience of other Member States.

Authors: Massimiliano Montini and Emanuela Orlando

Norway

The Fosen case[244] mentioned above may serve as an example:
The Supreme Court concluded that two of the developments were in violation of Sami rights associated with reindeer husbandry as an element of their culture. However, the Supreme Court did not indicate how this situation should be rectified. The situation seems to be that three actors will have to strike an acceptable agreement – the affected Sami reindeer owners, the responsible decision making authority and the owner of the wind power installations. There is no guarantee that such an agreement will take properly into account environmental interests or related interests of third parties.

However, some third party interests seem to enjoy special protection – potentially affected offshore petroleum production interests must be considered. By applying for a permit establish infrastructure to use electricity from the Fosen wind project to power offshore petroleum production, corporations engaged in petroleum production aim to use renewable energy to replace fossil fuel based electricity production at the platforms. This is part of a long-term policy to reduce CO_2 and NOx emissions from petroleum production. However, the fossil fuel thus saved, including natural gas and oil, will be exported. The Water Resources and Energy Directorate or the Ministry of Petroleum and Energy have a duty to make a decision based on the application.

There is no corresponding duty for the Ministry of Climate and Environment other any public authority to consider applications from affected Sami populations, NGOs or property owners to establish a protected area or direct the owners of the wind power project to remove the wind turbines and restore the environment.

Author: Ole Kr. Fauchald

Portugal

An interesting, yet tragic case of environmental conflict related with aquaculture happened in the first decades of the years 2000. Around 2005 an international investor (Pescanova) wanted to invest in Portugal to build the largest aquaculture project for the production of turbot fish in

[244] HR-2021-1975-S.

the world (https://www.pescanova.pt/noticias/inauguracao_em_mira_da_maior_unidade_mundial_de_aquicultura). The placement proposed was legally inadmissible: it was simultaneously a Natura 2000 site (grey dunes) and included in ecological network (https://www.publico.pt/2007/10/06/sociedade/noticia/quercus-volta-a-frisar-impacte-ambiental-negativo-de-projecto-da-pescanova-em-mira-1306721). However, the investment was 140M€ and the operator promised to generate two hundred direct jobs and 600 indirect jobs. The project was declared to have "national interest" and the procedure started and the project received public money to support the take off (Resolution of the Council of Ministers145/2007, de 28 de Setembro https://dre.tretas.org/dre/219682/resolucao-do-conselho-de-ministros-145-2007-de-28-de-setembro). In the end, it was obviously authorised (https://siaia.apambiente.pt/AIADOC/AIA1702/RNT1702.pdf and https://siaia.apambiente.pt/AIADOC/AIA1702/SE1702.pdf). The project was executed, implying the deforestation and occupation of a large dune area. After some accidents (the major was a collapse in the adductor tube that collected water in the ocean and the consequence was that all the fish dyed buried in sand and the system of filters, tanks etc was destroyed. To recover the business and keep the jobs (127, less than promised) the State invested 30% of all the money it had to support the fisheries in recovering the company (https://www.jornaldenegocios.pt/empresas/detalhe/projecto_da_pescanova_em_mira_captou_30_do_fundo_mare). In 2017 it is declared bankrupt (https://www.jornaldenegocios.pt/empresas/detalhe/projecto-da-pescanova-em-mira-declarado-insolvente) with a debt of 166,6M€. A procedure for recovery of insolvent companies was applied the company received further 8M€ from the State and in 2021 it had 149 jobs. The same year a plan to expand the production and the number of jobs to 450 till 2030 was presented (https://www.noticiasdecoimbra.pt/acuinova-preve-aumentar-de-149-para-450-postos-de-trabalho-em-mira-ate-2030/).

Final comment

Portuguese law on nature conservation and biodiversity has received the concept and typology of ecosystem services (ES). However, the language of ES is not being used to support the balancing of conflicting environmental interests.
It is not usually seen in EIA, in SEA, in IPCC, or in specific procedures (on water, forestation or deforestation, etc). Is is mentioned in the law transposing the environmental liability directive but this legal regime is seldom applied.

Besides, in intra environmental conflicts involving renewable energies the scale is almost always heavier on the side of climate and lighter on the side of biodiversity.

In February 2022 the environmental minister authorised cutting down 1079 cork oak trees and 4 holm oaks in 75 acres (https://www.jpn.up.pt/2022/02/15/governo-autoriza-abate-de-mais-de-mil-sobreiros-para-a-construcao-de-central-solar/). The cork oak tree is strictly protected by Decree-law n. 169/2001, de 25 de May.

Several huge hydropower projects compromise large extensions of ecosystems but are systematically justified by the interest of achieving the goals of renewable energies (ex. https://siaia.apambiente.pt/AIADOC/AIA2159/RNT2159.pdf)

Using MAES assessment methodologies (https://ec.europa.eu/environment/nature/knowledge/ecosystem_assessment/index_en.htm) to communicate and balance the gains and losses of ES consequently the increments and decreases in human wellbeing and environmental equilibrium would contribute to clarify the relative relevance of natural values (namely climate and biodiversity https://ipbes.net/events/ipbes-ipcc-co-sponsored-workshop-report-biodiversity-and-climate-change) and build consensus on sound decision criteria.

Author: Alexandra Aragão

Slovenia

The latest information, only a few days old,[245] reports resistance to the new wind turbines and refers to the experiences with the first wind turbine set up in Slovenia 14 years ago. The below-listed opposing arguments are interesting from different viewpoints; like that civic initiatives (CI) are learning from the past projects, that they are much more active than in the past, they are learning and gathering scientific evidence… and that they lack competent officials ready to talk to. The last one is an important message that can also be associated with other projects and spatial planning. The below text is a rather practical viewpoint of CI. As such can also be very persuasive for individuals. It is not a "good practice" but rather a case to be learned where the flows in communication and public participation are. One can find out that dialogue with competent state bodies is missing, as well as answers to arguments and questions, deep-rooted public participation, tolerance and, above all, a strategy by the state (and investors) how to include the public.

I refer to the representatives of CI across the country, especially to those from the west side of the country, where the new wind farm is under planning activities. They report that the practice is different, with promises that rosaries have no impact on residents and wildlife. They believe that Slovenia will probably never be a wind superpower. On paper, the state - which now derives only 0.04 per cent of its total electricity production from the wind - has bold plans. Still, in reality, it has not yet adopted a legal basis that would specifically regulate the installation and operation of wind farms. Investors - private companies themselves - have very ambitious plans to set up new wind turbines, but these inevitably collide with reality. Which is mainly averse to wind energy: there are few suitable areas with enough wind, and these are largely where nature is protected - and wind farms are therefore banned - or where populated areas are nearby.

Moreover, Slovenia has a very dispersed population, which further reduces the areas suitable for wind turbines. Currently, the state is planning nine new wind farms, five in eastern Slovenia, where there are none yet, and four in Primorska. The largest wind turbine was built more than a decade ago. The locals welcomed her. But when investors later proposed new wind turbines, the response from locals was unfavourable.

The Civic Initiative (CI) opposes a wind farms project worth eighty million euros. A decade ago, information on the impact of wind turbines was very sparse. They also present the current projects in a beautiful light. However, after one year of operation, the nearest residents of the village began to say that they could not sleep at night, that it was as if a plane were flying over their heads. More and more of that, more and more people started saying similar

[245] Reachable in Slovene language only; Radi bi povedali ljudem, naj ne nasedajo! (svet24.si)

things. However, they obtained studies from Australia, one of the first on the effects of infrasound produced by wind turbines, and thought deeply about what they read. They set up a civic initiative and began to delve into the subject. In fourteen years, they have gained connections with the whole world and information on what is happening in the field of wind energy. More and more people are opposed to this. They believe that resistance is growing around the world.

In nature, damage also occurs due to the construction of access roads, which must be adapted to an axial pressure of 30 and more tons. They explain that they will benefit from paths already in the woods. But these trails are for tractors, not 70-ton tractors that drive seventy-foot wind turbine propellers.

But it cannot be turned that around like a bicycle. So we should cut down the forest, even if they use the existing road route. You have to extend it to six meters; the bends must have a circle of seven meters. Not to mention areas where there are no roads at all. This should be done for each wind turbine separately. And then you cannot re-establish the original state, as the road has to stay for maintenance.

Then there's the concrete that stays in the land. The foundation for one wind turbine is like building a 30-story high-rise, so much concrete and iron goes into the foundation that it remains there forever. They don't remove that. Only a meter or a meter and a half in depth, the concrete is smashed and covered with earth, and the rest remains down there.

Then there is the problem of decomposition. Nobody talks about it. The wind turbine's lifespan is 15-20 years; although they do calculations at 25-30 years, after 15 years, they are already working t. i. 'repowering', i.e. the old wind turbine is removed, and a new one is brought in. However, this does not mean a new one can be placed on the same foundation. As they have been made so far, wind turbines are no longer working. They are now making wind turbines with power from three megawatts upwards. However, the ones they are planning now have a height of 230 m. One cannot build such a wind turbine on the same foundation because the loads are different. Therefore, new hole needs to be dug. And that is why it is not 'repowering'. More damage occurs. They said because wind turbines are more powerful, we will need less of them. This is theoretically true, but they keep quiet about doing additional damage. The investor is constantly reducing the number of wind turbines.

A few tens of meters long wind turbine blades made of composite materials are also a problem. They tried to burn them, but poisons went up in the air. They tried to grind them and mix them with other materials, such as concrete, but it turned out that such concrete is less durable. The propellers are cut into large slabs and buried. They will not fall apart, but at least no one sees them. Used wind farms are considered hazardous waste. No one has yet figured out what and where to do with them.

There are also no new jobs; namely, one of the benefits investors promised is new jobs for locals. The truth is different according to CI. Maintenance is performed remotely. The service technicians are in Austria and get the data. If they see that the wind turbine is blocked, they try to fix it remotely, but if it fails, they have to run here, start it, and come back. They say how many jobs this will bring. However, according to CI, they do not speak about the number, saying it depends on the number of wind turbines.

The first neighbour of the existing wind turbine thinks: "When they set it up, they brought a living container, there were security guards who guarded the wind turbine at night, but all Austrians - security guards, workers, whatever they got, everything was Austrian. Not a single Slovene was present. "

The effect on animals was also observed. "Hunters have noticed that deer no longer give birth since the wind turbine. There are no more puppies, but they used to be full, but now they are gone." The bald eagles, which led ornithologists to oppose the construction of a wind turbine on Volovja rebra (Natura 2000), are also flying here. And bats too. "Škocjan Caves has one of the largest colonies of bats, 23 species of bats fly there in this area. The wind turbine is a problem for bats because the rotation of the wind turbine between the column and the wind turbine creates a vacuum, making low-frequency noise. When a bat flies nearby, the pressure blows out its lungs. "

There are many arguments against wind turbines, but we have not even touched on their impact on people. "There is no uniform policy in Europe yet; each country has its own regulations regarding the distance of wind turbines from houses. We have suggested countless times - both to the Ministry of the Environment and Spatial Planning and the Ministry of Infrastructure - that if we already have a wind turbine set up, why not study, measure, and analyze everything for two, three, five years, then we will talk. And to this day, they have done nothing.

Proponents of wind turbines are mostly members of the "agricultural community"; they own the land that investors rent to build a wind turbine and receive a modest salary in return. The rent is 5,000-8,000 euros per year, divided among 65 plot owners. "This village was a very harmonious community. When the wind turbines arrived, it began to split into proponents and opponents. According to our estimates, it is now half and half. ".

The locals voted against the new wind turbines in a consultative referendum, opposed by the municipality of Divača, hunters, DOPPS (Society for the Observation and Study of Birds of Slovenia) ..., and investors are still insisting. They are changing their plans, but they are insisting, even the CI, even though they have been threatened with lawsuits, puncturing tires, writing insults in the car ... "We have been here for fourteen years, but we still haven't done anything," he says. "Only we came from one plan to four. I hope no one will come true."

Author: Rajko Knez

Spain

One of current environmental clashes concerns electric power lines and the protection of birds. These installations require three basic authorisations (explained above at para. XXX). Although they are subject to EIA, the appropriateness and the mitigation measures imposed on promoters during this procedure are contested on many occasions. In addition, criminal proceedings have been instigated in Cataluña against several directors of one of the most important electricity companies operating in Spain.

In 2008, the Spanish government adopted Royal Decree 1432/2008, establishing measures for the protection of birdlife against collision and electrocution on high-voltage power lines. The regulation has neither been contested by the EU nor annulled by the Spanish courts. Its preamble indicates that the growing demand for electrical energy requires an increase in the

number of power lines and power lines installed in the natural environment which, owing to the lack of specific regulations, lack the necessary elements or adequate protective measures to ensure their safety for birds, with the subsequent risk of electrocution or collision of these in these infrastructures, especially for some species included in the Spanish Catalogue of Threatened Species. It also acknowledges that at least several tens of thousands of birds die every year in Spain due to power lines, while these anomalies also lead to cuts and irregularities in electricity distribution. The regulation only applies in the following protection zones:

a) Territories designated as SPAs, in accordance with Law 42/2007;
b) areas of application of recovery and conservation plans drawn up by the Autonomous Communities for bird species included in the Spanish Catalogue of Threatened Species or in the Autonomous Community catalogues;
c) priority areas for breeding, feeding, dispersal and local concentration of those bird species included in the Spanish Catalogue of Threatened Species, or in the regional catalogues, when these areas are not already included in (a) or (b).

Whilst protection measures avoiding electrocution are compulsory for new and existing installations, those concerning collisions are not in the case of the latter installations.

By referring to two types of deficiencies in power lines, a different regulation addressing technical matters applicable to power lines (Royal Decree 223/2008) has extended the territorial application of those requirements (see (b) infra).

According to this regulation:

a) A very serious defect is "any defect which reason or experience has shown to constitute an immediate danger to the safety of persons, property or the environment". This includes (1) the failure to comply with the technical requirements established in Royal Decree 1432/2008, or (2) when the elements installed in application of the same regulation are in a deficient state, in lines located in Protection Zones, declared under this Royal Decree, and (3) when the line has been notified as dangerous by the competent authority.
b) Serious defect is a defect that does not pose an immediate danger to the safety of persons, property or the environment, but may do so as a result of a fault in the installation. This includes the failure to comply with the technical requirements established in Royal Decree 1432/2008, (1) when the power line has been notified as dangerous or (2) as causing forest fires or electrocution of protected birdlife, outside protected areas, or (3) when the elements installed in accordance with the technical requirements established in this Royal Decree are in a deficient state.

The importance of these two deficiencies lies in the notion of danger. The Supreme Court has held in a judgment of 7 October 2021, appeal 202/2020, that it must be taken into account that the lack of the anti-electrocution or anti-collision means established in Royal Decree 1432/2008 "always entails a risk of electrocution or collision of birds (with the possibility of causing fires)". The Court has added that "[g]iven that the electrocution or collision could be caused at any time, it could be assumed that the risk is always immediate (a bird could be electrocuted at any time) regardless of whether the line is located inside or outside the Protection Zones defined in Royal Decree 1432/2008".

This judgment should also be viewed in the light of Directive 2004/35 (environmental liability) and the definition of "imminent threat of damage" as a sufficient likelihood that environmental damage will occur in the near future (Article 2(9)).

An interesting matter that the Supreme Court has not addressed in its judgment concerns the reach of Article 6(1) of Royal Decree 223/2008, according to which installations carried out in accordance with the requirements of this regulation "shall be deemed to provide the safety conditions which, according to the state of the art, are required for the protection of persons and property when used for their intended purpose". Admittedly, the provision does not mention the environment. However, law 2171992, on Industry, which the regulation supplements, includes among its objectives, the protection of the environment.

Authors: Agustín García-Ureta and Ángel-Manuel Moreno Molina

Sweden

This case in the Land and Environmental Court of Appeal (MÖD 2017:21 *Skaftåsen*) concerned a license for a wind farm in the vicinity of a World Heritage site, namely the Fågelsjö Gammelgård (https://www.visitdalarna.se/en/book/to-do/1495720/worldheritage-f%C3%A5gelsj%C3%B6-gammelg%C3%A5rd/showdetails). In addition, some of the turbines were thought to have a negative effect on the local population of the golden eagle. Eolus Vind AB applied for 63 turbines in several areas, whereas the remit procedure showed that many authorities and the public pointed to the negative effect on the World Heritage site and on species such as birds of prey, eagle owl, forest hens, etc. The Regional Licensing Board in Västernorrland basically accepted the localization close to the Fågelsjö Gammelgård, but excluded 22 turbines in an area sensitive for the birds. The applicant and an association appealed to the Land and Environmental Court of Östersund. The court, however, shared the views of the Regional Licensing Board, although it also accepted another 10 turbines in one area sensitive for other birds than the golden eagle.

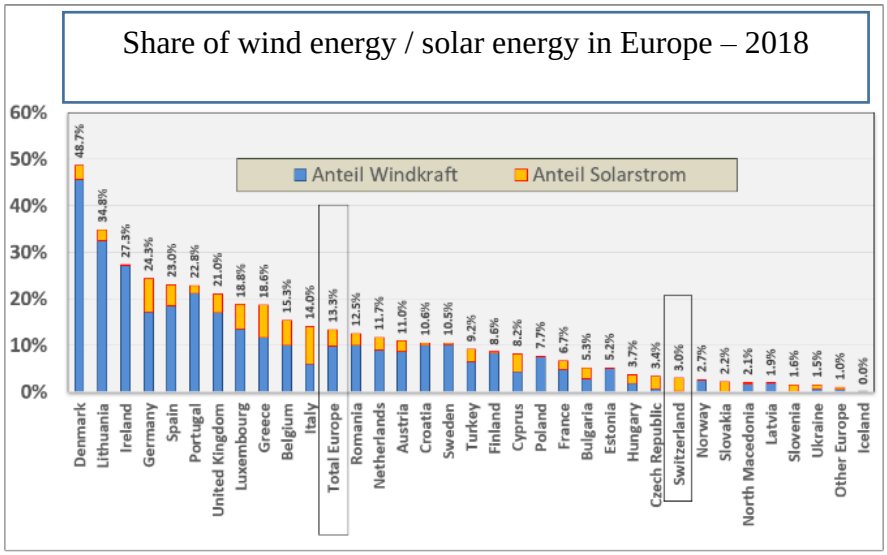
The association and the regional County Board appealed to the Land and Environmental Court of Appeal. The claimants now focused on the impact on the World Heritage site and to the fact that UNESCO in an opinion highlighted that wind farms in the vicinity may harm the interest (36COM 8B.40). A remit was also made to the Swedish National Heritage Board which sided with the claimants on this issue. The company on their hand pointed to the fact that the original application covered 130 turbines and sufficient consideration already had been showed by the cutting down on the numbers to less than half (51 turbines). The Land and Environmental Court of Appeal, however, shared the views of the County Board. Especially the turbines situated on the closest mountain Skaftåsen would change the open landscape character in the surroundings and thereby have a negative impact on the cultural values that constituted the protected interest. The Court also sided with the Regional Licensing Board about the protection of the sensitive birds and thus excluded 22 turbines from the permit.

NB: The case is rare. In my experience, UNESCO World Heritage sites have little influence on environmental decision-making in Sweden. I know of one more case among 3-400 where a license for a wind farm has been rejected due to these interests or other areas of great cultural value.

Author: Jan Darpö and David Langlet

Switzerland

I would like to point to a discussion involving conflicting interests in the context of the energy transition in Switzerland. The national "Energy Strategy 2050" provides for a prominent position for solar energy and there is indeed quite a considerable potential for this source of energy. However, the share of solar energy is still small also in comparison to other European



countries.

There are many reasons for the slow development of solar power (environmental conditions, reduced volume of public subsidies etc.), but quite a few of those reasons are of legal nature.

The legal hurdles for the installation of solar cells where substantially reduced in 2008 with the introduction of a provision stating that solar installations on roofs, which are sufficiently adapted do not require a construction permission, but only need to be reported to the competent authority (art. 18a(1) FSPA). Yet, a permission can be required by the Cantons in protection zones (villages centres, monuments etc.) and installations on cultural and natural moments of cantonal or national importance always require a construction permit (art. 18a(2) and (3) FSPA). This legal easement contributed to a further propagation of such installations.

When it comes to larger plants, e.g. on open spaces, however, there is almost no development visible. This stagnation is due to a series of legal circumstances: 1. In the context of agricultural zones such installations are usually not considered to be in conformity with the applicable spatial planning requirements. 2. Therefore, the construction requires the adaptation of utilization plans on the municipal level and possibly of directional plans on the cantonal level. 3. In those procedures as well as in the context of the decision on the construction permit considerations concerning landscape protection, but also nature protection etc. usually enjoy a very prominent role – with the consequence of further lowering the chances that such projects are put into practice.

A more recent development consists in projects using existing artificial structures such as reservoirs, landfills, fences or – this is the most recent large-scale proposal – the national

highways for the construction of such solar power installations outside construction zones. With regard to the looming winter gap in national electricity production (due to the reduced production of hydropower in winter) such installations in the alpine region are seen as a promising option. Additionally, the use of existing manmade structures may somewhat reduce the sharpness of the underlying conflicts of interest and thus increase the chances of such projects being put into practice. But the conflicting interests and considerations remain a serious problem and a major reason for the existing blockade regarding the construction of large(r) scale projects in Switzerland.

Author:Markus Kern

The Netherlands

Not sure whether these examples count as sufficiently related to the question but they are related to the question which public interests can have a place in the weighing of interests by public authorities when taking decisions.

- developers of solar parks/fields and wind farms are confronted with (tender) procedures that (also) apply criteria that are - to say the least - loosely based on the assessment criteria for granting a permit on the basis of the Spatial Planning Act. Sometimes the tender procedure for a solar park provides that the project must have 'added societal value' and must 'improve the landscape/scenic quality' in order to win the tender (and be granted a permit). See (ECLI:NL:RVS:2022:437 and ECLI:NL:RVS:2022:442).

- Sometimes developers of solar fields / wind farms feel that government is forcing them to put large sums of money in a fund without a legal basis. These companies already do a lot on the basis of their own guidelines but municipalities are striving to get as much financial means from the project developers as possible by 'persuading' them .

- no judgment yet in the case concerning the idea to extract natural gas from *under* the Wadden Sea in the Netherlands. The installation will be placed on land (not *in* the Wadden Sea). There has been some discussion about coordination of assessment criteria used for the permit needed on the basis of the Mining Act (Mijnbouwwet) and those used under the Nature Conservation Act (Wet natuurbescherming). Both mention nature protection as one of the assessment criteria (the competent authority differs however: the minister of Economic Affairs and Climate and the minister of Agriculture, Nature and Food Quality). The minister for Economic Affairs reasons that nature protection within the Mining Act can probably not represent the same public interests as nature protection under the Nature Conservation Act.

Author: Kars de Graaf

Turkey

D.1. There is not available legal case or analysis mainly covers a debate about environmental conflicts targeting climate neutrality and traditional environmental interests in the industrial or energy field. Conflicting interests have been put forwarded under the legal cases brought particularly by local people and environmentalists, and under the court's judgments related to

annulment of the alleged administrative decisions. These judgments are mostly related to the determination of illegality of several concrete and specific situations represented in the relevant cases, in terms of neglecting some other environmental interests as agricultural and recreational lands, protective areas and species to protect the interest of energy and investors.

As mentioned above the principal complaint under almost every case is related to inadequate application or neglecting of legal requirements, particularly with regard to environmental impacts assessments carried out for all renewable energy resources, particularly for wind farms and hydropower plants.

D.2. The example of *Karaburun:* In this context the best example is the wind farms almost periodically installed (since 2005) in *Karaburun,* a little village near *İzmir* located in a peninsula at the Aegean side. It is a quite rural area (far from the city) having high quality ecosystems, and indeed it has specially protected status. As a consequence of both its suitable rural characteristics and geographic position[246] as well as governmental policy promoting the use of renewable energy resources through several incentives *Karaburun* became the most popular area for investors not only for wind farms but also for solar energy. Many wind farms were constructed, particularly by well-known investors[247]. This fact inevitably caused conflicts between national concerns and local-environmental concerns, and between investors' interests and local people-environmental interests.

On one side of the coin there arenational concerns. These are the need to response increasingdemand for energy, to accomplish international commitments on climate change as reducing greenhouse gas emissions, and to prevent or at least decrease dependence on the foreign energy. These concerns coincide with the interests of investors and some local people who wants to get benefit from investments in a way.

On the other side of the coin there are local people's and municipalities'as well as environmental concerns other than reducing gas emissions. Municipalities and local people (particularly new residents coming to enjoy the nature and environmentalists) are against installation of so many wind farms because they want to maintain the natural status of the areas. To do that municipalities adopted and applied a "sustainable rural development conformity with agriculture and tourism"[248]. Therefore, unlawful purchase of private lands by public authorities, decrease in economic activities, noise pollution, installing near the settlement areas, (neglecting 500-meter requirement), using agriculture, forest and sit areas to install farms, damages to natural and rural environment caused by cleaning the land to install farms, damages to tourism and agriculture are among the major concerns and objections. Consequently, to combat climate change caused damage to the other components of environment as agriculture, forest, historic and natural beauty.

Main concrete reasons of the conflicts: lack of efficient integrated plans at the legislative and administrative level and undermining of existent legal requirements in the application process. Not taking into account the necessity to "balance of protection and use" during the selection of most suitable places (to give priority to technical aspects during the determination of farms' places) as well as EIA process, and undermining the cumulative assessment;not taking into account the opinions of public during both the preparation of relevant plans and decision-making process are among the major reasons. The main policy reason is as the above-

[246]See. *Özçam*, Zeynep: "Rüzgâr Enerjisi Çatışması: Kırsal alanlar ve Rüzgar Enerjisi-KaraburunDeneyimi." *Plan*lama 2018 (Ek 1) pp.15-24. p. 18-19.

[247] As 5 Mai 2022 the Karaburun City Council declared that "while more than %89 percent of the areas is already spared for wind farms, where are you installing the new solar energy facilities? See. www.karaburunkentkonseyi.org. (Accessed in 9 Mai 2022).

[248]*Özçam,* Above note 27, p. 18.

mentioned (title A.2) high politization of the decision-making process and over representation of investor's interests.

D.3. Court Decisions:Local people brought a legal suit before the local administrative court to annul the consent given for the EIA of Sarpıncık wind farm. (1) The local court annulled this decision under the reason that it neglected the special ecosystem of the region and it will not be any "life area" for fauna and flora species existed within the rich biodiversity of the peninsula. (2) However, the high administrative court (Danıştay) dismissed this judgement and also judged that the plaintiffs cannot appeal its decision based on its discretion under the "urgent trial procedure" adopted in the Law on Administrative Procedure[249]. The plaintiffs brought the case before the Constitutional Court (CC) based on the ground that Danıştay violated their right to fair trial. (3) The CC accepted the individual application and judged to for a new trial. It stated that "while there are illegality claims supported by the technical studies Danıştay neglected these claims without expressing any reason. Furthermore, although Daniştay accepted that there is a lack of information in the relevant "expertise report" he did not judge to complete it and did not explain the reason of this decision"[250]. (4) During the retrial process another chamber of Danıştay did not either order a new expertise analysis. However, it judged on behalf of the plaintiffs by approving the local court's judgement taken into account the existent expertise report as well as the documents and all information submitted by the plaintiffs[251].

Author: NÜKHET YILMAZ TURGUT.

[249]Danıştay 14. D. 29.13.2016. E. 2015/11075. K. 2016/2301. https://karararama.danistay.gov.tr
[250]AYM. 29.9.2020. Application No. 2016/13031. https://kararlarbilgibankasi.anayasa.gov.tr.
[251]Danıştay 6.D. 22.12.2020. E. 2020/10746. K. 2020/13387. https://karararama.danistay.gov.tr