Green Cities

Recent Developments / Climate Change for the Avosetta Meeting on May 12th/13th 2023 in Bern

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Austria

Climate change-related legislation in Austria

The current Austrian government (a coalition of the conservative party and the green party) has set the goal of achieving climate neutrality by 2040. This includes a political agreement on the phase-out of fossil fuels for heating buildings. However several of the legislative projects have not yet been realised or have been realised late.

The introduction of a new Climate Act to replace the federal law of 2011,[1], **has not been successful so far**; as a consequence there is currently **no binding path for reducing greenhouse gases for individual sectors** has been laid down at the national level. The Climate Act of 2011 establishes a procedure and criteria for setting emission ceilings and for the development of concrete and effective climate protection measures. The law is still in force, however, no (sectoral) emissions limits for greenhouse gas-emission ceilings have been set in the annexes to the Act since the end of the year 2020. Climate litigation cases have been filed, challenging the current state of the climate act (see below climate litigation).

For the building sector, a gradual, comprehensive decarbonisation of heat supply needs to take place. In numbers, the building sector (residential and commercial buildings) accounted for around 10% of Austria's greenhouse gas emissions (including ETS) in 2019.[2] Overall, the number of fossil-fuelled heating systems is around 1.9 million, with gas-fired systems alone accounting for around 650,000 installations. The **Renewable Heat Act (EWG)**, currently still pending in the legislative process, provides the legal framework for the phase-out. The law is intended to secure, among other things, the conversion of building heat supply to renewable energy sources or quality-assured district heating, contribute to improving energy efficiency or reducing energy consumption, and ensure nationally uniform specifications for the phase-out. The EWG includes stage plans for liquid and solid fossil fuels (oil, coal, and coke heaters) and for fossil gas heaters to phase out fossil heat supply. In the long term, the law provides for a general shutdown order. By 2035, all oil, coal, and coke heaters, and by 2040 also fossil gas heaters, are to be shut down, thus decarbonizing the entire heat supply by 2040.

An **eco-social tax reform** package was initiated, aiming at a socially just greening of the tax system and incentivizing climate friendly consumption. The **Eco-social Tax Reform Act 2022** introduced a national CO2 pricing (**National Emissions Certificate Trading Act** - NEHG 2022) [3]. The introduction (due in July 2022) was postponed due to inflation until October 2022. The trading participants (companies that produce or import fuels in Austria e.g. mineral oil companies, gas suppliers) must acquire certificates in order to obtain the right to place certain substances (e.g. mineral oil, fuels, coal) on the market. The price for the emission of CO_2 ("**CO_2 tax**") started at 30 euros per tonne and will increase annually up to a price of 55 euros per tonne in 2025. In order to alleviate the impact of rising costs for fuel prices and heating CO2 taxes a **climate bonus** of up to 200 euros per person was introduced. Due to current inflation and the associated rising prices, in 2022 the climate bonus was increased to 500/250 euros for adults/children as a **compensation for the expected additional burden on households from CO_2 pricing**. From 2023, the climate bonus is regionally staggered, the amount depends on the

[1] Bundesgesetz zur Einhaltung von Höchstmengen von Treibhausgasemissionen und zur Erarbeitung von wirksamen Maßnahmen zum Klimaschutz (Klimaschutzgesetz – KSG), BGBl. I 106/2011 idF BGBl. I 58/2017.
[2] 212/ME XXVII. GP - Ministerialentwurf – Erläuterungen,2.
[3] Bundesgesetz über einen nationalen Zertifikatehandel für Treibhausgasemissionen (Nationales Emissionszertifikatehandelsgesetz 2022 – NEHG 2022), BGBl I 10/2022 idF BGBl II 460/2022.

quality of infrastructure and public transport connections. Criticism has been voiced especially about the low entry price, which is considered to have little steering effect. Further climate-relevant elements of the reform include a special deduction for the replacement of fossil heating systems and comprehensive thermal refurbishment as well as the expansion of the exemption from electricity tax for self-produced and consumed electricity to all renewable energy sources. The abolition of the **diesel tax privilege** and the reform of the **commuter allowance** envisaged in the government programme were not included in the tax reform.

With the Federal Act on the Expansion of Energy from Renewable Sources[4] **(Renewable Expansion Act - EAG)**, a funding law was passed to implement the 100% coverage of national electricity consumption (national balance) by renewable energy sources according to the government program. Funding instruments are the main pillar of the EAG, in addition to innovations in market design, such as the establishment of energy communities, facilitated grid access for renewable generation plants, and regulatory sandboxes for research projects. One important instrument within the EAG are investment grants, which are generally aimed at the construction of generation plants, as well as market premiums, which support the operation of generation plants through a surcharge on revenue from sold and fed-in amounts of electricity.

Climate litigation in Austria

“Kerosene Cases”

As reported previously, under the leadership of Greenpeace Austria, over 8,000 individuals filed what they labelled as the first climate lawsuit in Austria in 2020.[5] The application aimed challenged various tax benefits for aviation, which – according to the applicants – resulted in an unfair advantage for air traffic and a disadvantage for railway traffic. The claimants argued that tax breaks – eg for kerosene - resulted in increased CO2 emissions, contribute to global warming and threaten the claimant’s fundamental rights. More precisely the applicants referred to the principle of equality as well as to the rights to life, private and family life according to Articles 2 and 8 of the European Convention on Human Rights (also respective rights granted by Article 2 and Article 7 of the Charter of Fundamental Rights). In Austrian law an application for constitutional review is admissible only, if the claimants can substantiate that they are directly and presently affected by the laws they challenge. The Austrian Constitutional Court rejected the case due to a lack of standing, as the applicants were neither addressees of the law nor had the succeeded in proving to be directly affected by the harmful tax benefits. The Court highlighted that respect that the applicants had claimed not to use air travel. The case is currently pending in Straßburg and has been postponed until after the hearings in the cases Klimaseniorinnen and Portugese Youth; Meanwhile **in 2022 a new application** has been filed at the Austrian constitutional court by a citizen who makes use of both rail and air services. The applicant suffers from a syndrome that worsens in the heat and claims that her health and physical integrity are specifically affected by the consequences of global warming. The case is still pending.

“Children’s Climate Case”

In February 2023, twelve minors, aged five to 16, filed a case at the Constitutional Court. The extensive application is directed against the Austrian Climate Act which has not been updated

[4] Bundesgesetz über den Ausbau von Energie aus erneuerbaren Quellen (Erneuerbaren-Ausbau-Gesetz – EAG, BGBl I 150/2021 idF BGBl I 233/2022.
[5] VfGH G 144/2020.

since 2021. The claimants argue, that due to serious legal deficiencies, the Austrian Climate Act 2011does not lead to a decrease in greenhouse gas emissions and does not sufficiently protect the plaintiffs from the consequences of global warming. The claimants are specifically invoking children's rights, which are protected by the Austrian constitution (BVG Kinderrechte - Federal Constitutional Law on Children´s Rights) and they also refer to the Charta of Fundamentals Rights (Art 24 and Art 37 GRC). The Applicants claim that the constitution stipulates that the well-being of children must be protected also in terms of intergenerational justice. The claim argues that the unconstitutionality arises from the fact that the inadequacy of the Climate Act 2011 does not lead to a reduction in greenhouse gas emissions and, therefore, the claimants argue that a law which lacks greenhouse gas reduction targets, clear responsibilities and an accountability mechanism clearly infringes these constitutional rights the law is not suitable for averting life-threatening consequences, such as heatwaves, for children.

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Czech Republic

The Czech Republic does not have a comprehensive legal framework of climate legislation, and references to climate change in the legislation are anecdotal, mostly stemming from the EU legislation. Furthermore, Czechia does not even have Climate Act.[6]

The war in Ukraine and the subsequent ban on Russian gas have caused several distinct issues for the Czech Republic. Since the country has not been able to integrate renewable energy sources into its energy mix on greater scale, the price of emission allowances and, consequently, the price of electricity and natural gas have skyrocketed. This has led to a rapid deployment of climate-friendly measures, such as home-installed solar panels for electricity production and heat pumps. However, in some regions, the grid operators are hesitant to connect newly installed solar power plants to the electricity grid due to its limited capacity. Nonetheless, solar power plants can still power homes or installations independently of the grid (in form of "off-grid solar power system").

The recent developments in climate legislation in Czechia can be divided into two categories. The first category contains specific legal instruments. The second category contains climate litigation.

The first category contains various legal instruments, such as acts, policies and financial instruments. The latter two legal instruments are intertwined because policies such as The Climate Protection Policy of the Czech Republic[7], Strategy on Adaptation to Climate Change in the Czech Republic, National Action Plan on Adaptation to Climate Change and National Recovery Plan[8] form the basis for specific financial instruments such as subventions and subsidy programs that are in place to combat climate change.

The funded projects, *inter alia*, include:

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[6] Cf. Avosetta 2022. Recent developments in climate law and litigation. Czech Republic report.
[7] Climate Policy of the Czech Republic. Ministry of the Environment of the Czech Republic. Available in English: https://www.mzp.cz/en/climate_policy_of_the_czech_republic
[8] Government approved proposal of National Recovery Plan for nearly 200 billion, agreed with further easement of epidemic control measures. Government of the Czech Republic. Available in English: https://www.vlada.cz/en/media-centrum/aktualne/government-approved-proposal-of-national-recovery-plan-for-nearly-200-billion--agreed-with-further-easement-of-epidemic-control-measures-188479/

- Comprehensive planning, monitoring, information and educational tools for adaptation of the territory to the impacts of climate change, with particular emphasis on agricultural and forestry management in the landscape.
- Frameworks and options for forestry adaptation measures and strategies related to climate change.
- Promoting the exchange of information on climate change impacts and adaptation measures at national and regional levels.
- National strategy for adaptation of buildings to climate change.
- Adaptation of settlements to climate change - practical solutions and sharing of experience.
- Possible solutions for rainwater harvesting in urbanised areas in the Czech Republic.
- Adaptation of cities to climate change - selection of measures and public participation.[9]
- Aid for the partial repair of small water reservoirs.[10]

The Czech Republic is currently awaiting new amendments to its Energy Act (Act No. 458/2000 Coll.) and the Act on Subsidized Energy Sources (Act No. 165/2012 Coll.) on the legislative front. These amendments will introduce new terms such as “energy community”, “sharing of electricity”, and other instruments in line with the latest EU legislation into the Czech legal code

The second category – climate litigation, can be further divided into climate litigation *largo sensu* and climate litigation *stricto sensu* (strategic climate litigation).

There has been only one strategic Climate litigation case in the Czech Republic. The action was filed in April 2021, and the decision of the first court (the Municipal Court in Prague) was issued on 15. June 2022 (no. 14 A 101/2021-248[11]). The plaintiffs claimed an unwarranted interference of administrative authorities in their inactivity.[12] The interference was seen in the failure to provide adequate and necessary mitigation and adaptation measures to protect against the adverse effects of climate change.

The case was brought by six different plaintiffs – affected individuals, an environmental NGO and a municipality – against the Czech Government, the Ministry of the Environment, the Ministry of Industry and Trade, the Ministry of Agriculture, and the Ministry of Transport, as the entities in charge of the various parts of the climate agenda.

The applicants accused the defendants, in particular, of insufficient activity in adopting mitigation and adaptation measures. The applicants considered that insufficient measures were

[9]Adaptation projects in the Czech Republic. Ministry of the Environment of the Czech Republic. Available only in Czech: https://www.mzp.cz/cz/adaptacni_projekty_cr_odkazy

[10] Repair your pond and help with water retention in the landscape. Ministry of the Environment of the Czech Republic. Available only in Czech: https://www.mzp.cz/cz/news_20230426_Opravte-si-rybnicek-a-pomozte-se-zadrzovanim-vody-v-krajině

[11] Judgement of the Municipal Court in Prague of 15. June 2022, case no. 14 A 101/2021-248. Available in English: https://www.klimazaloba.cz/wp-content/uploads/2022/07/Czech-Climate-Litigation-Full-Judgment-in-English.pdf

[12] S. 82 et seq. of Act No. 150/2002 Coll., Administrative Procedure Code

being taken to prevent further aggravation of climate change and to adapt the Czech landscape to the irreversible changes brought about by the environmental crisis.[13]

Forms of order sought by plaintiffs

The pleas in law can be divided into two categories. In the first one, the plaintiffs wanted the court to acknowledge that the Czech Government and several Ministries did not fulfil their international obligations in lowering GHG emissions (insufficient or missing mitigation and adaptation measures) and, by this inactivity, committed unwarranted interference.

In a more detailed way, the plaintiffs asked the court to declare that the Czech Government, the Ministry of Environment, the Ministry of Industry and Trade, the Ministry of Agriculture, and the Ministry of Transport had not adopted sufficient mitigation measures to lower GHG emissions in agriculture, transport, and energy sector by 55 % as opposed to the year 1990. Furthermore, the plaintiffs also demanded the court to declare that these defendants failed to adopt sufficient adaptation measures to combat climate change.

In the second plea in law, the plaintiffs wanted the court to order the defendants to adopt sufficient and adequate mitigation measures in their respective sectors to comply with obligations under the Paris Agreement six months after the delivery of the court's judgement. Furthermore, the Ministry of Environment and the Ministry of Agriculture have to introduce sufficient adaptation measures to adapt the Czech Republic to climate change.

The plaintiffs claimed, among others, that the defendants infringed their rights guaranteed under the Charter of Fundamental Rights and Freedoms, specifically, art. 6 – Right to life, art. 10 – Right to private and family life, art. 11 – Right to own property art. 26 - Right to engage in enterprise and pursue other economic activity, art. 31 – Right to the protection of her health and art. 35 - Right to a favourable environment.

Municipal Court's judgement

The court excluded the Czech Government from the action (the Government was not passively legitimated).

The first plea in law was upheld. The court agreed with the plaintiffs and stated that the mitigation measures adopted were insufficient. The court inferred that art. 4(2) the second sentence of the Paris Agreement is directly applicable to Czech law. Therefore, the National Determined Contribution (NDC) is the binding plan for the Czech Republic. Furthermore, the NDC introduces a specific timeframe in which the decrease of GHGs has to occur (as opposed to adaptation measures). State authorities have a duty to have a plan with accurate and wholesome mitigation measures that would lead to a reduction target of 55 % GHG in the year 2030 compared to GHG levels in the year 1990.

However, the court did not specify which type of remedies competent authorities should adopt to comply with the NDC.

The court did not agree with the second plea in law (sufficient adaptation measures). It stated that since ministries adopted policies (in this case National Action Plan for Adaptation to Climate Change) and according to the Paris Agreement, adaptation measures plot a policy

[13] For more detailed information see MÜLLEROVÁ, H. – AČ, A. The First Czech Climate Judgment: A Novel Perspective on the State's Duty to Mitigate and on the Right to a Favourable Environment. Climate Law. 3–4/2022 (12), pp. 273–284. ISSN: 1878-6561.

course with a specific goal. However, without a specific timeframe, it cannot constitute unwarranted interference.

The court also disregarded six months period for implementation stated in the original judicial motion and ordered compliance with the judgement without a specific timeframe, therefore, ordering compliance upon written delivery of the judgement.

All parties filed cassation complaints, and the Supreme Administrative Court (SAC) issued its ruling of 20. 2. 2023, case no. 9 As 116/2022-166.[14] The Court rescinded the Municipal Court's ruling and ordered it to review the case again.

The SAC did not view the encroachment on subjective public rights as dire as the plaintiffs believe. According to the Court, in the situation in which there is no climate act, and new NDCs are being discussed, it is too early to utilise judicial review. Furthermore, the SAC disagreed with the Municipal Court and identified the reduction goal of 55 % to 2030 as a collective responsibility of the EU and not of individual Member States. The Court was of the opinion that premature judicial interference would hinder any future political and legislative manoeuvrability. The only binding target (at the time of announcement) was a 14 % reduction for non-ETS sectors as opposed to 2005.

The SAC chose a pure positivistic approach meaning it required a legal act (e.g. climate act) to be able to properly assess the state's unwarranted interference.

On the other hand, the SAC acknowledged in *obiter dictum* that climate change and climate-related issues impact fundamental human rights, and it is legitimate to ask ministries and government to act on them. Furthermore, it stated that global warming and related climate change is a legal notoriety; thus, it does not have to be proved. The SAC also acknowledged that unwarranted interference could stem from sectoral legislation, but it is up to the claimants to prove it. Furthermore, the Court gingerly admitted that its approach could be changed based on the intensity of interference (connected to the effects of climate change), new legislation or the case law of ECHR (e. g., Klimaseniorinnen or Duarte Agostinho).

Besides the abovementioned case, some hints of climate litigation *largo sensu* can be found in numerous administrative lawsuits and constitutional complaints. The plaintiffs invoke, *inter alia*, infringement of art. 35 of the Czech Charter of Human Rights and Freedoms (Act No. 2/1993 Coll.) - The right to a favourable environment[15] and international obligations connected to Greenhouse gases (GHG) reduction and microplastic reductions.[16] However, climate-related issues were only part of the plaintiff's argumentation since the lawsuits targeted Covid-19 restrictions.

In administrative cases concerning renewable energy, for example, it is often argued that renewable energy sources should be promoted in the interest of protecting the climate and the environment. The same argument is found in several tax cases concerning additional tax imposed on solar energy producers or the obligation to put a minimum amount of biofuels into free circulation for transport purposes. In cases concerning air pollution, obligations arising

[14] Judgment of the Supreme Administrative Court of 20. 2. 2023, case no. 9 As 116/2022-166. Available only in Czech: https://vyhledavac.nssoud.cz/DokumentOriginal/Html/708466
[15] Act No. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms.
[16] E.g., Judgement of the Municipal Court in Prague of 4. 5. 2022, case no. 3 A 13/2022-37 or decision of the Supreme Administrative Court of 29. 4. 2022, case no. 2 Ao 1/2022-45. Case law available only in Czech: https://vyhledavac.nssoud.cz/

from the Kyoto Protocol and the Paris Agreement are sometimes put forward but do not have a decisive role in the particular case. Within the vast framework of various state policies, urban planning or environmental impact assessment, climate change-based arguments of both the claimants and the courts rarely play any substantive role and usually serve as introductory remarks or general observations. Eventually, courts dismiss such claims as unsubstantiated because suits have different merits.

On the other hand, the Constitutional court cautiously admitted in its obiter dictum in the case[17] related to the judicial review of Act No. 416/2009 Coll., on Construction Lines, that even if not all effects of climate change are thoroughly scientifically described (and quantified), they can still have a negative effect on social, economic or climate conditions of the state. Therefore, this scientific uncertainty does not preclude the state from preparing adequate measures. Thus, the Constitutional court conceded that climate change is able to affect state affairs, so the precautionary principle could be one of the prevailing arguments for the justification of onerous legislation.

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EU and local authorities

The EU consists of member States. Local authorities are not really represented. A Committee oft he Regions advises the Commission, the EParliament and the Council, in practice only the Council. It consists of 329 members of local and regional authorities. Appointments are made on proposals from governments; political party adherence is, de facto, an important criterion for appointment. The Committee gave, in the past, more than 1000 opinions on the environment. Its practical influence on EU legislation is limited.

The biggest interest by local authorities in EU activities is funding. EU list the following funding possibilities: LIFE, European Regional Development Fund, Cohesion Fund, Urban Innovation action, Uract, Interreg, Horizon Europe, Green Leaf Award, Green Capital Award. The majority of these possibilities passes over the national governments; direct applications are the exception.

A serious local initiative is the Green City Accord. Participating cities commit themselves to reduce their impact on air, water, biodiversity, waste and noise, and report regularly on progress, based on rather precise indicators.

Another initiative of this kind is the Covenant of Mayors for climate and energy, which became since a global initiative. Commitments and reporting obligations are less precise, the overall announced objective is compliance with the 1.5° C target of the Paris Agreement.

EU environment legislation has a major influence on the local environment, as regards water and air, waste, noise, impact assessments, infrastructure (waste water treatment plants, port waste reception installations, drinking water supply, traffic impact). Access to EU courts is normally not possible (no direct and individual concern). Town and country planning may be unanimously organised at EU level, but has rightly not been done so.

Author: Ludwig Krämer

[17] Judgment of the Czech Constitutional Court of 22. 3.2022, case no. Pl. US 39/18. Available only in Czech: https://nalus.usoud.cz:443/Search/GetText.aspx?sz=Pl-39-18_1

EU legislative activities in 2022/2023

1. Planning until 2024

   The EP, the Council and the Commission adopted a joint declaration concerning the legislative priorities until 2024 (OJ 2022, C 491/2). First priority was the implementation of the European Green Deal (COM(2019) 640); also, practically all environmental commitments were repeated.

2. 8th environmental action programme

   Decision 2022/591 adopted the 8th EAP (OJ 2022, L 114/22), an action programme without action proposals. Following that, the Commission published a list of 26 indicators to assess progress in the implementation of the EAP (COM(2022) 357). AS EU environmental law and policy are based on the assumption that there are also national policies on the environment, the indicators may be used to also assess progress at national levels.

3. Corporate Sustainability

   The Commission published a proposal for a directive which would oblige large companies to control also the activities of their daughter companies and their suppliers as to human rights and to environment protection (COM (2022) 71).

4. Information on sustainability

   Directive 2022/2464 was adopted which obliges large companies to regularly report on environmental rights, social and human rights and governance issues. A Commission regulation 2022/1988 provided details of such information by financial services undertakings.

5. Energy prevails over environment

   Regulation 2022/2577, based on Article 122 TFEU, provides that for a period of 18 months (which may be prolonged), renewable energy projects are of superior public interest than habitats or species protection (Art.6 of 92/43), birds protection (dir.2009/147) or areas which come under Dir.2000/60. For solar enegy projects, no screening under dir. 2011/92 is necessary. Permit procedures are limited in time (3 to 6 months); private solar projects are deemed to be permittted, when the authority has not answered within a month.

6. Nuclear energy

   Commission regulation 2022/1214 clarified that investments in nuclear energy and in gas are, under certain conditions, to be considered as green investments.

7. Environment Implementation Review

   The Commission published its third review (COM (2022) 438, which gave some very limited information on (non-)compliance with existing environmental legislation. Nevertheless, it would be highly desirable to have such a report at regulat intervals also by Member States.

8. Restoration of nature

The Commision published the proposal for a regulation on the restoration of nature (COM (2022)304) which wouldd oblige Member States to adopt national restoration plans.

9. Vulnerable marine zones

   The Commission adopted regulation 2022/303 which established 87 vulnerables zones in the North East Atlantic where seabed fishing is prohibited. No such measures exist for the Mediterranean and the Black Sea.

10. Air pollution revision

   The Commission proposed a revision of directive 2008/50 to align it more to WHO guidelines (COM (2022) 542). With some 300.000 premature deaths per year in the Union, this is timely.

11. Nanomaterials

   The Commission published a recommendation on the definition of nanomaterials (OJ2022, C229), which is not legally binding.

12. Pesticide use

   The Commission proposed a regulation to reduce the pesticide use in agriculture (COM (2022)305). The Council thought that the situation had changed with the Russian war and considered the impact assessment insufficient, asking the Commission to improve; an absolute innovation.

Author: Ludwig Krämer

France: Recent Developments in Environmental Law & Climate litigation 2022

Recent Developments in Environmental Law 2022

The year 2020 was marked by the election of the President of the Republic followed by the legislative elections. Elisabeth Born is appointed Prime Minister by the President Macron and she is responsible for the ecological and energy planning ("Planification écologique et énergétique")[18]. In her genera policy statement (July 2022), she announced that "*the government's project would be based on three main principles: environmental responsibility, budget responsibility and no tax increases*". She promised "radical transformations in the way we produce, house, travel and consume" and called for a general mobilisation to "*become the first major nation to move away from fossil energies*".

Legislative activity in 2022 is therefore less dense than in previous years. However, mention may be made of Law 2022/217 on differentiation, "*décentralisation, déconcentration*" and various measures to simplify territorial public action, which provides for the décentralisation of the management of terrestrial Natura 2000 sites to the region as of 1 January 2023 (decree 2022/1757 - Art. L. 414-1 & Environmental Code). Due to the post-Covid context and the war in Ukraine, legislative activity in 2022 focused on other issues, such as the adoption of Law 2022/1158 on emergency measures for the protection of people' purchasing power in August 2022. Mention may also be made of the adoption of Law 2022/401 aimed at improving the protection of whistleblowers, particularly in view of the conditions laid down by Directive (EU)

[18] She was the Minister of ecological and solidarity transition (2017-2019 & 2019-2020).

2019/1937. Such law is accompanied by the adoption of the Organic Law 2022/400 aimed at reinforcing the role of the Human Rights Defender with regard to whistleblowing.

Among the bills introduced by the government in 2022 is the Renewable Energy Acceleration Bill (the law was enacted in March 2023). The goal is to increase solar energy production tenfold to over 100 gigawatts (GW), to deploy 50 offshore wind farms to reach 40 GW and to double onshore wind production to 40 GW. The law introduces a territorial renewable energy planning system to facilitate, in particular, local approval of projects. In November 2022, the government also presented, under an accelerated procedure, a bill on the acceleration of procedures related to the construction of new nuclear facilities near existing nuclear sites and the operation of existing facilities. This bill is currently discussed by the national Assembly and the Senate. It aims to accelerate the construction of new reactors construction of six EPR2 reactors and the possibility of eight more nuclear reactors. The objective of reducing the share of nuclear power in the electricity mix to 50% by 2035 has been removed (this objective had been introduced by the Law 2015 energy transition with a deadline of 2025, raised to 2035 by the energy-climate law 2019) and penalties for trespassing in a nuclear power plant have been increased. A public debate on new nuclear reactors and the Penly project in Seine-Maritime is being organised by the Commission Nationale du Débat Public from October 2022 to February 2023. At the end of January 2023, Greenpeace and the Sortir du nucléaire network decided to stop participating in the public debate in view of the legislative process launched by the government without waiting for the end of the public debate organised by the National Commission for Public Debate.

A presentation of a constitutional bill to create an Environmental Defender by the elected members of the National Assembly in December 2022 (608/2022) should also be mentioned.

The legal news of 2022 is therefore mainly jurisprudential. Several decisions have specified, most often in an extensive sense, the right to a balanced and healthy environment enshrined in Article 1 of the Constitutional Charter of the Environment (Constitutional Council decision no. 2022-843, Loi portant mesures d'urgence pour la protection du pouvoir d'achat; Council of State, 2022 - no. 451129, the right to the environment has the "character of a fundamental freedom").

Furthermore, the development of renewable energies and the problematic of derogations for "protected species" continue to give rise to disputes (Council of State, 2022, *Assoc. Non aux éoliennes entre Noirmoutier et Yeu et a.*, n° 443420).

Climate & air litigation 2022

- ACTIONS AGAINST THE PUBLIC AUTHORITIES

LEGALITY LITIGATION

Council of State: air pollution & directive 2008/50/EC. “background & 2022”

➔ 12/7/2017, n°394254 Les Amis de la terre & /State

The Council of State annulled the implicit decisions of the President of the Republic, the Prime Minister and the ministers in charge of the environment and health, refusing to take all necessary measures and to draw up plans in accordance with Article 23 of Directive 2008/50/EC (concentrations of nitrogen dioxide and fine particles PM10). The judge also enjoined the Prime Minister and the minister in charge of the environment to take all necessary measures to ensure

that, for each of the zones listed in his decision, an air quality plan is drawn up and implemented to reduce, as soon as possible, the concentrations of nitrogen dioxide and fine particles PM10 below the limit values set by Article R. 221-1 of the Environment Code, and to transmit it to the European Commission before 31 March 2018.

➔ 10/7/2020, n°428409 Les Amis de la terre/State

The Council ordered the State to pay a penalty payment if it did not justify, within six months of the notification of this decision, having executed the decision of 12 July 2017, for each of the areas listed in point 11 of its new decision, and fixed the amount of this penalty payment at 10 million euros per six-month period until the date of this execution.

➔ 4/8/2021, n°428409 Les Amis de la terre/State

The Council of State proceeded to the provisional liquidation of the penalty imposed for the period from 11 January to 11 July 2021 and ordered the State to pay the sum of 10 million euros, to be distributed as follows: 100,000 euros to the Friends of the Earth France association, 3.3 million euros to the French Environment and Energy Management Agency (ADEME), 2.5 million euros to the Centre for Studies and Expertise on Risks, the Environment, Mobility and Development (CEREMA), 2 million euros to the French National Health Security Agency, 1 million euros to the National Institute for the Industrial Environment and Risks (INERIS), 350,000 euros each to the approved air quality monitoring associations Air Parif and Atmo Auvergne Rhône-Alpes, and 200,000 euros each to Atmo Occitanie and Atmo Sud.

In February 2022, the Council of State asked the Minister for Ecological Transition to inform it of the measures taken by the State services to ensure the execution of the decisions. In March 2022, the Minister for Ecological Transition specified the measures adopted by the State to this end.

In September 2022, Friends of the Earth France and several other associations submitted a brief to the Council of State to have it noted that judgments no. 394254 and no. 428409 had not been fully executed at the end of the period allowed by the decision of 10 July 2020 and to order the State to pay 20 million euros for the period from 11 July 2021 to 11 July 2022;

➔ 17/10/22, n°428409 Les Amis de la terre/State

In view of the delays in complying with the decisions and the situation of exceeding air pollution standards in several areas (NO2: Toulouse, Lyon, Paris, Aix-Marseille) the judge decides to order the State to pay the sum of 20 million euros, as a provisional liquidation of the fine imposed by the decision of 10 July 2020, for the period from 11 July 2021 to 11 July 2022. The judge divided this sum between the associations and agencies as follows

- 50,000 euros to the association Les amis de la Terre France,
- 5.95 million euros to ADEME,
- 5 million euros to CEREMA,
- 4 million euros to ANSES,
- 2 million euros to INERIS,
- 1 million to Air Parif and Atmo Auvergne Rhône-Alpes, each,
- 500,000 to Atmo Occitanie and Atmo Sud, each.

In its press release, the Council of State states that it will review in 2023 the State's actions from the second half of 2022 (July 2022-January 2023)

LEGALITY LITIGATION

Council of State : Commune de Grande Synthe et Damien Careme (maire) /State : "background & 2022"

➔ 19/11/2020, n° 427301 (see french report Avosetta 2021)

➔ 1/07/2021, n° 427301[19]

As a reminder, in the light of the data communicated by the public authorities, the Council of State concludes that *the reduction in greenhouse gas emissions for 2020 cannot (...) be considered sufficient to establish a trend in emissions that respects the trajectory set to achieve the 2030 objectives*. The Council of State orders the adoption of all useful measures to curb the curve of GES produced on the national territory (...) before 31 March 2022.

At the beginning of May 2022, the French government published its response to the Council of State in order to demonstrate that the French objectives will be met[20]; in particular, the government lists various legislative and financial levers that have been mobilized since July 2021: the Law 2021/1104[21] to combat climate change and strengthen resilience to its effects[22] (which takes up some of the measures recommended by the citizens' climate convention), the France 2030 Investment Plan of 30 billion euros (50% for the ecological transition). It also mentions the commitment of the President of the Republic in February 2022 to multiply by 10 the solar production capacities by 2050, the creation of about 50 offshore wind farms and the construction of 6 EPR2 nuclear reactors by 2050. A future programming Law on Energy and Climate is also envisaged for 2023

- ACTIONS AGAINST NGO

Cour de cassation : climate activist and portrait of the President of the Republic

➔ 30/11/2022, n° pourvoi 22-80.959 – Mme P, MM E, Mme O &.

Climate activists stole the portrait of the President of the Republic from town halls and were condemned by several court decisions. In this case, they are appealing against the judgment of the Court of Appeal of Agen (Judgement of 3/2/2022).

For the Court of Cassation, although the action carried out by the defendants was part of a militant approach and could be considered as expression within the meaning of Article 10 of the European Convention on Human Rights, the conviction with a waiver of sentence was not disproportionate in view of the symbolic value of the portrait of the President of the Republic, the absence of restitution and the fact that the thefts had been committed in a reunion. The Court therefore dismissed the appeal (pourvoi).

➔ 18/5/2022, n° pourvoi 21-86.685 – Mme X et M D.

Same case and conclusion. Court of Appeal Colmar (30/6/2021).

- ACTIONS AGAINST COMPANIES

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[19] https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-01/427301
[20] https://www.ecologie.gouv.fr/sites/default/files/dp-rep-gouv-gs.pdf
[21] So-called «*Law Climate & Résilience* ».
[22] https://www.legifrance.gouv.fr/jorf/jo/2021/08/24/0196

Les Amis de la terre & al./TotalEnergies

- ➔ 28/2/2023 : two judgement of Judicial Tribunal of Paris (22/53942 Friends of the Earth/ TotalEnergies
- ➔ et n°22/53943 Association Survie & /TotalEnergies.

Friends of the Earth has filed an application for interim relief against TotalEnergies for a major project in Uganda (drilling of 426 oil wells, some in a natural park) before the judicial tribunal of Paris. In October 2022, the tribunal asked three academics to advise on the concept of duty of care introduced by the Duty of Care Law 2017/399 (this is an uncommon practice, this can be explained by the first judicial application of this Law).

The tribunal emphasized that the content of due diligence measures remains general in the Law 2017/399 and that the decree that was to provide details on this subject has still not been adopted. In this case, the Court considers that the complaints relating to the 2021 compliance plan were not notified to TotalEnergies by way of a formal notice prior to referral to the Court, and that consequently, in the absence of such formal notice prior to referral to the judge, the tribunal declares that the associations' requests to suspend work on the Tilenga and EACOP projects on the basis of duty of care are inadmissible.

In October 2022 Friends of the Earth France, Notre Affaire à Tous and Oxfam France have put BNP Paribas on notice to comply with its due diligence obligations and are asking it to end its financial support for new fossil fuel projects and to adopt a plan to exit the oil and gas sector. In February, 2023 they decided to take the bank to Court.

Author: Simon Jolivet, Nathalie Hervé-Fournereau

Germany: Environmental Law

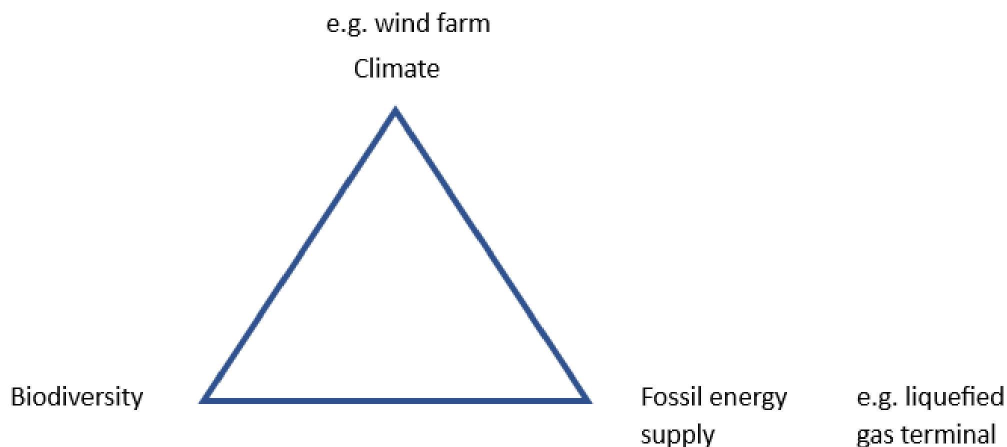
Energy supply has been the dominant theme of environmental legal policy during the past year. Germany had to cope with (at least) eight major challenges:

(1) the political promise to push renewable energy sources
(2) the political promise to step out of fossil sources
(3) the political promise to end nuclear energy
(4) the need to substitute Russian oil and gas imports
(5) the need to protect biodiversity from side-effects of renewables
(6) the interest in economic growth
(7) the interest of households in affordable energy prices
(8) scarcity of public budgets

Renewables and the stepping out of fossil and nuclear energy had set on their way before the start of the Russian invasion in Ukraine, 2038 as final year programmed for ending coal and 2022 (completed 15 april 2023) for nuclear. Since then the need to substitute Russian gas has much of the progress towards renewables slowed down or even turned back. Gas imports were boosted including shale gas from the US which is exploited with risks for groundwater and damage to landscapes. When the core corporation in charge of gas imports, UNIPER, was hit by difficulties to buy gas and pass the rising gas prices on the international market through to consumers, it was heavily subsidised and even taken over in public ownership. Prices for end consumers were also subsidised although in somewhat erratic ways. Energy supply companies were suspected to take advantage of that situation making windfall profits. The plan of the

present political coalition to step out of coal-based energy generation by 2030 rather than 2038 as previously determined was given up, with the exception of a deal between government and RWE to step out of lignite earlier in exchange for extending the lifetime of of two coal power plants. This untimely promotion of fossil sources slowed down the reduction of greenhouse gas emissions. Nevertheless, investment in renewable sources was accelerated. However, side-effects on biodiversity e.g. of wind farms, photovoltaic installations and biomass cultivation have increased.

In more abstract terms recent developments had to cope with the double conflict climate vs biodiversity and climate vs fossil energy supply, or the triangle climate - biodiversity – fossil energy supply.



Two examples may illustrate this triangled tension: Promotion of fossil energy at the disadvantage of biodiversity and climate, exemplified by the accelerated installation of liquefied gas terminals, and promotion of climate protection at the disadvantage of biodiversity and fossil energy, exemplified by the accelerated installation of wind energy installations.

(1) Liquefied natural gas: Legals bases include the Law on the acceleration of supply with liquefied natural gas (Gesetz zur Beschleunigung des Einsatzes verflüssigten Erdgases – LNG-Gesetz) of 22.05.2022 which also modified relevant provisions of the Federal Emissions Protection Law (Bundesimissionsschutzgesetz), the Federal Water Law (Wasserhaushaltsgesetz) and Federal Nature Protection Law (Bundesnaturschutzgesetz):

- Scope: stationary installations on water or land for discharge, storage and regasification of liquefied gas, pipelines connecting with the gas grid
- Modifications of environmental legal requirements if 'accelerated authorisation suited to relevantly contribute to manage or prevent a crisis in gas supply':
    - Waiver of EIA requirement
    - Substantive requirements of applicable sectoral laws nevertheless to be observed
    - Publication of application 1 week, public comments within 1 further week, public hearing only if 'necessary or expedient' (erforderlich oder zweckmäßig)
    - Construction tolerated before submission of complete application dossier and before public participation if collection of missing information not

    - possible due to urgency of the project and positive decision to be expected even without the missing information
    - In case the project encroaches on natural assets any replacement or compensation measures (which are normally due under German nature protection law, called encroachment regulation (Einriffsregelung) only to be imposed within 2 years after issuance of project authorisation and to be initiated 3 more years, i.e. entire 5 years after authorisation
    - Fiction that extraction and discharge of water for/from installations do not have harmful effects on waters
    - No suspensive effect of administrative appeals or actions before courts
    - First and final competence of the Federal Administrative Court (Bundesverwaltungsgericht)
- I have doubts if this eradication of many environmental achievements is compatible with EU law, including Directive 2011/92 (EIA), Directive 2010/75 (Industrial installations) and Directive 200/60 (Water).

(2) Wind energy installations: Legal bases include: Law on determination of special reservations for wind energy installations (Gesetz zur Festlegung von Flächenbedarfen für Windenergieanlagen an Land); Construction Code (Baugesetzbuch); Federal Law on Emissions Protection (Bundesimmissionsschutzgesetz); Federal Law on Nature Protection (Bundesnaturschutzgesetz)

- Scope: wind energy installations on land
- Provisions
    - Each Land to dedicate 2 % of its space for wind energy installations (2% varying from 0.5 to 2.2 % depending on the size of the Land); Contractual offsets between the Laender possible
    - Each land to determine by land-use plans priority areas (Vorranggebiete) for wind energy installations, stepwise in two instalments, by end of 2027 and of 2032. SEA required according to general criteria on scope and content.
    - The determination of priority areas is not bound by withstanding provisions in other land-use plans
    - Laender to annually report about determination of priority areas, construction authorisations and constructions of installations
    - Authorisation of wind energy installations within priority areas not requiring an EIA, except if no SEA was made for the area
    - Wind energy installations allowed in landscape protection areas (Landschaftsschutzgebiete) even if conflicting with protection requirements; allowed in Natura 2000 areas only if protection provisions not jeopardised
    - Species protection requirements in principle to be respected but standardised: the closer the windmill site to nesting sites of certain birds of prey and storks the more requirements concerning operation restrictions or even dislocation of installations; presumption that beyond outer limits no adverse effect to expected; this is, for instance, 2500m for the harrier species (Weihe)

- Concerning powers of authorities to grant dispense from species protection wind energy is to regarded as prioritary public interest
- Integrated procedure covering all necessary authorisations
- Decision on application to be decided within 7 months (applicable also for any other project covered by BImSchG)
- Facilitation of licensing of repowering of existing installations;' repowering' defined as including substantially larger installations and at extended locations

The new approach will need to be tested against the amendment of the Renewable Energy Directive 2018/2001 once it will be adopted, see COM 2022/222 and 1st reading of EP P9_TA(2022)0441, especially concerning the treatment of adverse side-effects on biodiversity and other environmental concerns. I copy some of the innovative provisions, taking the version of the COM proposal and the EP amendments:

Art. 16a Permit-granting process in renewables acceleration areas

(1)

Member States shall ensure that the permit-granting process referred to in Article 16(1) shall not exceed nine months for projects in renewables acceleration areas, including their related energy network elements and grid connection.

(3) 2nd subpara:

By derogation from Article 6(3) of Directive 92/43/EEC, the plants referred to in the first subparagraph, shall not be subject to an assessment of their implications for Natura 2000 sites, provided that those renewable energy projects comply with the rules and measures established in accordance with Article15c(1), point (b) of this Directive and if the absence of significant effects of the plants was proved on the basis of the appropriate assessment of the plans designating renewable acceleration areas carried out in accordance with Article 15(c)(2) of this Directive.

(4):

The competent authorities of Member States shall carry out a screening of the applications referred to in paragraph 3. Such screening shall aim to identify if any of such projects is highly likely to give rise to significant adverse effects in view of the environmental sensitivity of the geographical areas where they are located, that were not identified during the environmental assessment of the plan or plans designating renewables acceleration areas carried out in accordance with Directive 2001/42/EC and, if relevant, with Directive 92/43/EEC….

For the purpose of such screening, the project developer shall provide information on the characteristics of the project, on its potential impact on the environment, on its compliance with the rules and measures identified according to Article 15c (1), points (b) and (c), for the specific renewables acceleration area, on any additional measures adopted by the project and how these measures address environmental impacts. Such screening shall be finalised within 30 days from the date of submission of the applications for new renewable energy plants, …

(5)

Following the screening process, the applications referred to in paragraph 3 shall be authorised from an environmental perspective without requiring any express decision from the competent authority, unless the competent authority adopts an administrative decision, duly motivated and based on clear evidence, that a specific project is highly likely to give rise to significant adverse effects in view of the environmental sensitivity of the geographic area where they are located that cannot be mitigated by the measures identified in the plan or plans designating renewables acceleration areas or proposed by the developer for the project. Such decision shall be made available to the public. Such projects shall be subject to an assessment in accordance with Directive 2011/92/EC and, if applicable, to an assessment under Article 6(3) of Directive 92/43/EEC, which shall be carried out within six months following the screening decision.

Art. 16b Permit granting process outside renewables acceleration areas

(1)

Member States shall ensure that the permit-granting process referred to in Article 16(1) shall not exceed 18 months. That period shall apply to renewable hybrid power plants, and their related energy networks concerning projects outside renewables acceleration areas.

(2)

Where an environmental assessment is required under Directive 2011/92/EU or Directive 92/43/EEC, it shall be carried out in a single procedure that combines all relevant assessments for a given project. When any such environmental impact assessment is required, the competent authority, taking into account the information provided by the developer, shall issue an opinion on the scope and level of detail of the information to be included by the developer in the environmental impact assessment report, of which the scope shall not be extended. Where the specific projects have adopted all necessary mitigation measures, any killing or disturbance of the species protected under Article 12(1) of Directive 92/43/EEC and Article 5 of Directive 2009/147/EC shall not be considered deliberate.

Art. 16d Overriding public interest

By ... [three months from entry into force], until climate neutrality is achieved, Member States shall ensure that, in the permit-granting process, the planning, construction and operation of plants for the production of energy from renewable sources, their connection to the grid and the related grid itself and storage assets are presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in the individual cases for the purposes of Articles 6(4) and 16(1)(c) of Directive 92/43/EEC, Article 4(7) of Directive 2000/60/EC and Article 9(1)(a) of Directive 2009/147/EC.

No later than ... [one month after the date of entry into force of this Directive], the Commission shall, in order to reduce legal uncertainty, issue guidance on how to implement this Article in line with existing requirements under Union law and with relevant rulings of the Court of Justice of the European Union.

Author: Gerd Winter

Germany: Climate protection policy and climate litigation

German climate protection policy is in deep trouble. Since the phase-out of nuclear power, initiated by the former conservative government after the Fukushima shock and completed by the current “traffic light” coalition in deference to the Greens, there has been no climate-friendly base-load electricity supply. The gas-fired power plants planned as "bridge technology" are no longer economically, geopolitically and ecologically attractive since the discontinuation of cheap Russian natural gas. At present, the base-load electricity supply is again being provided to a large extent by coal-fired power plants. Even more than 25 years after the start of the much-invoked "energy turnaround", Germany is therefore **one of the High-CO2-emitting countries in the field of electricity production**, and not only in a European comparison (https://app.electricitymaps.com/map?lang=de).

Nevertheless, Robert Habeck, the Green "super-minister" for the economy and climate protection, and the government as a whole are sticking to the policy of the **"electricity turnaround"**. According to this policy, the areas of building-heating and transport, which have so far mainly been powered by fossil fuels, are also to be electrified. For all new heating systems to be installed after 2023, electrification ("heat pump") will de facto be mandatory. Electric vehicles will continue to be subsidised by the state. Estimates therefore assume that the electricity demand of the average German household will triple in the next few years. The "climate-neutral" (actually: more climate-friendly) production of this electricity is to be provided by a massive expansion of wind and solar energy. However, there are considerable doubts about the feasibility of these expansion plans. The problem of electricity storage also remains unsolved.

Against the backdrop of this policy, the spectacular "successes" of German **climate litigation** also appear increasingly doubtful. The litigation euphoria observed after the sensational climate protection decision of the Federal Constitutional Court has given way to **disillusionment** (Remo Klinger, Warum die Klimaschutz-Rechtsprechung des Bundesverfassungsgerichts auch enttäuschend ist, in: Zeitschrift für Umweltrecht (ZUR) 2022, 577 - 579).

In particular, the subsequent proceedings before the Bundesverfassungsgericht following the decision of the Court have all remained unsuccessful. Thus, the BVerfG (15.12.2022 - 1 BvR 2146/22 - **Speed Limit**) dismissed as inadmissible a constitutional complaint directed at the introduction of a speed limit on German motorways. The constitutional complaints with which the complainants wanted to force the legislators of the federal states to make more concrete climate protection plans were also unsuccessful (BVerfG, 18.01.2022 - 1 BvR 1565/21, et al. - **Landesklimaschutzplanung**).

Attempts, analogous to the Dutch "Shell" decision (Rechtbank Den Haag, 26.5.2021, C/09/571932 / HA ZA 19-379 - Milieudefensie u.a./Royal Dutch Shell), to compel **German car manufacturers** to undertake more extensive climate protection efforts through the courts have also consistently failed so far. For example, the Regional Court of Munich rejected a lawsuit that sought to force BMW to abandon the production of passenger cars with internal combustion engines from 2030 (judgement of 07.02.2023, ref. 3 O 12581/21). Parallel lawsuits against Mercedes (Stuttgart Regional Court, judgement of 13.09.2022, ref. 17 O 789/21) and VW (Detmold Regional Court, 24.02.2023 - 01 O 199/21; Braunschweig Regional Court, 14.02.2023 - 6 O 3931/21) were also dismissed at first instance.

All attempts to have the further expansion of **motorways** stopped by the courts with reference to the climate protection decision of the Federal Constitutional Court and the legal obligation to take climate protection targets into account have also failed so far (BVerwG, 9 A 7.21 - judgement of 04 May 2022 - A 14; BVerwG, 9 A 1.21 - judgement of 07 July 2022 - A 20).

The constitutional mandate on climate protection developed by the Federal Constitutional Court has so far only become effective in interpretative decisions on the applicable law. For example, the Federal Constitutional Court has rejected as unconstitutional a Land law provision banning **wind turbines in forests** without exception, also citing the importance of climate protection (BVerfG, 27.09.2022 - 1 BvR 2661/21 - Windkraft im Wald). However, the main argument here was the division of competences between the federal government and the Länder. Conversely, the BVerfG, referring to the climate protection goal, declared the obligation under Land law for **residents to participate financially in the income from wind turbines** to be constitutionally permissible despite the associated encroachment on the right to freedom of occupation (BVerfG, Beschl. v. 23.03.2022, Az. 1 BvR 1187/17 - Bürgerwindparks MV). Referring to the constitutional climate protection goal, the VGH Baden-Württemberg (13.07.2022 - 2 S 808/22 - Parkgebühren) declared **parking fees** of the city of Freiburg increased by a factor of 16 and the climate policy incentive effect pursued with this increase to be lawful. However, an appeal against the decision is still pending before the Federal Administrative Court (BVerwG - 9 CN 2.22).

Author: Bernhard Wegener

Hungary: A glimpse on the Hungarian reality in May 2023

<u>Empowerment in crisis/danger situations</u>

Covid-19, Russian-Ukrainian war both could provide a perfect legal basis to overrule environmental limitations, using the crisis situation as an excuse. The Fundamental Law of Hungary (constitution) in an amendment, connected to the Covid pandemic prescribed the followings:

State of danger
Article 53
(1) In the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act.
(2) In a state of danger, the Government may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.
(3) The decrees of the Government referred to in paragraph (2) shall remain in force for fifteen days, unless the Government, on the basis of authorisation by the National Assembly, extends those decrees.
(4) Upon the termination of the state of danger, such decrees of the Government shall cease to have effect.

On the basis of the above authorization, a separate act – Act no. VI of 2022 on the prevention of consequences of armed conflict and humanitarian catastrophe in a neighbouring country – has been adopted, serving the basis of a quasi unlimited regulatory power, given to the Government, even to amend or set aside acts of Parliament, in a temporary basis. In practice this additional legal basis is not really necessary, knowing that the governing parties have a 2/3

majority in the Parliament, so they might even legislate many things even without any reference to a crisis.

This empowerment has been used many times, and among others three times in connection with environmental requirements:

- Gov. Decree No. 287/2022. (VIII. 4.) Korm. rendelet on guaranteeing the firewood. Many nature conservation limitations were set aside, as the whole decree focused on cutting trees in nature conservation areas, even allowing clear-cutting;
- Gov. Decree No. 293/2022. (VIII. 9.) Korm. rendelet, which forbid for a while to install solar panels on apartment and private houses, arguing with the additional capacity requirements, putting a burden on the existing energy systems. It was in contrast with the previous messages sent to the owners, namely to install as many solar panels as possible. Later this decree has been invalidated and again the government send the same message as earlier, that is to use more panels;
- Gov. Decree No. 627/2022. (XII. 30.) Korm. rendelet on extraction of minerals, necessary for the national economy. The decree allowed surface mining in nature conservation areas, ecological corridors and also overruled the Natura 2000 rules of the EU, generally declaring that every mining might be taken as exceptional public interest – while according to the EU requirements this should only be decided on a strict case-by-case basis.

As all these - primarily the tree-cutting and mining – regulations might have long-lasting, even irreversible impacts, in my capacity as an ombudsman for future generations (I could not go to the Constitutional Court against these decrees, as this is only open for the commissioner of fundamental rights, while I am only the deputy) I published a notice on the necessary harmony of crisis legislation and the interests of future generations. This notice is available at our website and have been sent to the relevant ministers.
(https://www.ajbh.hu/documents/10180/2926454/Alapjogi_osszefoglalo_jn_vh.pdf/16bf0555-38ea-fc93-43d3-6d99eb68a41d?t=1676377091588)

The general background for such a regulatory power is given in the Act No. XCIII of 2021 on the harmonization of protection and safety operations. Art. 80 par. 4 of this act is clear in this respect, saying that the Government may use its sphere of authority "exclusively with using such measures which are for the immediate reaction and also necessary and proportionate as compared with the threats to be managed." The continuous supervision of the reasonableness is also obligatory, thus the unnecessary measures should be cancelled.

In my notice I had to underline that the legal basis might not be enough to use measures which have a long-lasting effect, but only such measures which are necessary for immediate action and having an intermediate character. Consequently, it may not be possible to have measures which might have longer lasting, probably irreversible, irreparable consequences, influencing more the future than to have an effect in the actual situation. Such kind of longer lasting consequences, effecting other – for example future generations' – interest may not be accepted on the basis of current empowerment. The reason behind the crisis legislation is to assist in solving the current difficulties and should not have lasting negative consequences, thus these rules should always be – by definition – temporary. Practically speaking, it means that at the end of the crisis, the consequences of the new measures may not be perceptible any longer. If it is not the case than something went wrong.

In our notice some general constitutional principles and requirements have been listed, all of which being also binding for the rule-making in such crisis situations, too.

First of all, prevention and precaution, as indicated by the Constitutional Court in several decision, such as in Decision no. 13/2018. (IX. 4.) AB: "[14] …The fact that the Fundamental Law explicitly mentions in Article P) (1) the obligation of preserving for the future generations the common heritage of the nation, raises a general expectation regarding the legislation that in the course of adopting the laws, not only the individual and common needs of the present generations should be weighed, but also securing the living conditions for future generations should be taken into account, and the assessment of the expected effects of individual decisions should be based on the current state of science, in accordance with the precautionary and preventive principles. … [15] …One of the aims of responsible management of the assets within the scope of the nation's common heritage, as specified in the Fundamental Law, namely defining the needs of future generations, is not a political question: it could and should be defined at all times on scientific basis, taking also into account the precautionary and preventive principles."

The strict minimum of evaluating the legislation or any decisions of the Government is the non-retrogression (non-derogation) principle, guiding the practice of the Constitutional Court since the first major environmental decision in 1994. This is summarized clearly in Decision No. 13/2018 (IX. 4.) AB, taking into consideration all the other elements: "[62] As it has been already pointed out by the Constitutional Court earlier, based on the precautionary principle, the State shall secure that the condition of the environment does not deteriorate due to a specific measure. {Decision 27/2017. (X. 25.) AB, Reasoning [49]}. Consequently, the legislator has to verify that a specific planned regulation does not qualify as a step-back, and thus does not cause any damage – an irreversible one, as the case may be –, and does not provide an opportunity in principle for such a damage."

If there is a crucial need to step back, this should only be based upon the necessity to protect another fundamental right and taking into consideration to principle of proportionality. The irreversible or hardly reparable consequences are typically go beyond this limit.

Finally, the need to use foresight, namely strategies and planning, to look beyond the government cycles is a must.

Priority public investment

There is one other tendency in the recent – past 10 years - and current regulatory practice, that is the extended enlargement of the scope of the reference to the priority public investment. The current draft legislation on state investment and the proposed act on building and construction activities are also using frequently this option. The decision is of the Government, and they are willing to use this – otherwise exceptional – authorization for many smaller investments, which do not have too much to do with the real content: high priority public interest. The current tendency, that is to make Hungary as the fourth biggest battery manufacturer of the world, is always utilizes this option. The consequence of it is the shorter procedure, the overruling of local physical plans, the shorter time available for public involvement, the greater option to disregard what is a significant effect. Summing it up, practically to extend over the environmental constraints. And due to the fact that the time-limit open for access to justice is also very short, in many cases the public or other interested parties does not have the chance to realize that something went wrong.

Some positive results

1. The **Public Procurement Office** in the past one-two years – currently also with the involvement of our ombudsman office – is focusing more and more on green public procurement policy. The first step is of September 2021, an Environmental Pubic Procurement Ethical Code. They could also develop a guidance and sample documents in order to publicize the greening of general procurement policy, going to be published soon. (Just now when one opens the website the first is to ask the visitors to voluntarily fill a green procurement inquiry form!)

2. The **Competition Authority** is also very active in the field of environmental protection, currently they initiated an anti-green-washing campaign.

Author: Gyula Bándi

Hungary – the case of the climate act

In Hungary there is only one ongoing legal case in front of the Constitutional Court, concerning the Act XLIV of 2020 on climate protection. The original draft had been presented by the opposition, accepted and substantially changed, leaving practically all the direct requirements. The act divides the coming years into two groups: till 2030 almost everything remains the same, while between 2030 and 2051 substantial efforts should be taken. The whole act is 1 page long. The opposition MPs turned to the Constitutional Court against the act. In February 2023, on the request of the CC me, as an ombudsman for future generations presented an *amicus curiae* in connection with the case. Unfortunately, the judgment is still far away.

Here I summarize my comments, available also at the CC website. According to our opinion the act does not meet the institutional protection obligations of the state, based upon the Art. XXI of the Fundamental Law. Also, those very limited aims to 2030 are against the interests of future generations, based upon Art. P), covering the public trust doctrine, the planning obligations, and precautionary principles. It would be necessary to develop direct and effective emission limitation values till 2030 also, providing among other the conditions and obligations of implementation. On the contrary, the legislator did not provide the means and tools of implementation, did not provide the list of responsibilities. These all mean that the act is a *lex imperfecta.* The duty of care and cooperation also belong to the obligations of the state to keep the emission reduction targets, also as a commitment to international efforts.

As to the long-term planning as an obligation of the state, if there are no direct an effective reduction targets till 2030 there is a limited chance to meet the final carbon-neutrality as an objective. The short-term operations do not serve the long term goal.

The interests of future generations are also neglected, as the real burden of action is put on the coming generations, also the burden of damages and risks. The precautionary approach is not seen either, as the act practically reconciles to the options that the targets are not met in due time and to the option that the coming generations might have a drastic sacrifice in order to balance the inactivity of the present.

Author: Gyula Bándi

Italy

Climate Litigation: recent developments

On 9th May 2023, GreenPeace Italia, ReCommon and twelve Italian citizens have initiated the first civil action in an Italian court against a private energy company, the ENI Group. With this action, brought before the Tribunal of Rome, the plaintiffs ask the court 'to ascertain the damage to and violation of their human rights, their right to health and a private family life'. They argue in particular that the company's decarbonisation strategy is in blatant violation of the international commitments of Italy and of the company itself under the Paris Agreement. This claim, titled "*La Giusta Causa"* (literally: *A Just Claim*) is the first climate case against a private company in the Italian legal order. The first hearing may be scheduled towards the end of November 2023. Further details can be found here.

This claim follows the legal action under the heading "*Giudizio Universale"* (literally *The Last Judgment)*. brought before the Tribunal of Rome by over 200 claimants (including citizens and 24 non-governmental environmental organisations, including the environmental NGO "*A Sud*" as the first claimant in the action) with the assistance of *Legalitá per il Clima*, a network of lawyers and legal scholars, against the Italian State for the inadequate development and implementation of emission reduction policies. So far, the legal action had two oral hearings. Greater details and background on this case, can be found in the Italian recent development report of 2022.

Other recent developments

Besides climate litigation, other normative developments which are worth mentioning is the establishment of a plastic tax, which was set up under Budget Law 2020 (Article 1, para 634-658, of Law n 160 /2019) and which will start applying on 1st January 2024. The tax is imposed on the consumption of single use plastic products used to contain, protect or deliver food products, excluding those used for compostable goods or medical devices.

Additionally, the 1st January 2023 signs the entry into force of the obligation for producers and operators placing products on the market to comply with the new binding rules on product package labelling. These new rules were set up by legislative decree 116/2020 on the transposition of Directive 851/2018 on waste and 852/2018 on packaging and packaging waste, complemented by the decree of the Ministry of Environment and Energy Security 360/2022, which provided for the adoption of Technical Guidelines for the labelling and information concerning the packaging of products. The aim of these rules is to provide clearer indication on the type of package material to facilitate recycling and manage packaging waste.

Finally, another development, closely related to the topic of Green cities, is the establishment by Budget Law 2023, of a Fund with a budget of 160 million euros to fund projects and actions for the years 2023-2027 aimed at requalify areas and respond to land degradation in urban and peri-urban areas and aimed at contrasting the phenomenon of "consumption of new land".

Author: Massimiliano Montini, Emanuela Orlando

Latvia

I institutional

New ministry (for Climate)

It is worth to start with the recent institutional/functional changes in the area of climate and environmental protection: from 1 Jan.2023 **the Ministry of Climate and Energy** has been established largely based on joined forces (human resources) from the Ministry of

Environmental protection where the responsibilities on climate policy was based before and from the Ministry of Economic where the competence on energy policy was before. Now climate policy has its ‘political leadership’ that could lead to more intense or noticeable activities with respect to the climate (and energy) policy, however, the capacity (at the administration level) is very much lacking. Hopefully, it will change but at this moment there is no powerful output. At the same time, the minister is ex-mayor of relatively small city (close to Riga) that the first introduce the solar panel heating system substantially reducing usage of gas for the central heating and electricity production.[23] Let’s see whether the support demonstrated by ex-mayor to climate friendly developments at local level would contribute to the developments of persuasive climate actions at the national level. However, it is clear that there could be good cooperation perspectives with local level facilitating activities at municipalities’ level towards climate objectives (thus, more positive trends could be expected with respect to topics covered by this year Avosetta meeting). In a sense, the first step has been made with the provision in the recently adopted **Law on Municipalities** (that came into force in 2023). It introduced among other well-established ‘autonomous functions’ of municipalities a new one: “to contribute to climate change mitigation and adaptation.”[24]

II legislation

1. *Draft for the Climate law*[25]

The draft has been adopted in 2021, but so far, it is pending in “conciliation” stage, going through the third round of consultations (with other ministries, representatives of municipalities, stakeholders, and NGOs). In addition, it has been decided to add to the new law the needed requirements in light of the Fit 55 package (as far as possible at this stage), therefore, even longer time would be needed to get till the Government for approving the draft. After it, it has to be sent to the Parliament (so, additional 1 year could be expected till the law is adopted).

2. *The Law on Construction Procedures for Energy Supply Structures Necessary for the Promotion of Energy Security and Independence*

The purpose of the law is defined as the following: “**to promote the production of renewable energy**, to promote the energy security and independence of Latvia, as well as **to reduce the processes of negative climate and environmental changes**.”

Sounds good, right? However, one needs to note that the main aim of the Law was to ease the requirements of the procedures (especially, EIA) and reduce an ‘administrative burden’ that are blamed for very slow development of the RES projects in Latvia. The law states that it “establishes a simplified procedure for the following activities:

1) for the construction of **wind power plants** with a total capacity of at least 50 megawatts and the necessary infrastructure;

[23] The first solar energy park in the Baltics has been opened in Salaspils in 2019. In 2011 the district heating provider of this municipality committed to max reduce gas consumption for the heating and electricity supplies, and in 10 years later they have achieved that goal by installing 1720 solar panels (continuing developing the park) and wood chip boiler system.

[24] Art.4(1)(22) of law on Municipalities.

[25] Please see the report of 2022 (Uppsala) where the details of the draft has been discussed, as no major changes have been introduced (at least not publicly known).

2) for the installation of external engineering networks necessary for the operation of **solar panels** (equipment) and the construction of other related structures, if the total capacity of solar panels (equipment) for one object is at least 10 megawatts;

3) for construction works required for the installation or replacement of thermal energy production equipment, if the **thermal energy** is planned to be produced **from renewable energy resources**, the capacity of the relevant equipment is at least five megawatts and the thermal energy will be transferred to the centralized heat supply system;

4) for the construction of structures used for energy supply in the internal sea waters and territorial sea of the Republic of Latvia and the distribution, transmission or storage infrastructure necessary for them.

The law also generally defines an approach **where** the construction of wind power plants **is allowed** stating that it is,

> "outside cities and villages in the territory of industrial zones defined by the spatial planning of a municipality, as well as territory of technical construction, the territory of agriculture, on forest lands, provided that the distance from residential and public buildings to the border of the nearest planned wind power plant and wind park is at least 800 meters."

In general, the requirements on the EIA are reduced (and speed up), including through the 'compensation measures' to be foreseen in parallel with the project development (for example, if a wind power station is going to be built in the forest, the law states: "the negative effects caused by deforestation are compensated by afforestation.")

For type of developments covered by this law, the 'development consent' is to be adopted by the government (Cabinet of Ministers) "within 30 days after the technical requirements are issued or a decision on an EIA report is adopted."

There are also interesting provisions on the 'personal' scope e.g., who may own the companies developing this type of projects (based on security reasons and risk) excluding two nationalities of neighbouring countries.

After the law was adopted, the State Environmental Service has elaborated the guidelines for 'carrying out the screening procedure' in order facilitate it's implementation according to the new law and "creating clear conditions for wind power developers." Interestingly to note that there are parameters, especially distances from so called 'sensitive areas' (although not from the 'perspective' of nature but human security) etc., based on two materials developed in Belgium[26] and Sweden (Uppsala University).[27]

3. *The Law on Skulte[28] liquefied natural gas terminal (adopted Sept.2022).*

The main reason of adopting such specific (non-typical) law was the aim of providing a 'national interest object' status to particular terminal in Skulte. The objective of the law as determined therein:

[26] Government of Flanders, Department of Environment & Spatial Development Territorial Development, Environmental Planning and Projects Division, WIND TURBINE MANUAL, Guidelines for the risk calculations of wind turbines (Version 1.1 of 01/10/2019)
[27] Modelling of Ice Throws from Wind Turbines. Joakim Renström. Uppsala University. 2015
[28] Skulte is small coastal city, the terminal is planned to be located in the sea very close to the coast (and the place people used to go swimming).

> "to strengthen the stability of Latvia's energy supply routes, as well as to create legal prerequisites for promoting the development of the Skulte liquefied natural gas terminal."

According to the Art.1(2) "The law determines the status of an object of national interest for the Skulte liquefied natural gas terminal and its application."

There are only four articles all together and apart from the determination of the special status, they provide for some relieved rules on the EIA (mainly speeding procedures) and an exception from the Law on Marine Environment Protection and Management Law on the procedures how one can get the territory in the sea to be used for a project, as well as a right to use it. (As, in fact, the territory has been chosen already.) In addition, the law defines the deadline when the project should be completed (by 15.09.2024). At the same time, there are quite remarkable objections against it from the local inhabitants who have created 'Coastal environmental protection organization' and trying to object to this development.

In the beginning of this year the developer of the project has announced that the costs of the project have significantly raised from 120 milj.EUR to plus 28 milj.EUR. At the same time, the EIA has even not started (now they are looking for possibility to change the technological solution to reduce the estimated expenses).

On top of that, the Law is challenged by the two environmental NGOs before the Constitutional Court recently (see below).

III **Case law**

1. *Project development – status of an object of national interest to liquefied natural gas terminal – relieved requirements for the EIA – climate(?)*

Interesting case is pending before the Constitutional Court, where the above-mentioned *Law on a liquefied natural gas terminal in Skulte* has been appealed (March 2023) by two environmental NGOs disputing the compliance with the Constitution (Art.115 – right to healthy environment) of granting the *status of an object of national interest* to liquefied natural gas terminal (as well as indirectly or directly approving the *location* by adopting that law).

The law provides for relieved (or at least speed up) conditions for the environmental impact assessment process for particular project. In the opinion of environmental organizations, this creates a risk that, in the event of the project development, the potentially negative environmental and social impacts, including the impact on the promotion of global warming, would not be properly evaluated.

According to the ENGOs "This is a large-scale infrastructure facility that can have a lasting, degrading impact on the quality of the marine and terrestrial environment and the daily lives of local residents, and clearly increases the country's dependence on fossil energy resources."

At this moment, the application is under the Court's consideration with respect to the admissibility (which is particularly interesting as the first time the *law* has been challenged by the ENGOs based on Art.115).[29]

[29] The question discussed is whether they could claim the rights based on the Aarhus Convention even if the legislator is clearly outside the scope of a 'public authority' who's acts could be challenged.

2. ***Nature protection - Compensation for damage** caused by wild birds on a Natura 2000 site and **de minimis rule** (a judgement after the response from the ECJ in preliminary ruling case C-238/20 Sātiņi-S)*[30]

The Administrative Supreme Court requested a preliminary ruling in proceedings between Ltd. 'Sātiņi-S' and the Environmental Protection Authority (EPA) concerning the latter's refusal to grant it compensation for damage caused to its aquaculture farm by protected birds on a Natura 2000 site. The refusal based on the ground that it had already obtained the maximum amount of money that could be granted to it in the light of the *de minimis rule* of a state aid.

The disputed started when in 2017, Sātiņi-S applied to the EPA for an award of compensation for the damage caused to aquaculture by birds and other protected animals. The authority refused that request, on the ground that Sātiņi-S had already been awarded a total amount corresponding to the de minimis rule of EUR 30 000, over a period of three fiscal years, provided for in Article 3(2) of Regulation No 717/2014.

By its request for the preliminary ruling the national court firstly asked in essence – whether Article 17 of the Charter must be interpreted as 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 site under the 'Birds' Directive from being significantly less than the damage actually incurred by that operator. Secondly, whether it shall be treated as a *state aid* and thus the *deminimis* rule would be applicable.

Firstly, as neither of two Nature directives request or oblige MS to provide for a compensation, the COM raised the issue of inadmissibility of the question noting that the Charter is not applicable. The Court overruled such presumption by stating that:

"The Member States also implement EU law, within the meaning of Article 51(1) of the Charter, when they establish schemes granting payments under the 'Birds' Directive and the 'Habitats' Directive." (para 27)

"In that regard, the mere fact that those directives do not provide for a compensation scheme themselves or that they do not impose an obligation on Member States to provide for such a scheme cannot be interpreted as meaning that Article 17 of the Charter is not applicable." (para 28)

Secondly, the Court ruled that Art.17 of the Charter 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 network area under the 'Birds' Directive **being significantly less than the damage actually incurred by that operator**.

Thirdly, that the respective compensation **confers an advantage capable of constituting 'State aid'** for the purposes of Art.107 of the Treaty, where the other conditions relating to such a classification are satisfied and, thus *deminimis* ceiling would be applicable.

In light of this judgement – the referring court adopted its judgement (in 2022) confirming the decision to refuse additional compensation over 30000 euro, noting that "a commercial activity is associated with different risks, which an entrepreneur must consider and take into account

[30] It seems to be the first request for a preliminary ruling from Latvia in environmental/nature protection area. Together with another case C-234/20 involving the same applicant "Sātiņi" but complaining about other restrictions for receiving a compensation due to limitations according to rules of protecting Natura 2000 site.

before engaging in a specific type of commercial activity. If they have decided to engage in an aquaculture business, he must take into account the impact of various flora and fauna, and he cannot demand that the state partially or fully compensate for the losses caused by this impact. It is up to the state's decision-making institutions whether and to what extent to support their entrepreneurs within the framework of legal norms. **The costs associated with the mandatory compliance with environmental protection regulations are the normal operating costs of a company in the aquaculture industry**."[31]

Author: Zaneta Mikosa

Netherlands: Recent Developments in Environmental Law

1. Environment and Planning Act will be introduced on 1 January 2024

After years of preparation and delay the Netherlands will introduce the Environment and Planning Act in 2024. This Act will integrate and reorganize 26 existing legislative acts concerning the environment (including the Spatial Planning Act, the Nature Protection Act, the Water Act, the main parts of the Environmental Management Act etc). More information: https://iplo.nl/regelgeving/omgevingswet/english-environment-and-planning-act/.

Besides that major development the (new/newer/newest) climate goals set by the EU and the Dutch Government, including the implementation of the so-called Climate Agreement (*Klimaatakkoord*), are source for a continuous stream of new legislation (mainly concerning the energy transition).

2. Nitrogen-overburdened Natura 2000 sites

The societal and political problems surrounding the nitrogen-overburdened Natura 2000 sites have existed in the Netherlands for a long time and have worsened since the judgement of 29 May 2019. Although the nitrogen-sensitive habitats and habitats of species have been overburdened on a large scale for the past decades, it is referred to as a crisis ever since the Dutch Council of State found the Dutch Programmatic Approach on Nitrogen to be incompatible with the Habitats Directive. The judgement impeded not only the realization of new agricultural projects, but also the building of new homes and other buildings and building activities. For this latter group, the Dutch legislator developed a solution to allow building activities although the activity causes Nitrogen deposition on overburdened Natura2000 sites: the "building exemption". The solution exempts the nitrogen emissions associated with the development of new building projects from a separately assessment in light of the Habitats Directive. The reasoning of the legislator was that on a programme level, sufficient measures would be taken that reduce the nitrogen deposition.

This exemption was litigated against by a well-known Environmental NGO in the so-called Porthos case. The Porthos project aims to capture and transport CO_2-emissions from the Port of Rotterdam into empty gas fields below the North Sea. Nitrogen will be emitted during the construction of the CO_2-infrastructure – such as pipelines that transport the CO_2, but also a compressor station and a new platform at sea. The Dutch NGO argued that the already nitrogen-overburdened Natura 2000 located nearby could be significantly impacted by this building activity and that the competent administrative authority had to conduct an appropriate assessment to ascertain that such an effect is ruled out. Their main point is that it is insufficiently

[31] Supreme Administrative Court judgement in case SKA-79/2022 para 10, refering to the similar opinion expressed by AG Rantos in this case C-238/20, para 41.

clear whether the positive measures that underlie the building exemption necessarily cover the emissions this specific project causes on every nearby Natura 2000 site.

The Council of State rules that the decision based on the building exemption to authorize the Porthos project indeed falls short in providing sufficient clarity that no significant detrimental effect is likely to occur (Council of State 2 November 2022, ECLI:NL:RVS:2022:3159). Therefore, the project could not be authorized without better substantiating why no significant detrimental effects would occur. It is currently unclear whether the project developer and, ultimately, the administrative authority can provide sufficient evidence that these effects would not arise or whether the path laid down in (the Dutch implementation of) article 6(4) of the Habitats Directive must be followed.

This ruling means that the building exemption is off the table. All other construction projects that are likely to have a significant detrimental effect on Natura 2000 sites must be appropriately assessed (again). So, the Dutch Nitrogen saga continue; not just concerning the slim possibilities to grant permits for project but also about many requests by NGOs to either revoke granted permits and/or instigate enforcement measures against projects that are in operation without proper Nature conservation permit.

3. Damages for phasing out coal fired power plants?

In 2019 the Act prohibiting the use of coal for electricity production (*Wet verbod op kolen bij elektriciteitsproductie*) was established and phases out the four Dutch coal-fired power plants by 2030 at the latest. However, the Amer power plant is subject to the ban from 1 January 2025 as it is the most inefficient (oldest; most polluting). RWE and Uniper initiated a total of seven legal proceedings in the Netherlands, the United States and Germany to claim damages. The proceedings in the Netherlands are based on the ground that the phasing out of the plants are violating the property rights of the owners as protected in article 1 First Protocol of the ECHR and article 17 EU Charter. They believe the law should not have been introduced without sufficient financial compensation from the State. RWE, for example, claims to have damages of almost 1,5 billion euros through a decrease in the value of the power plant because the economic life of the power plant (normally 40 years) will be shortened by 25 years. On 30 November 2022, the district court of The Hague (ECLI:NL:RBDHA:2022:12628, ECLI:NL:RBDHA:2022:12635, ECLI:NL:RBDHA:2022:12653) ruled that in three proceedings that the claims of the owners must be rejected and that no compensation is required to phase out the coal plants. The Court considers that no difference exists in the level of protection between article 1 First Protocol and article 17 EU Charter and continues by setting out the assessment framework in this former article and applying it to the case. Much attention is paid to the question whether the infringement has a legitimate objective that serves to promote the general interest, and the question whether there is a fair balance. The general interest for the new Act is clear: prevent or at least reduce emissions and prevent climate change (in the Netherlands). However, the main argument of RWE and Uniper is that emission reductions realized by phasing out the coal plants in the Netherlands could be extra emitted elsewhere according to the EU ETS. This so-called waterbed effect would hamper the ban's effectiveness, which would make the infringement invalid. The Court reasons that the State has a wide margin of appreciation and considers that the objective of the Act can be realized by the Act, namely reducing greenhouse gas emissions in the Netherlands. The discussion regarding the fair balance mainly revolved around the extent to which the ban was foreseeable. The Court considers that there is no evidence that the owners of the power plants could rely on the idea

that no new legal frameworks would be developed to regulate these plants. The transition period of 10 years is deemed to be sufficient to allow the owners to profit and (further) adapt the power plants to allow for other fuels than coal (biomass).

The ruling leaves RWE and Uniper empty-handed. Appeal by both parties has been lodged.

4. Lack of regulation for cumulative odor nuisance violation of human rights

On September 14 2022, the District Court of The Hague (ECLI:NL:RBDHA:2022:) issued a groundbreaking judgment on the protection of residents near intensive livestock farms who experience (serious) odor nuisance. The court has determined that the State is acting unlawfully because the protection against odor nuisance that the Odor Nuisance and Livestock Farming Act (*Wet geurhinder en veehouderij*) offers is inadequate, and no reasonable or appropriate measures have been taken.

The local residents argue that the State is acting unlawfully towards them as long as it maintains the current odor nuisance regulations, in particular the standards for odor nuisance in the Odor Nuisance and Livestock Farming Act (*Wet geurhinder en veehouderij*). They demand measures that no serious odor nuisance will occur and refer to, among other things, a Government policy document on odor nuisance and Article 8 ECHR (right private and family life). The State should also compensate the material and immaterial damages suffered.

The Court states first and foremost that Article 8 ECHR not only applies to environmental nuisance caused by a State itself, but also to nuisance resulting from a failure of a State to adequately regulate the private business activities that generate the nuisance. This follows from the positive obligation that rests on the State under this article to take reasonable and appropriate measures to protect individuals against environmental nuisance that may affect the well-being of individuals.

The State argues that the claims should be rejected because they are at odds with the division of tasks between legislator and court. Referring to the Urgenda case, the court states that the court should not interfere in political decision-making. On the other hand, the court is competent, or even more so: obliged, to test whether the legislator has complied with its legal obligations laid down in treaty provisions that are binding on everyone (Articles 93 and 94 Dutch Constitution). This leads the court to the opinion that it cannot itself prescribe a maximum odor standard, but can and must assess whether the relevant Dutch act (*Wet geurhinder en veehouderij*) offers adequate protection in the light of Article 8 of the ECHR.

The court takes as a starting point the environmental quality criteria that the Dutch National Institute for Public Health and the Environment uses in its reports for odor nuisance. This states that an odor load from 19.4 ou/m^3 to 25.3 ou/m^3 qualifies as 'very bad' and higher than 25.3 ou/m^3 as 'extremely bad'. According to the court, an odor standard of 19.4 ou/m^3 – which is no less than four times the (maximum) odor standard in industrial areas – is the limit value for determining whether there is an acceptable nuisance level. It has been established that the cumulative odor load on the homes of the local residents is higher than that so the court concludes that the legal system apparently does not offer the necessary protection. The court concludes that the State has acted unlawfully with regard to these local residents in violation of Article 8 of the ECHR. The court case continues with a procedure to establish the compensation for the damages of the local residents.

Never before has a Dutch court held the State liable for insufficiently protecting residents near intensive livestock farms against serious odor nuisance. The ruling thus builds on previous rulings such as Urgenda and Shell, in which the court seems to be taking a more active role in testing climate and environmental legislation against European and international treaties (and human rights) in the context of the doctrine of tort. The judgment contains several interesting considerations, including the choice of 19.4 odor units/m³ as the standard for unlawful conduct. To a certain extent this norm is arbitrary but it is now de facto a concrete standard based on a (in principle non-binding) policy document.

5. Access to justice after 'Varkens in nood'

As a result of the *Stichting Varkens in Nood* case of the ECJ on 14 January 2021 (ECLI:EU:C:2021:7), the Council of State in the Netherlands has drastically intervened in the rules concerning access to judicial review (by administrative courts) of 'environmental law' decisions in 2021. The Dutch case law concerns access to justice and not just for those decisions that are within the scope of the Aarhus Convention but simply all environmental law decisions that are subject to or should be subjected to the decision-making procedure arranged for in section 3.4 of the Dutch General Administrative Law Act (GALA, that allows for participation by the possibility to submit views about a draft decision that is made publicly available). In light of the Stichting Varkens in Nood case the Dutch Council of State has granted access.

1) see ECLI:NL:RVS:2021:953. Access to court is allowed for *anyone* that participated in the preparatory decision-making procedure of section 3.4 GALA (even those who are not an 'interested party', although art. 8:1 GALA specifically states that only an interested party may lodge an appeal). They are allowed to appeal against all aspects of the decision (and not just against possible mistakes in the preparatory procedure) but are confronted with the Dutch version of the Schutznorm / relativity requirement in Dutch administrative procedural law that could in many cases lead to the conclusion that the appeal is unfounded (because it was lodged by someone who is not an interested party and his interest are not protected by the applicable norms).

2 (see ECLI:NL:RVS:2021:786) access to court for any *interested party* regardless whether they participated in the decision-making procedure; which is also a deviation of the Dutch legislation, art. 6:13 GALA). Interested parties may also appeal against any part of the decision. We await the legislature to repair the situation (art. 6:13 GALA is partly in violation of the Aarhus Convention).

This has been the situation since May 2021 but one issue was still pending. If the appeal is lodged by someone who is not an interested party (and who did participate in the preparatory procedure), the ECJ had specified in its judgment that – since the Dutch legislation allowed anyone to participate – these persons should have a possibility to complain to a court about these participatory rights being infringed. With regard to invoking the violation of such procedural standards or formal principles of good administration, the Council of State has consistently considered that this violation cannot be viewed separately from the substantive standard invoked. These procedural norms or formal legal principles are therefore of no independent significance. For invoking a violation of these standards and principles, the scope of protection of the underlying substantive standard is therefore decisive for applying the Dutch Schutznorm. In the judgment of the Council of State of 15 February 2023 (ECLI:NL:RVS:2023:606) this consistent line is adjusted because of the Stichting Varkens in

Nood case. Anyone who has submitted (or excusedly has not) submitted an opinion about the draft decision, both interested parties and others, must be able to successfully appeal in court proceedings against violation of procedural norms regarding the right to participate in the decision-making procedure. This means that from now on independent significance will be attributed to procedural standards or formal principles of good administration that relate to the decision-making procedure when section 3.4 GALA is applicable. If an interested party or non-interested party invokes a procedural standard or a formal principle of good administration that does not relate to (public) participation (or if the appeal focuses on a substantive standard), the Schutznorm / relativity requirement will be applied.

Author: Kars de Graaf

Portugal: Recent developments

Heated discussions occurred and are still going on around the environmental effects of the projects supported by the Recovery and Resilience Funds.

The problem here is COHERENCE.

The Funds are being used to support several projects and activities – in agriculture, energy, transport, circular economy, education, etc - some highly commendable, others not so much.

The reason is the fact that the conditions for receiving the European financial support are being checked at an early stage (too early). The nexus between the "No Significant Harm Principle" checklist, a form that has to be filled and submitted to the Commission in order to demonstrate that the principle has been respected and the EIA procedure is not clear. For the government the precedence of the EIA is not obvious and in practice the DNSHP form has been filled and submitted to the EC before the EIA of the project. This order allows the operation to be authorised and the money to be transferred to the State. When the EIA declaration is issued, even if it concludes that the project will have be some impacts that must be mitigated, the DNSHP form will not be changed. This is precisely the case of a dam for intensive irrigation agriculture near a Natura 2000 site (Pisão Dam) that is now being challenged in court.

-:§:-

Also questionable is a recent law adopted in February 2023 changing over 20 pieces of environmental legislation to simplify environmental procedures.

In this case the question is REGRESSION.

The so-called "Environmental SIMPLEX" is a simplification act with an extension of 190 pages that goes through all the environmental obligations on permitting, reporting, monitoring, supervising in the fields of water, air, soil, EIA, IPPC, etc and removes, reduces or softens the environmental burdens imposed on the operators. The new legal regime "normalizes" tacit approvals in various cases, dismisses EIA for a few projects, waives environmental permitting for some industries, shortens the administrative delays for practicing several acts, allows procedures to proceed and allows acts to be practiced without a technical opinion when it was not issued in time; determines that asking the for additional documents does not suspend the deadlines for practicing the act, etc…

Depending on how it will be applied, several simplification moves put forward by the *environmental SIMPLEX* can result in a huge regression or just in some (acceptable) environmental regression with immediate economic advantages.

-:§:-

In court cases, the issue is INFRINGEMENTS:

Considering that there is a case against Portugal (https://ec.europa.eu/commission/presscorner/detail/es/ip_23_165) pending in the ECJ since last January for not having correctly reflected certain provisions of the amended EIA Directive into national law. For example, according to the Commission the wording of the national provisions exempts more projects from environmental assessment than what the Directive allows. Well, the *environmental SIMPLEX* makes things much worse.

The Portuguese children's case (Duarte Agostinho) is still pending at the ECHR.

-:§:-

Finally, the matter of overall PERFORMANCE

Internationally Portugal is under the spot light, having been object of international assessments by the UN special rapporteur on human rights and environment (https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/616/63/PDF/G2261663.pdf?OpenElement) and the OECD ("OECD assessment of Portugal https://www.oecd.org/environment/oecd-environmental-performance-reviews-portugal-2023-d9783cbf-en.htm).

Both reports have been produced with the contributions of stakeholders, NGOs and the academia, besides the official version of the facts provided by the government, as a consequence they convey a very realistic image of the country's environmental performance.

Author: Alexandra Aragão

Slovenia

Prices of the emission coupons (emission allowances) have increased tremendously for one of the biggest electricity producers in Slovenia - it is a story closely connected with climate change. Namely, the biggest conventional producer of electricity - the thermal power plant Šoštanj - Block 6 (hereinafter: TES 6) - built several years ago, needs additional emission allowances in the amount of all emission allowances required by the Slovenian industry. Instead of investments in green electricity sources, Slovenia invested in the thermal plant, knowing in advance that the price of the electricity would also increase due to the additional purchases of emission allowances. I.e., a spill-over occurred to the consumers.

Governmental plans for a **new nuclear power plant block** are giving more and more potential. The Government plans to rely more heavily on nuclear energy. Movements against nuclear-produced power in Slovenia are not substantial, differently as, for instance, in some other EU countries. Also, the last accident in Fukushima did not raise a lot of opponents in Slovenia. So, we are witnessing the closure of nuclear power plants in Germany and building a new one in Slovenia (déjà vu, like in the case of TES - Block 6).

The European Green Deal aims to achieve climate neutrality in Europe by 2050, boost the economy with green technology, create sustainable industry and transport, and reduce pollution. For this, changes are needed in all areas, and the key among them is energy, both production and networks. For example, Slovenia needs electricity for e-mobility, a desired and clear trend in Europe. Energy consumption is growing the fastest in transport. Unfortunately, in Slovenia, we face substantial problems obtaining approvals for connecting photovoltaics plants to the

electricity grid (more about that problem below). We also need electricity for heating, as heat pumps are increasingly being used instead of stoves that use heating oil, gas, or wood. Last year, the **number of sales of heat pumps increased by 40 per cent**. Despite more significant energy efficiency, electricity consumption will not decrease.

Therefore, the question arises as to where we will produce electricity. Last year, Slovenia was **import-dependent at a record high**. Due to the lack of coal and the shutdown of the sixth block of TES, the overhaul of the nuclear plant and poor production in hydroelectric power plants due to the dry summer, **it had to import almost a third of its electricity**, and the beginning of this year was not any better. The forecasts for the future are also unencouraging; TES 6 was built on unrealistic assumptions regarding lignite reserves, and sooner or later, it will have to be closed; climate change threatens with more dry periods and worse winters, thus lower production of hydroelectric power plants. Therefore, the second block of the Krško nuclear power plant is a solution seen by the Government.

There are still persistent **objections against wind turbines**. Complaints continue, and Slovenia obtains only app. 0,04 % of its electricity from wind turbines—a tiny portion.

The electricity grid cannot keep up with the need for photovoltaic power plant connections. There is an expansion of photovoltaic power plants in Slovenia (individual and big ones). Higher prices of electricity, not likely to decrease in the future, foster plans on an individual basis to instal photovoltaic power plants on houses (roofs) and public buildings. However, the electricity grid, especially electrical transformers needed for the proper functioning of the greed, is unsuitable for numerous new photovoltaic power plants. **Up to 37% of new applications are therefore denied.** This is a substantial step back in the environmentally friendly production of electricity. **This way, it will be very challenging to increase only 2,7 % part of solar energy in Slovenia**.

The renewed EU plan, called REPowerEU, foresees that the share of renewable sources in total energy production would increase to 45 per cent by 2030. The EU plans to invest the most in solar power plants, which are expected to reach 320 GW of power by the middle of the decade and 600 GW of power by the end of the decade. The emphasis on solar power plants is mainly due to the relative ease of construction and the accessibility of the investment to the wider masses, which significantly facilitates the implementation. **Slovenia already lags far behind the European share, and due to the inadequacy of the network, the gap will increase even more.** The mass construction of solar power plants does not change the final energy consumption. Still, they increase the load on the distribution network, that is, the part of the network that brings electricity to households.

At first glance, this is unusual since consumers consume part of the electricity themselves and only transmit the excess to the system. But in fact, higher loads are created during the peak hours of the day because that's when production surpluses occur. The effect is similar to rush hour roads.

The Government, therefore, **refers to self-supply and the use of batteries**. Only in this way (with batteries) would the state continue to subsidize the construction of new photovoltaic power plants. Again, this is a considerable (negative) pressure (and an additional investment) since batteries are expensive and, for their production, limited natural resources must be exploited. The demand for lithium-ion batteries (LIBs) for auxiliary energy storage systems is therefore growing. This surge in demand requires a concomitant increase in production and,

down the line, leads to large numbers of spent LIBs. The ever-increasing battery waste needs to be managed accordingly. Currently, there are no universal or unified standards for waste disposal of LIBs around the globe.

Deforestation to obtain more agricultural land; the previous Government started an action of deforestation to acquire more agricultural land that Slovenia lost in three last decades. NGOs strongly objected to this action. With the change of the Government, the action stopped. Nevertheless, the forest is also under pressure for other reasons; more and more wood is needed in the construction industry and as a source of energy (the return to former ways of heating with firewood is on the rise). In addition, the Court of Auditors issued an opinion that app. 27% of yearly felling of trees is stolen (and not part of the statistics, meaning that also data on how much Slovenia can cut per year (up to the annual growth of the forest) is not proper).

Author: Rajko Knez

Sweden: Recent developments in Swedish environmental law and practise

General

Since September 2022, Sweden has a conservative Government ruling with the support of the right-winged nationalist Party, the *Sverigedemokraterna*. So far, this has resulted in a merger of the ministries of enterprise and environment into a single Ministry of Climate and Enterprise. This reform drew some international attention, as it was said that Sweden for the first time ever had closed down its Ministry of Environment and that all such issues now were placed under the responsibility of the Minister of Enterprise (Sweden threatens European biodiversity | Science). This was one of those rumours which simply are not true; such mergers have happened before and the minister of the environment is on an equal footing to the minister of enterprises (in Sweden, the Government always decides as a group, no such thing as “ministerial rule” as in other countries exists). However, the Government was also quick to undertake radical changes to the climate policy of the old government; the weakening of the reduction duty of the greenhouse gas intensity of transport fuels, a stop for the subsidies to electric cars and the reform of the tax system for work travels, as well as the withdrawal of the financial support to the drawing of cables to wind farms at sea. In addition, there is a Parliamentary standstill – emphasized by the Presidency of the Council of the EU during the spring 2023 – although the Government has assigned a number of commissions on different environmental topics, mostly in line with the ideas of Better Regulation. In addition, the Government has announced a range of measures in order to promote the building of new nuclear power plants, although most of those so far have been mainly symbolic.

Sweden’s first climate case

To this background, it is not very surprising that Sweden during the year has seen the first “real” climate case; Climate Trials | Auroramålet (xn--auroramlet-75a.se) *Aurora*, a group of more than 300 individuals (26 years and younger) have sued the Government for its inability to meet the international climate obligations. As in many of other European climate cases, the *Aurora* association invokes the European Convention on Human Rights, most importantly Articles 2 and 8. However, in contrast with similar cases in Europe, they don’t claim that EU law or the Paris agreement shall be used as a yardstick, but that Sweden’s efforts shall be calculated from its “fair share contribution”, developed by the organization *Climate Analytics*; The Fair Share Approach to Establish Climate Responsibility (climatefairshares.org) The case is handled by

the Nacka Land and Environmental Court and a subpoena against the State was issued in late March.

Forestry in Sweden

As for other issues to be mentioned, forestry has been in the focus of the public debate in the field of environmental law in Sweden. As you may be aware of, the Swedish Government has been very active in its effort to oppose any environmental demands on forestry in the Fit-for-55 agenda, encompassing the negotiations on the new RED, and the coming directives on nature restoration, deforestation, soil health law and more. According to the Swedish Government, forestry is sustainable as it is and there is no need for further biodiversity requirements or any control mechanisms for that matter.

Further, as mentioned in last year's update, the Forest Agency succeeded in its campaign against the "over-implementation" of the Birds Directive in the Swedish Species Ordinance (2007:845). Until October 2022, the protection scheme in the Ordinance was similar for listed species under the Habitats Directive (92/43, HD) and birds under the Birds Directive (2009/147, BD). However, after the reform there are provisions in the Ordinance, in verbatim repeating the prohibitions in Article 5 BD and Article 12 HD. In contrast, the derogation grounds are still to be found in one common provision, reflecting Article 16 HD. Hopes ran high among the forest owners that the protection of birds would now be very different and allow for more clear-cutting operations in sensitive areas. So far, this has not happened. The strong tendency that the Land and Environmental Courts stop controversial operations in the forest having effect on prioritized birds – such as the Capercaillie, Three-toed woodpecker, Siberian jay, Willow tit, Eagle owl, etc – continue as a result of ENGO actions against decisions and omissions by the Forest Agency. Commonly, the courts strike down on the authority's failure to show – or even to try to show – that the operations will not entail damage or disturbance of the birds according to Article 5 of the Directive. Despite the ruling in C-473/19 and C-474/19 *Skydda skogen* and subsequent case-law by the Land and Environment Court of Appeal (MÖD 2020:45), the authority refuses to confirm its responsibility to obtain knowledge about the area where a clear-cutting operation will take place, the species therein and the operation's effect on the species and its habitats (see paras 67-78 in the ruling). Instead, the authority is actively culling the registers built up since the beginning of the 1990s on "key habitats", resulting in that most notifications about clear-cutting operations today go through the automatic control system without "flagging". Thus, after 6 weeks, the forest owner can further on with the operations without any control at all, if not an ENGO reacts and challenges the Agency's passivity in court. In 2018-19, about 10% of the annually 65,000 notifications ran through the system without check, today the number is more than 50%. Originally, the registry contained about 70,000 sites of "key habitats", but has today been reduced by close to 10,000 sites. This development has been driven not only by small and middle-sized landowners, but also by big forest companies such as STORA.

To add to this somewhat dark picture of Swedish forestry, a recent ruling from the Supreme Court should be mentioned. The *Malsätra case* concerns the rules on compensation to foresters for measures that they have taken in order to protect species under EU law. According to Chapter 31 of the Environmental Code, any restriction on ongoing land-use – including all clear-cutting operations in the forests (sometimes covering hundreds of hectares) – shall be compensated with 125% of the real estate's loss of market value (commonly the value of the timber). It had been debated for some years whether species protection shall be included in the

compensation scheme in Chapter 31 of the Code, as denied derogation from the protection under the Species Ordinance is not listed in those provisions. It had also been debated if this generous scheme for compensation may run counter to the rules on state aid in Articles 107-109 TFEU. Among others, three governmental commission and the Forestry Agency has raised this issue. Against this background, the State as a Party to the proceedings in the case argued that the Supreme Court was obliged to make a request for preliminary ruling from the CJEU according to Article 267 TFEU on the matter.

In its judgement, the Supreme Court, answered yes and no to those questions. First, the court noted that although species protection is not mentioned in the compensation scheme under the Code, it may still be compensated under "general principles" under the Swedish constitution. The conditions for that, however, is that the landowner in the individual case is out control of or could not foresee the situation which triggered the order to protect the species. In addition, the order must represent a substantial economic loss for the landowner in question. Moreover, as denied derogation to species protection is not listed in the Environmental Code, the compensation should only cover the factual market value loss of the real estate. Second, as for the state aid issue, the Supreme Court simply stated that the rules in Chapter 31 of the Code merely are aiming at the covering of the loss for a landowner when a certain regulation results in unforeseeable and especially harsh consequences in economic terms in a way which is not common for all landowners. Thereby, the scheme only enables for the landowner in question to keep his or her competition position. Thus, the system does not entail any distorting effects on the competition at the common market, why the rules on state aid in Article 107 are not applicable.

At the face of it, the Supreme Court may seem to have established strict rules for compensation for landowners and others when abiding to the strict protection of species according to EU law. As illustrated in the case, however, this situation occurs very often in forestry. As the rules allows the landowner to circumscribe the protection worthy area by way of clearcutting surrounding areas, the effect will always be "unforeseen" as long as the authorities cannot prove otherwise. In the Malsätra case, the competent authority claimed that the area needing protection was the last of over 20 playgrounds for Capercaillie, as all the rest had been destroyed by forest operations by the landowner during the last 20 years. In addition, the economic effect is calculated from the "affected area", thus always being 100% of the value (the area in question in this case was 22 hectares in a property covering more than 22,000 hectares). And as the Supreme Court states that compensation with 125% of the market value is not in breach with the rules on state aid, it thereby invites the Swedish legislator to add species protection to the compensation catalogue in Chapter 31 of the Environmental Code. In sum, Swedish landowners will hereafter always to be able to claim 125 % compensation when their operations are affected by the strict protection of birds and species under the EU nature directives, and derogation is refused by the authorities.

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Finally…

…a decision by the European Court of Human Rights (ECtHR) concerning Sweden ought to be mentioned. The Sami village Semisjaur-Njarg appealed a decision by the Forest Agency not to take any further actions as regards a notification by a forest company to clearcut an area of importance for their reindeer herding. As the land-use and cultural rights of the Sami people are protected as a traditional property right in all the Nordic constitutions, it came as a big surprise when the administrative courts dismissed the Sami village's action, stating that the passivity of the authority ("omission") was a non-appealable decision. When the Supreme Administrative Court confirmed this position, the Sami village made a complaint to the ECtHR,

claiming a breach of Articles 6 and 14 of the ECHR. The decision came in December last year and was quite astonishing (ECtHR 2022-12-08; A 44586-22; not published). The Court dismisses the complaint by stating that the "*domestic remedies have not been exhausted as required by Article 35 § 1 of the Convention, since the applicant failed to raise before competent domestic authorities, the Chancellor of Justice or the general courts, either in form or in substance and in accordance with the applicable procedural requirements, the complaints that were made to the Court*".

I have understood that the underlying reasoning of the ECtHR judge is that Sweden has introduced a possibility for victims to human right breaches to go to court and ask for compensation (cf Karin Andersson v. Sweden (29878/09), Eriksson v. Sweden, no. 60437/08, § 52; Ruminski v. Sweden [dec.], § 37). However, to apply this doctrine to forest operation having an impact on reindeer herding areas amounts to an absurdity; each Sami village and herding area may be impacted by hundreds of notification in the course of the years and how would one even be able to calculate the value of the loss of standing in each of those cases? And further, the Sami village wants to have a say in the decision-making procedure, which has nothing to do with money. Besides, this legal construct runs counter to the international protection of indigenous people, as they must not be "bought out" from their land-use and cultural rights by society. A reasonable conclusion is therefore that the Sami community will regard the ECHR avenue as a "lost cause" in future action and instead rely – using the Norwegian example of Fosen – Article 27 of the UN Convention on Civil and Political Rights (ICCPR).

Jan Darpö

Switzerland

Klimaseniorinnen

The European Court of Human Rights held a Grand Chamber hearing on 29 March 2023 in the case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (application no. 53600/20).

The applicants had submitted a request to the Federal Council and other authorities, claiming that various acts of government where not in line with the obligations under the Paris Agreement on climate change.

The competent Federal Department, the Federal Administrative Court as well as the Federal Tribunal declared that the applicants are not sufficiently affected (not more than other groups in society) in order to assert an interest worthy of protection and therefore dismissed the appeals by the Klimaseniorinnen. The applicants claim that the Swiss State has failed to protect their life effectively (art. 2) and to ensure respect for the private and family life (art. 8). They further complain that they did not have access to a court within the meaning of art. 6 of the Convention.

Researchers from the University of Bern had submitted an amicus curiae brief.

A decision is to be expected around the end of this year, beginning of next year.

Popular initiative on renewable heating systems

In a very recent decision the Federal Tribunal decided a case on a municipal popular initiative demanding that it must be ensured that from 2030 onwards all heating systems in the municipality will be powered exclusively by renewable energies. The initiative was invalidated

by the cantonal court based on the justification that the initiative is violating superior law as it constitutes an infringement into the right to property (art. 26 Federal Constitution) as well as to the guarantee of vested rights (§ 178 of the cantonal planning and building act).

The Federal Tribunal reversed this decision. First it observed in very general terms, that there is no entitlement to the retention of the legal order at a certain point in time. More specifically, it stated that the popular initiative could be upheld given the fact that its implementation could well take place in respect of the aforementioned guarantees. A possible option would for instance be to grant sufficient subsidies to the owners of such heating systems in order to compensate them for the financial burden they face. The Federal Tribunal thus signals a certain openness when it comes to the necessary legal changes in order to allow for the transition to renewable sources to happen.

Pending popular initiatives on the federal level:

1. “Glacier Initiative”: This popular initiative wants to enshrine the net-zero goal in the Federal Constitution and includes a ban on fossil fuels by 2050 with the only exception of technically non-substitutable applications. The Federal council rejects the initiative, but formulated a counter proposal, which as accepted by parliament. Subsequently the committee which launched the popular initiative opted for a conditional withdrawal, the condition being the acceptance of the counter-proposal by the people. On June 18, 2023 a popular referendum will be held on the act.

2. “Biodiversity initiative”: The initiative wants to better protect nature, the landscape and the architectural heritage. It would mainly bring two new elements to the Federal Constitution: An explicit obligation of the Cantons to preserve landscapes, sites and historical monuments, and a narrow framework for weighing up the interests in the case of significant interventions in protected objects. The Federal Council rejects the initiative, but formulated a counter proposal demanding amongst others the implementation of the concept of ecological infrastructure in a Federal Act as well as the enshrinement of the goal to establish core zones for biodiversity on 17 per cent of the Swiss land area in law. The initiative (and the counter-proposal) is currently debated in Parliament. The National Council agreed in general but is opposed to any quantitative aims. The competent commission of the Council of States has decided not to take up the discussions on the act, stating that the counter-proposal with its “Swiss Finish” is not warranted to fulfill the obligations under the Kunming-Montreal Global Biodiversity Framework.

3. “Landscape Initiative”: This instrument basically demands a freeze when it comes to the number of buildings situated outside of construction zones. Therefore, new buildings outside the settlement area could only be constructed, if existing ones are deconstructed. The Federal Council proposes to reject the initiative, even though the government shares some of its main aspects (clear division between construction and non-construction zones, aspiration to limit the number of buildings outside of construction zones etc.). The debate in Parliament began last year.

Author: Markus Kern

Turkey: Recent Developments on Environmental Law

I. Developments on climate law and litigation

A. Climate related legislation and soft law documents

A new by-law on fluorinated greenhouse gas emissions repealing the previous one dated 4.1.2018 was promulgated in the official gazette (29.6.2022). It is prepared to ensure the full adaptation to both the Montreal Protocol and the regulation (EU) No 517/2014 of the European Parliament and of the Council[32]. To implement this by-law a new circular has also been prepared as a replacement of the previous one dated 24.1.2014. It regulates the conditions and prohibitions regarding the use of documents required for the export as invoices and control certificates, and lists the export restrictions for some substances[33].

The strategy document on ecosystem-based adaptation to climate change for the Anatolian steppes is prepared. After describing the vulnerability of the Anatolian steppes, it defines the main strategic goals as to establish resistance for the steppes that are already affected or might be affected by climate change, and to integrate the adaptation measures to general policies, plans and decisions[34].

The by -law on the service units and study procedures of the department of climate change was promulgated[35]. It regulates the powers and duties of the climate change department which is established in 2021 as a subsidiary institution of the Ministry of Environment, Urbanization and Climate Change. The principal goal of this department is to carry out all climate related activities to ensure Turkey's "2053 net zero emission and green development" target according to the European green commitment programme.

The new by-law on green certificate for buildings and settlements was promulgated[36]. It repealed the previous one dated 23.12.2017. It regulates the general provisions on green certificate that will be designed for the existing and new buildings. The main goal is to ensure sustainability, low emissions and energy efficiency through increasing green buildings and settlements. However, currently it is not obligatory to have this certificate. All details concerning criteria, application and evaluation process, and experts are defined in its very comprehensive attachment titled "green certificate assessment guide".

B. Climate litigation

The first instance administrative court judged on behalf of the plaintiff in the so called first climate case of the Country. The case had been brought before the local administrative court in March 2022 by the fishermen whose economic interests have been damaged because of the dried Marmara Lake. In spite of this drought the relevant public authority had claimed the rent from the association established by the local fishermen for the fishery shelter used by

[32] Florlu Sera Gazlarına İlişkin Yönetmelik. Resmi Gazete. 29.6.2022. www.resmigazete.gov.tr.
[33] Ozon Tabakasını İncelten Maddelerin ve Florlu Sera Gazlarının İhracına İlişkin Tebliğ (ihracat: 2023/4). Resmi Gazete. 28.4.2023. www.resmigazete.gov.tr
[34] Anadolu Bozkır Ekosistemleri İçin İklim Değişikliğine Ekosistem Tabanlı Uyum Strateji Belgesi (2022-2036). https://www.tarimorman.gov.tr/TRGM/Belgeler/ANADOLU%20BOZKIR%20EKOS%C4%B0STEMLER%C4%B0%20%C4%B0%C3%87%C4%B0N%20%C4%B0KL%C4%B0M%20DE%C4%9E%C4%B0%C5%9E%C4%B0KL%C4%B0%C4%9E%C4%B0NE%20EKOS%C4%B0STEM%20TABANLI%20UYUM%20STRATEJ%C4%B0S%C4%B0.pdf.
[35] İklim Değişikliği Başkanlığı Hizmet Birimleri İle Çalışma Usul Ve Esasları Hakkında Yönetmelik. Resmi Gazete. 20.7.2022. www.resmigazete.gov.tr.
[36] Binalar ile Yerleşmeler için Yeşil Sertifika Yönetmeliği. Resmi Gazete 12.6.2022. www.resmigazete.gov.tr.

them[37]. Even though it is called as climate case because the attorneys of the association had also claimed to obtain a "declaratory judgment" from the court indicating that the State is responsible for the alleged situation because he acted against all his international commitments regarding climate change; the court, in its judgment, mainly considered the protection of the individual interests of the fishermen without responding such claim. Therefore, the Court has annulled the payment order issued by the defendant[38].

II. Developments on the other fields of environmental law

There are several amendments on the laws and by-laws as well as several new by-laws repealing the previous ones relating to the various components of the environment.

- The majority of recent amendments to the existing by laws are related to the electricity and energy, and they are done in order to implement and promote the Government's policy to maximize the use of renewable energy resources.
- Most of the new by-laws are related to nuclear energy in order to response the needs derived from the construction of the first nuclear power of the Country in Akkuyu. Authorization for nuclear installations[39]; management system for nuclear, radiation and radioactive waste installations[40]; procedures on the study of the nuclear regulatory board[41]; administrative sanctions for the nuclear regulatory board[42], and nuclear safety[43] are among the principal subjects of these by-laws.
- The new by-law on mine was promulgated[44] repealing the previous one dated 21.9.2017. Last year the previous by-law had been amended to allow mining in the olive fields[45]. This was contrary both to the law on mine and on olive cultivation. Therefore, several legal actions had been brought before the highest administrative supreme court (Danıştay). While these cases are still pending, the Ministry of Energy and Natural Resources promulgated this new by law without including the mentioned controversial provision anymore.
- Some provisions of the new by-laws represent backsteps in terms of environmental protection. The most significant ones are described below.

The crucial and criticized recent development is the promulgation of the new by-law on **environmental impact assessment**[46]. It repealed the previous one dated 25.11.2014, and brings so many controversial -negative- provisions in terms of both the most important aspects of the EIA process and the supremacy of the rule of law. When it is compared with the previous one

[37] See. Nükhet Yılmaz Turgut, "Recent Developments on Climate Law and Litigation in Turkey- Report". See. Avosetta Meeting 27/28 May 2022 in Uppsala *"Integrated Permit Regimes in Conflicting Times"* *https://www.avosetta.oer2.rw.fau.de/contents.html* .

[38] It was not possible to reach this judgment. See the news https://www.haberler.com/guncel/turkiye-nin-ilk-iklim-davasinda-karar-cikti-15585260-haberi/ , and https://www.cnnturk.com/video/turkiye/turkiyenin-ilk-iklim-davasinda-karar

[39] Nükleer Tesislere İlişkin Yetkilendirme Yönetmeliği. 17.03.2023. www.resmigazete.gov.tr

[40] Nükleer Tesisler, Radyasyon Tesisleri ve Radyoaktif Atık Tesislerinde Yönetim Sistemi Yönetmel*iği.* Resmî Gazete 27.04.2022. www.resmigazete.gov.tr

[41] Nükleer Düzenleme Kurulunun Çalışma Usul ve Esasları Hakkında Yönetmelik. Resmî Gazete. 5.06.2022. www.resmigazete.gov.tr

[42] Nükleer Düzenleme Kurumu İdari Yaptırımlar Yönetmeliği. Resmî Gazete. 24.01.2023. www.resmigazete.gov.tr

[43] Nükleer Güvence Yönetmeliği. Resmî Gazete. 19.11.2022. www.resmigazete.gov.tr

[44] Maden Yönetmeliği. 11.12.2022. https://www.resmigazete.gov.tr/eskiler/2022/12/20221211-1.htm

[45] See. Note 6 above.

[46] Çevresel Etki Değerlendirmesi Yönetmeliği. Resmi Gazete. 29.7.2022. www.resmigazete.gov.tr

most of the new provisions aim to strengthen the authority of investors on the conduct of EIA process. Indeed, almost all of the new provisions are designed on behalf of developers. The times for getting the required consents from the Ministry of Environment, Urbanization and Climate Change are shortened, capacity increases in the already applied projects are eased and almost seen as routine, and the role of public participation is decreased. The project owners can prevent the efficiency of the public participation, and decrease the number of participants through the application of the provision named "stakeholder participation plan" (Article 4.çç) which will be prepared by them. Through this plan, developers will decide about the people who are affected and will be affected by their projects. Since the term "legal persons" are removed from the definition of the term public, developers can prevent the participation of the efficient non-governmental organizations in the process. Further ore, as it is well-known, one of the significant aspects of the EIA process is that the studies to the related development project must be started in certain time defined according to the time of the related given consent; otherwise, the given consent becomes invalid after the termination of that time unless there is a "force majeure". In this context this new-by-law brings a new provision regarding the definition of that term and include the term "decisions of the administrative courts -stay of executions or annulation decisions that will affect the entire project" among the factors as natural disasters and state of emergency situations (Article 4.bb). This provision ignores the constitutional principle regarding "the bindings' of courts decisions", and is completely contrary to the supremacy of the rule of law. Therefore, The Union of Turkish Bar Associations brought a legal action on the issue before the supreme administrative court (Danıştay)[47].

The new by-law **on environmental noise pollution** has also repealed the previous one dated 4.6.2010[48]. Unlike the previous one prepared in line with the EU noise directive, this new by law is a short -framework- document prepared mainly to establish "a special noise management system for each city", and to entitle the municipalities and general directorates in cities for regulating the details through the noise maps. Therefore, it contains limited provisions as the noise limit values for day, evening and night, and prohibitions relating to both the changes on the noise decreasing equipment in vehicles and the use of noisy tools inside and top of the vehicles unless necessary.

The new by-law **on forest parks** repealed the previous one dated[49]. Unlike the previous one it contains controversial provisions in terms of protection of forests and forests ecosystems. It allows the establishment of forest parks in the context of the law on encouragement of tourism, through enlargement of installations particularly constructed and or rented by private persons or companies. It even allows the use of protected areas within the forests with this aim under the condition of taking permission from the relevant authorities who are hold responsible for protection of these areas. Shortly, several provisions of this by-law are contrary to the constitutional principles on the protection of forest, to the forest law and to the international commitments of the Country relating climate mitigation and adaptation. Thus, The Union of

[47] Türkiye Barolar Birliği. https://www.barobirlik.org.tr/Haberler/ced-yonetmeliginin-iptali-icin-danistay-a-dava-acilmistir-83081#:~:text=T%C3%BCrkiye%20Barolar%20Birli%C4%9Fi%20taraf%C4%B1ndan%2C%2029,durdurma%20istemli%20iptal%20davas%C4%B1%20a%C3%A7%C4%B1lm%C4%B1%C5%9Ft%C4%B1r.

[48] Çevresel Gürültü Kontrol Yönetmeliği. Resmi Gazete. 30.11.2022. https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=39864&MevzuatTur=7&MevzuatTertip=5 .

[49] Orman Parkları Yönetmeliği. Resmi Gazete. 28.5.2022. https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=39544&MevzuatTur=7&MevzuatTertip=5

Turkish Bar Associations brought a legal action on the issue before the supreme administrative court (Danıştay)[50].

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United Kingdom: Climate Change Litigation

Friends of the Earth and others v Secretary of State for Business, Energy and Industrial Strategy (High Court [2022] EWHC 1841) – Government's Climate Change Plan

This is the first major climate change case against Government where NGOs were successful. The court upheld the challenge that the Government's most recent strategy for reducing greenhouse gases was contrary to provisions in the Climate Change Act 2008. Essentially this was because the court felt the briefing provided by civil servants on the draft strategy did not contain sufficient detail for the Secretary of State to make a rational decision. The court make a fairly bold interpretation of some key and fairly innocuous sounding provisions in the Climate Change Act 2008, though in essence the basis of the court's intervention is procedural rather than substantive.

The Climate Change Act imposes a legal duty of government to achieve net zero by 2050, and also to produce 5 yearly carbon budgets to ensure a smooth trajectory. The latest budget approved by Parliament in June 2021 covers 2033-2037 (leading to a 78% reduction from 1990 levels).

Two sections of the Climate Change Act were at the heart of the challenge. Once the carbon budget is agreed, the Secretary of State must "prepare such proposals and policies" as he or she considers will enable the budgets to be met (s 13). A report must be laid before Parliament setting out the policies and proposals , their timescales and explaining how they will affect different sectors of the economy (s 14). In October 2021 the Government laid before Parliament its policy entitled Net Zero Strategy in accordance with ss 13 and 14 Climate Change Act.

The court examined in detail the background to the Net Zero Strategy, what legally it should contain, how it was prepared by civil servants, and in particular the briefing they gave the Minister before he approved and published it before Parliament. As the evidence revealed, the policies and plans claimed to deal with 95% of the emissions in quantitative terms, leaving around 5% as a matter of uncertainty and qualitative judgment. The judge disagreed with the claimants that the policies and plans must be expressed in quantitative terms to cover 100% of the reductions required. Indeed he even doubted whether the 'quantitative ' and 'qualitative' distinction was really sound : "The kind of quantitative analysis which is carried out is not focused simply on empirical measurements of past or present conditions. It is not a purely objective exercise. It involves predictions of future conditions over many years in a changing socio-economic, environmental and technological landscape and therefore a good deal of uncertainty. The consideration of matters such as these depends upon the use of judgment, whether the analysis is quantitative or qualitative."

When it came to the briefing material provided by civil servants to the Minister, the court concluded that it did not contain sufficient detail on how individual policies would contribute to the 95% predicted quantifiable reductions, "The briefing to the Minister did not enable him to appreciate the extent to which individual policies, which might be subject to significant

[50] Türkiye Barolar Birliği. https://d.barobirlik.org.tr/2022/20220906_dilekce.pdf . Reached on April 2023.

uncertainty in terms of content, timing or effect, were nonetheless assumed to contribute to the 95% cumulative figure". The Minister needed this information to consider the "all-important risk to delivery". Similarly in relation to the 5% shortfall, he should have been given more detailed information to make a rational judgment.

As to the duty under s 14 to publish before Parliament, the court held again there should have been far more detail about the contributions to be made by individual policies and the inevitable uncertainties involved : "The statutory objective of transparency in how the targets are to be met extends beyond Parliament, to local authorities and other statutory authorities, NGOs, businesses and the general public. That transparency requires reports under s.14 to contain explanation and quantification. The purpose of a such a report is not limited to telling Parliament what the Secretary State's proposals and policies are."

The Court ordered the Government to produce a report compliant with its interpretation of the Act within nine months. In March 2023 the Government published as a response a new strategy Powering Up Britain – the Net Zero Growth Plan together with an Energy Security Plan, and accompanied by several thousand pages of documents and proposals. Some new initiatives were included (such as more investment for carbon capture and hydrogen projects) though its ambitions have been criticised by environmental groups.

Friends of the Earth v Secretary of State for International Trade Court of Appeal 13 January 2023 ([2023] EWCA Civ 14). Export finance to third country and the Paris Agreement

This was a challenge to the UK Government's decision to provide export finance for a liquified natural gas project in Mozambique. The key argument was that the decision was contrary to the provisions of the Paris Climate Change Agreement to which the UK was party. The court noted that the agreement had not been incorporated into national law and therefore it was not their role to provide a definitive interpretation. The Government had considered the Paris Agreement and had been advised that that financing a natural gas project would be consistent with its obligations because it would help Mozambique move away from more damaging coal fired plants. The Government's view was 'tenable' according to the Court – i.e. it may not have necessarily been the correct decision but was within the margin of reasonable decisions that could be taken. This is considerably less intense level of scrutiny that would be expected if the treaty had been incorporated into British law.

The decision was also challenge on the grounds that the Government had failed to quantify with any degree of certainty the Scope 3 emissions from the project. These were very difficult to predict in practice but again the court concluded the decision was well within the margin of appreciation afforded to decision-makers. Estimates of Scope 3 emissions in this sort of case was full of uncertainty – "A failure to make such an estimate as part of a multifaceted decision making process does not itself render the decision irrational".

Although the Court was not prepared to quash the Government's decision, it gave a fairly robust view of the obligations under the Paris Agreement. In its view, the temperature goal in Art 2(1)(a) was a clear objective of the Agreement to which all parties had committed. Arts 4, 7, 9, 10, 11 and 13 (referred to in Art 3) were all 'actions to be taken' and not simply aims and aspirations as characterized by one of the judges in the court below.

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United Kingdom: UK Environmental Law – New Long term environmental plan and targets

This report will focus on under the Environmental Act 2021 concerning long term planning for the environment since it has distinctive and innovative legal elements. The Act recognizes that securing significant improvements to the environment can take decades, well beyond normal election cycles. Following the precedent of the Climate Change Act 2008, it introduces the concept of long-term plans, long term statutory targets, an independent assessment body, and a combination of enforceable legal duties combined with regular accountability of Government to Parliament and the public.

1. Long term environmental improvement plan

The Act requires the Government to produce a long-term (minimum 15 years) plan setting out the steps it will take to improve the natural environment. The plan must be reviewed at least every 5 years. The Government produced its first statutory improvement plan in January 2023 (updating a previous non-legal improvement plan) including a major goal to halt the decline in biodiversity.

The Plan as such is not legally binding as such but the Government is legally obliged to produce an annual report to Parliament on its progress in achieving the plan (political accountability) .

2. Long-term statutory targets

The Act requires the Government to produce in regulations long-term (min 15 years) targets for the environment covering at a minimum air quality, water, biodiversity (and a speceis abundance target for 2030) and resource efficiency. These targets are legally binding on the government in that there is a legal duty on the Government to meet them. Targets must be reviewed every 5 years to determine whether they still will significantly improve the environment.

Statutory targets were published in December 2022 and were incorporated into the Environmental Improvement Plan. They included a target to halve species decline by 2030, and increase populations by 10% by 2042, halve waste sent to residual treatment by 2042, and restore 70% of designated features in Marine Protected Areas by 2042. Although a direct read across to current EU targets is not easy, some are similar to EU targets, though some (especially on biodiversity) go further.

3. Independent evaluation and parliamentary accountability

The new Office for Environmental Protection has a duty to provide an annual report to Parliament evaluating Government’s progress in meeting its plan and statutory targets. The first such report will be published later this year. In fact in January, the OEP published an assessment of Government’s progress in meeting its previous, non-statutory 25 year plan for the environment published in 2018. Aside from air pollution, the OEP noted that the Government was not making progress with many of its aims or there was insufficient data to make a proper judgment. A consistent theme of much of the OEP work to date has been to welcome the Government’s overall ambitions but criticize its ability to deliver.

It is too early yet to judge whether these new legal provisions will help secure longer term environmental improvement. At present there are many national concerns (especially continuing biodiversity loss, river pollution from agriculture and sewerage, climate change

mitigation and adaption) which will require consistent government commitment. The new plan and statutory targets provide a valuable framework but no more.

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