WATER LAW & SUSTAINABLE TRAJECTORIES

RECENT NATIONAL LAW DEVELOPMENTS

Contribution Ludwig Krämer

EU climate-related matters 2023/2024

In 2023, the European Union adoptait a number of acts, in order to reach the objective of a 55 per cent reduction of greenhouse gas emissions by 2030, compared to 1990:

- Regulation 2023/956 on a carbon border adjustment mechanism, destined to avoid the relocation of EU undertakings to countries with lower energy prices. The Regulation applies to cement, electricity, fertilisers, iron and steel, aluminium and hydrogen. At the import of such products into the EU, a supplement has to be paid; the price of the supplement is fixed by the EU Commisssion. Poland considered this mechanism to be a tax, which should have been adopted at unanimity under Article 192(2) TFEU (C-513/23).
- Regulation 2023/955 establishing a Social Climate Fund. The Fund is destined to support vulnerable persons and undertakings. It is equipped with 65 billion euro (2026 to 2032). Member States shall elaborate a Social Plan, which is, up to 25 per cent, to be financed nationally. The money of the Fund is already earmarked (PL 11,4 billion, FR 7,3 billion, Italy 7,0 billion, Spain 6,8 billion, Romania 6.0 billion, Germany 5,9 billion etc).
- Regulation 2023/957 on the inclusion of maritime transport in the EU greenhouse gas emissions trading scheme, established by Directive 2003/87. This measure will apply to ships using an EU port, independently of their flag,and has thus a clear extraterritorial effect.
- Regulation 2023/839 provided for the reductions of GHG emisssions from land use, fixing for each Member State the quantities of emissions which had to be reduced (Sweden, Spain and Poland having to reduce most).
- Regulation 2023/857 increased the GHG emission reductions which h ad been established by Regulation 2018/842 (for energy sources, industrial productesagriculture, waste), but only by a certain percentage, not in absolute terms, and only compared to 2005; no explanation was given.
- Regulation 2023/851 amended Regulation 2019/631 on the fleet-wide GHG emissions of motor vehicles, and imposed further reductions. The Regulation works again with percentages which make it rather incomprehensible.
- Regulation 2023/2413 established that renewable energies should, by 2030, make a percentage of 42,5 per cent of the final energy consumption of the EU. No objective for the individual Member States was fixed.
- Regulation 2023/1791 stated that energy efficiency measures should, by 2030, have the result that an absolute quantity of final energy consumption be not exceeded. Member States were invited to fix national indicative targets.

It is doubtful to what extent these measures are clear, transparent and comprehensible.

Ludwig Krämer

National Reports

Austria

National Energy and Climate Plan

End of June 2023 the Federal Minister of Climate Protection, Environment, Energy, Mobility, Innovation and Technology (BMK) presented the draft of an integrated National Energy and Climate Plan (NECP) for Austria (2021-2030) and took up consultations with other ministries and the public.[1] The draft was open for comments during the summer of 2023 to ensure broad participation from both public and private stakeholders. This resulted in a significant response with a total of 100 statements submitted, including 1408 proposed measures.[2] The draft was sent to Brussel (belatedly) in October 2023. However, due to controversies in the coalition government the climate minister (green party) had to withdraw the draft, as the Minister for European Affairs (conservative party) claimedthat it only reflected the position of the climate ministry. In December 2023 the Commission opened infringement proceedings. Austria seems to now be the only country that has not submitted its draft plan.

Climate change related legislation in Austria

Considering Austria's goal to become climate neutral by 2024, for the numerous buildings still reliant on gas or oil it is not only necessary to exchange and convert heating systems to renewable ones but also to improve energy efficiency. In last year's report, it was mentioned that the **Renewable Heat Act (EWG)** was still in the legislative process. As of the beginning of 2024, this legislative process has now been completed, and the law has been enacted. While the original draft of the law prescribed a phase-out of oil and gas heating systems in existing buildings, this provision was ultimately excluded. This development has caused particular indignation among NGOs, as they see the legislation as almost entirely undermined, especially considering the promised phase-out by 2035 (2040 for gas heating) in the government's program. The comprehensive subsidies for transitioning to renewable heating systems and the prohibition of gas heating systems in new buildings were positively received. Nevertheless, the general demand for a "roadmap" that initiates the end of fossil fuels and promotes the energy transition remains standing.

2023 the draft for the **Renewable Gas Act (EGG)**[3] on the introduction of an obligation for gas suppliers to provide gas from renewable sources was published. The legal act serves the implementation of Directive (EU) 2018/2001 as amended by Delegated Regulation (EU) 2022/759. The EGG aims to increase the sales of renewable gases in the Austrian gas market from 5 to 7.5 TWh by 2030 which would correspond to a 50% increase.[4]

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[1] BMK, Integrierter nationaler Energie- und Klimaplan für Österreich (2023) <https://www.bmk.gv.at/dam/jcr:34c13640-4532-4930-a873-4ececc4d3001/NEKP_Aktualisierung_2023_2024_zur_Konsultation_20230703.pdf>.

[2] *Steininger et al*, Nationaler Energie- und Klimaplan (NEKP) für Österreich - Wissenschaftliche Bewertung der in der Konsultation 2023 vorgeschlagenen Maßnahmen (2024) p. 30 <https://ccca.ac.at/fileadmin/00_DokumenteHauptmenue/02_Klimawissen/RefNEKP/Bericht/NEKP_Wissenschaftliche_Bewertung_der_Massnahmen_der_Stellungnahmen_Februar2024.pdf>.

[3] ME 251 XXVII GP.

[4] Sec. 2 Draft of the Renewable Gas Act (Erneuerbares-Gas-Gesetz – EGG).

So far, the **introduction of a new climate protection law** to replace the federal law of 2011, which came into effect to comply with maximum greenhouse gas emission limits and to develop effective measures for climate protection[5], **has still not been successful**. Its obligation period ended in 2020, and since then, there has been no binding path for reducing greenhouse gases for individual sectors at the national level.

[5] Climate Change Act (Klimaschutzgesetz – KSG), BGBl I 106/2011 last amended by BGBl I 58/2017.

Belgium

L. Lavrysen

I. Bioval methodology and jurisprudence

INBO, the Research Institute for Nature and Forest in the Flemish Region of Belgium, developed in collaboration with EUFJE, ENPE and IMPEL a calculation method and an indicative list of compensation amounts for 100 protected species, common in court files. Based on an online survey in 2020, literature review and expert discussions, INBO selected the most relevant criteria covering instrumental, relational as well as intrinsic values of nature. The selected criteria are Extinction risk, Ecological Significance, Cultural significance, Contribution to welfare and Size or lifespan of the species. To go from criteria to a monetary compensation amount, one used a novel methodology to take into account the interrelation between different categories, the incommensurability of the different values of nature and the feasibility of both the formula itself and the resulting compensation amounts in the light of legal procedures. See: https://biovaltool.eu/
The methodology has been tested in two cases (https://biovaltool.eu/case-law)
Criminal Court East-Flanders, Ghent division, 1 March 2023
In a case of illegal catching of starlings, a sanction of 120 hours community service was ordered. The court ordered the restoration of the place into the original state or "adjustment works". The court decided that restoration *in natura* by breeding and reintroducing 77 starlings was not only impossible, but also prohibited according to the Flemish Species Regulation of 15 May 2009. The court ordered financial compensation instead, using the BIOVAL calculation method: 200 euro per starling (short-living species, least concern, important cultural significance, normal ecological significance and normal contribution to welfare). The offender was ordered to pay 200 x 77 starlings = 15.400 EUR to the Flemish Environment and Nature Fund (MINA-fonds) within 4 months. This public fund is granted all the amounts of fines and compensations for nature restoration purposes. The judgment has been confirmed (Court of Appeal of Ghent, 26 January 2023).
Criminal Court East-Flanders, Ghent division, 1 February 2024
In a case of various infringements of CITES and species protection regulations in the Flemish Region of Belgium, a sanction of 8 months imprisonment (4 months suspended) and a fine of 24.000 euro was ordered. The defendant was also banned from keeping animals for life. An NGO Bird Protection Flanders was granted 7.500 euro for its personal moral damages in view of its statutory goal and the efforts it deploys to protect nature and birds. The court ordered financial compensation, using the BIOVAL calculation method stating that it was based on scientific and objective criteria and that the amounts are reasonable acceptable. The court ruled the defendant had caused ecological damage by possessing the birds illegally. He was ordered to pay a financial compensation of in total 68.545,06 euro to the Flemish Environment and Nature Fund (MINA-fonds) within 6 months. This public fund is granted all the amounts of fines and compensations for nature restoration purposes).

II. Legislation

Climate

- Cooperation agreement of September 22, 2023 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region regarding certain provisions of the distribution of the Belgian climate and energy objectives for the beginning of the period

2021-2030 and the distribution of federal revenues from the auction of emission allowances for the years 2015 to 2020
    - Partial and late agreement

- Decree of the Walloon Region of November 6 November, 2023, on Carbon Neutrality decree
    - Purpose: carbon neutrality by 2050 at the latest, by following the trajectory set out in Article 5, with a fair and socially fair transition, taking into account the objectives of sustaining and developing the activity, and even to relocalize and reindustrialize the Walloon territory;
    - Take the necessary adaptation measures to make the Walloon Region more resilient to the climate change;
    - Contribute to international climate finance.

- Federal Law of January 15, 2024 on the organization of federal climate policy
    - Federal contribution to NECP, adaptation plan and long term strategy
    - Yearly follow-up
    - Expert committee

- Commission Recommendation of 23 February 2024 on the draft updated integrated national energy and climate plan of Belgium covering the period 2021-2030, C(2024) 1195 final
    - Belgium does not reach its emission reduction target based on projections
    - Belgium estimates to reach its net removals target in LULUCF based on projections
    - Belgium's final energy consumption is above the indicated target resulting from EU Legislation
    - Belgium's submitted contribution to the EU Renewable Energy target is significantly below the one resulting from EU legislati

Federal
- Art. 94 of the New Criminal Code – Crime of Ecocide
- Introduction of environmental judges and prosecutors

Flanders
- Decree of the Flemish Region of 26 January 2024 on the programmatic approach to nitrogen
    - To contribute to the realization of the conservation objectives for European protected nature by structurally and systematically reducing the impact of nitrogen deposition on protected habitats
    - "Efficient and stable" licensing (avoid a stop on licensing)

Wallonia
- Decree of 9 March 2023, on waste, the circular use of materials and public cleanliness

Partial annulment by Constitutional Court – "solo slim" concerning extended producer

Croatia

Lana Ofak

I. Parliamentary elections April 2024

The newly formed state administration system will include the creation of a new Ministry of Environmental Protection and Green Transition. In the past four years, the environmental protection department was a part of the Ministry of Economy and Sustainable Development.

II. Constitutional right to a healthy environment

In 2023 Constitutional Court of the Republic of Croatia for the first time clearly held that the right to a healthy life and environment is a fundamental right of citizens protected by the Constitution of the Republic of Croatia (Decision and Ruling of the Constitutional Court, no. U-II-845/2019 and U-II-2160/2019).

Background information on the context: In 2001, Croatia regressed by no longer explicitly guaranteeing its citizens the constitutional right to a healthy environment, instead only providing the right to a healthy life. The Constitutional Amendment of 2001 altered Article 69, paragraph 2 of the Constitution prescribing that the state provides the necessary conditions for a healthy environment, as opposed to directly ensuring citizens' right to a healthy environment. In simpler terms, the State's responsibility "to guarantee citizens the right to a healthy environment" was changed to "ensuring the circumstances necessary for a healthy environment".

The constitutional case concerned the Decision on the Order and Dynamics of Landfill Closure[6] adopted by the Minister competent for environmental protection, under the then-valid Sustainable Waste Management Act.[7] With this Decision, 27 waste disposal sites, which failed to meet the necessary legal standards for health and environmental protection, have been shut down. Their waste was rerouted to landfills belonging to local self-government units that aligned the disposal of non-hazardous waste in their area with legal regulations. The initial plan was to implement this as a temporary solution until the waste management centres became operational. However, the centres have not been constructed within the expected timeframe, and their establishment is still far from achieved. As a result of the disputed Decision, specific local self-government units were required to accept unsorted and unused waste from other non-compliant units. Consequently, this led to a significant rise in the volume of waste that they had to receive and adequately dispose of. As the projects for waste management centres are still in progress, the ongoing practice of redirecting waste from non-compliant landfills to compliant ones has essentially become a long-term solution.

Based on two proposals, the Constitutional Court determined that the contested Decision violated the constitution and subsequently repealed it. As already mentioned, the Constitutional Court explicitly stated for the first time that the Constitution guarantees the fundamental right to a healthy life and environment (Article 69 of the Constitution). It is interesting to note that the Constitutional Court stated this without any explanation of the Article 69. It appears that the

[6] Decision on the Order and Dynamics of Landfill Closure, OG no. 3/19 and 17/19.

[7] This is an excerpt from my article "The right to a healthy environment in the light of the new case law of the Croatian Constitutional Court" that will be published in Journal of Agricultural and Environmental Law.

Constitutional Court based its determination regarding the right to a healthy life and environment on the judgments of the CJEU. This is rather unusual since the Charter of Fundamental Rights of the European Union does not explicitly grant individuals the right to a healthy environment, but instead focuses on the importance of maintaining a high level of environmental protection.

I hope that the ambiguity in the current explanation of the Constitutional Court's decisions will not lead to varying interpretations in the future, particularly when there are changes in the Court's members.

III. Limited instances of climate change litigation in Croatia and no developments of action plans

In comparison to other topics, Croatian citizens do not consider the environment to be a highly important issue. Instead, 43.2 percent of respondents prioritize the topics of economy and poverty as the most pressing social problems in Croatia.[8] The perspective on Croatian citizens' worries regarding environmental issues changes slightly when they are individually asked about their overall level of concern for environmental issues. The disposal of household waste (20.8 percent) and climate change (16.3 percent) are the most crucial environmental issues, according to the survey.[9]

It is challenging to foresee the ramifications of the ECtHR's judgment in the Klimaseniorinnen case in Croatia, given that no court cases regarding climate change have been brought in Croatia (to my knowledge).

Pursuant to the Act on Climate Change and the Protection of the Ozone Layer, Croatia has adopted the Strategy for Low-Carbon Development and the Strategy for Adaptation to Climate Change, however, the five-year action plans necessary for their execution were expected to be adopted by June 2021 but have not yet been finalized.

IV. Coming into force of the new Act on the Administrative Disputes in July 2024

In disputes related to EIA and appropriate assessment (AA) brought by environmental NGOs, the administrative courts have typically rejected the motion for expert testimony and declined to review the validity of expert evidence, such as environmental impact studies, with the explanation that they were prepared by a qualified and authorised body.

Some recent changes in the Act on Administrative Disputes could simplify the process of challenging EIA and AA decisions, as courts are now specifically empowered to assess the accuracy of expert evidence used in these cases.

V. Publishing of court decisions

In Croatia, court decisions are not typically made publicly available, with only a small number of judgments being published on the Supreme Court portal and accessible through searches.

The High Administrative Court's judgment, upheld by the Supreme Court, stated that neither the Right to Access to Information Act nor the Aarhus Convention covers access to judgments involving environmental matters. Instead, the Court's Rules of Procedure apply to cases concerning access to judgments, even in environmental matters.

[8] https://www.idi.hr/en/news/notifications-list/a-summary-of-the-research-report-a-lost-decade-attitudes-of-croatian-citizens-on-the-questions-of-climate-change-environment-and-energy-transition-published.
[9] Ibid.

According to a new provision of the Act on Courts that will enter into force on 1 January 2025, final court decision shall be published on a special website with prior anonymization and compliance with the rules on personal data protection. The aim of the new provision is to enhance transparency and openness of court proceedings and to strengthen public trust in judiciary. According to July 2022 Eurobarometer data, trust in the judiciary among Croatian citizens was only 26% (the lowest among all EU member states).

Czechia

Jiri Vodicka

During 2023 several new interesting acts and amendments were enacted.

- Unified Environmental Opinion and Construction Law Framework

In 2023, Act No. 148/2023 Coll., introducing the Unified Environmental Opinion (UEO), was enacted. This act modifies the procedural stages of the permitting process and is required when a project falls under Act No. 283/2021 Coll., Building Act or requires an Environmental Impact Assessment (EIA) under Act No. 100/2001 Coll., on Environmental Impact Assessment.

The UEO aims to consolidate 26 various acts (binding opinions and decisions) from 10 different acts into a single act.[10] The objective is to streamline and expedite the permitting process by eliminating the need for applicants to obtain several binding opinions from different authorities. Instead, the UEO consolidates all necessary binding opinions into one document.

Despite its intended benefits, the act has some challenges. It does not encompass all environmental acts required for construction permits. Moreover, in some cases, the UEO will not contain acts connected to the nature and landscape protection even though it will be issued for other protected interests.[11] Procedurally, it's unclear how modifications or alterations to a duly issued UEO will be managed since it will contain provisions from various acts but will come into force as a single act.

The UEO is part of the new construction law framework that includes the new Building Act and amendments to several other acts. These amendments, critical for environmental protection, modify public participation by ecological organisations in proceedings and standardise the requirements across various laws (Act No. 254/2001 Coll., Water Act; Act no. 76/2002 Coll., on Integrated Prevention; Act No. 100/2001 Coll., on Environmental Impact Assessment). Additionally, the amended Act No. 114/1992 Coll., on Nature and Landscape Protection, also broadens the possible participation of ecological organisations in construction proceedings if certain conditions are met.

- Amendments to Act No. 458/2000 Coll., Energy Act.

Czechia has successfully incorporated amendments to Directive 2018/2001 into its legal framework. Noteworthy amendments include:

1. Act No. 19/2023 Coll.: This amendment increases the installed capacity limit of power plants to 50 kWp. As a result, photovoltaic installations within this limit no longer require a building permit, operating license, or professional competence. Additionally, the Energy Regulatory Office has updated Decree No. 408/2015 Coll., on Electricity Market Rules, to allow electricity sharing within apartment buildings.
2. Act No. 469/2023 Coll.: This amendment introduces two types of energy communities: "ordinary" energy communities and those specifically designated for renewable energy sources. These non-profit entities have limited participation by large enterprises. Community

[10] Act No. 62/1988 Coll., on Geological Works. Act No. 114/1992 Coll., on Nature and Landscape Protection. Act No. 334/1992 Coll., on Protection of Land Fund. Act No. 289/1995 Coll., Forest Act. Act No. 100/2001 Coll., on Environmental Impact Assessment. Act No. 254/2001 Coll., Water Act. Act No. 256/2001 Coll., Funeral Act. Act No. 201/2012 Coll., on Air Protection. Act No. 224/2015 Coll., on the Prevention of Serious Accidents. Act No. 541/2020 Coll., on Waste.

[11] Section 83(9) of Act No. 114/1992 Coll.

members can share electricity with up to 1,000 members across three neighbouring municipalities (a restriction set to be lifted in 2026).

A new amendment is currently under consideration in Parliament. This amendment aims to enhance the integration of new renewable energy sources into Czechia's energy mix, stabilise the electricity grid through the aggregation of flexibility of smaller energy sources into bigger ones, and improve energy storage and accumulation.

Denmark

France

FOCUS on Derogations to the protection of wildlife - the gradual neutralisation of the imperative reason of overriding public interest

France introduced the concept of protected species into its domestic law with the Law of 10 July 1976 on the protection of nature. Initially, the protection afforded to wildlife (animal or plant) with this status was subject only to very limited derogations. Article 4 of the 1976 law only authorised the regulatory authority to 'issue authorisations for the capture of animals or the taking of species for scientific purposes'. After the creation of derogations on a case-by-case basis, a qualitative leap was taken by the Agricultural Policy Act of 5 January 2006 to bring France into line with its European commitments, specifically article 16 §1 of the Habitats Directive (C. envir., article L. 411-2 4°). As the transposition of this text was almost literal, the granting of exemptions to the prohibitions on disturbing and destroying protected species has since been subject to the fulfilment of three cumulative conditions : there is no other satisfactory solution, the derogation will not adversely affect the maintenance of the species concerned in a favourable conservation status, and lastly - this is the reason for the derogation - there is an interest either in protecting flora and fauna, preventing damage to agriculture, public health and safety, or 'other imperative reasons of overriding public interest, including those of a social or economic nature'. Disputes over exemptions to species protection have been developing since the 2010s, and have gradually crystallised around the condition relating to imperative reasons of overriding public interest[12]. The latter has been accused of blocking or at least delaying the implementation of numerous projects, including those favourable to the energy transition, such as those aimed at developing renewable energies.

As a result, the French legislator of 2023 devised a mechanism for presuming imperative reasons of overriding public interest, based on Council Regulation (EU) 2022/2577 of 22 December 2022 establishing a framework for accelerating the deployment of renewable energy, and the reformed Renewable Energy Directive (Directive (EU) 2023/2413 of 18 October 2023). This is the purpose of article 19 of the law of 10 March 2023 on accelerating the production of renewable energy (C. envir., art. L. 411-2-1). Precisely in order to 'save time', projects falling within its scope - specified by decree - are exempted from demonstrating that they meet an imperative reason of overriding public interest. This condition would be difficult to prove for projects with low installed capacity. On the other hand, the absence of harm to the populations of the species concerned in a favourable conservation status, and the absence of a satisfactory alternative solution, must always be demonstrated. The Constitutional Council (*Conseil constitutionnel*), which had article 19 of the law referred to it by opposition MPs, confirmed its constitutionality by insisting that the other two cumulative conditions remain in place, and that the administrative authority must ensure that they are met under the supervision of the courts (decision no. 2023-848 DC of 9 March 2023). In addition, in response to the applicants who claimed that the constitutional objective of protecting the environment had been violated 'given the harmful effects that these installations could have on the health of local residents and on protected species and their habitats', the Constitutional Council retorted that the legislature itself pursues such an objective when it aims to promote the production of renewable energy and the development of energy storage capacity. This situation is fairly

[12] G. Audrain-Demey, « Aménagement et dérogation au statut d'espèces protégées: la «raison impérative d'intérêt public majeur» au cœur du contentieux », *Droit de l'environnement* 2019, p. 13.

emblematic of the conflicts of environmental interest that were the focus of the Avosetta group seminar in 2022, and are often resolved by sacrificing the protection of biodiversity.
Moreover, by a knock-on effect that is typical of the regressive logic of contemporary environmental law, the presumption of an imperative reason of overriding public interest was rapidly extended by the legislature. This was first the case with Article 12 of the Law of 22 June 2023 on the acceleration of nuclear power. It allows certain nuclear power reactors to benefit from the presumption of an imperative reason of overriding public interest. However, unlike the situation for renewable energies, this is not a simple presumption, but an irrefutable one[13]. Its compatibility with European Union law (the Habitats and Birds Directives) is thus more than doubtful.
This was then the case with article 19 of the law of 23 October 2023 on green industry, for the benefit of industrial projects qualified by decree as projects of major national interest 'for the ecological transition or national sovereignty' (new paragraph of article L. 411-2-1 of the Environment Code). So it is no longer necessarily climate protection that justifies the presumption of an imperative reason of overriding public interest. In addition, this recognition cannot be challenged in the appeal against the decision granting the 'protected species' exemption, but only against the decree qualifying the industrial project as being of major national interest. This is an indirect restriction on access to the courts, for claimants who are distracted or insufficiently informed about this particular procedural feature.

[13] A. de Prémorel, « Souveraineté industrielle et énergétique : l'intérêt public majeur reprend de la vigueur », *Bulletin du droit de l'environnement industriel*, décembre 2023, supplément n° 108, p. 13.

Germany

Bernhard Wegener

Energy-Restructuring

Last year, the development of German environmental law was once again characterised by the restructuring of the energy supply caused by the Russian invasion of Ukraine and climate policy. The German government's aim is to continue to replace the loss of Russian gas imports with the supply of LNG gas on a transitional basis and to promote the long-term transition to a hydrogen supply. To this end, it is relying on a strategy of modified gas network expansion. The network is to be upgraded in such a way that it will enable the supply of LNG gas on the one hand, and on the other hand will also be upgraded for the subsequent transport of hydrogen. The environmental organisations criticise the development of the LNG structure in particular. They question its economic necessity and ecological compatibility. Above all, the poor carbon footprint of imported LNG gas raises doubts about the retention of gas as a "bridging technology" to a climate-neutral hydrogen economy. From a technical and economic perspective, there are still considerable doubts about the validity of the government's hydrogen strategy.

A report by the German Federal Court of Auditors attracted considerable attention, according to which the reorganisation of the German electricity industry is lagging well behind the federal government's schedule. In particular, the Court of Auditors criticised shortcomings in the expansion and conversion of the electricity grids and the further expansion of onshore and offshore wind energy. In some cases, the expansion of renewable energies is already more than seven years behind the official schedule. In addition, the German government is said to conceal the true costs of renewable energies because only the comparatively cheaper construction of the actual energy generation plants is included in the corresponding calculations. In contrast, the considerable costs of building and expanding the energy infrastructure, fluctuation compensation and storage technology are not included in the calculations. With regard to the storage of electricity from renewable energies, the Federal Government's scenarios are said to be unrealistic and over-optimistic.

Meanwhile, the German government - in cooperation with the EU legislator (Directive 2023/2413) - is focusing on further accelerating the approval procedures for renewable energy projects (see most recently the draft bill for a law to implement the EU Renewable Energy Directive in the area of offshore wind energy and electricity grids dated 1 February 2024). This is intended to further relativise and push back objections from the field of nature and species conservation in particular. However, it remains uncertain whether this will succeed in view of the extensive FFH case law of the German administrative courts (see most recently Federal Administrative Court, judgement of 19 December 2023 - BVerwG 7 C 4.22) and the ECJ. Against the backdrop of delays and cost increases in the expansion of the electricity grids for the transport of renewable energy, the regularly planned underground laying of power lines has recently been called into question once again. There is a plea in favour of a largely traditional above-ground route. However, this has met with considerable resistance from the affected population.

The German government - and in particular the Green-led Federal Ministry of Economics - has significantly changed its position on carbon capture and storage. On 26 February 2024, the Ministry published a draft bill to amend the Carbon Dioxide Storage Act, which is intended to enable the

permanent storage of carbon dioxide in underground rock layers of the continental shelf and the exclusive economic zone for commercial purposes on an industrial scale.

The Federal Administrative Court has rejected all applications against the construction of LNG connection pipelines (see most recently Federal Administrative Court, decisions of 25 January 2024 - BVerwG 7 VR 1.24 and 7 VR 2.24). In particular, it denied a judicial review of the necessity of the corresponding facilities previously determined by the legislator. It also denied the inclusion of Scope 3 emissions associated with the construction of the pipeline in the environmental impact assessment. According to the BVerwG only the emissions directly attributable to the project are to be included in the assessment.

Financing Climate Policy under constitutional constraints

The Federal Government's environmental policy was hit financially above all by a decision of the Federal Constitutional Court (judgement of 15 November 2023, 2 BvF 1/22), which declared the transfer of credit authorisations amounting to €60 billion, which were intended for the economic management of the consequences of the coronavirus pandemic, to a "climate fund" to be unconstitutional. As a result, numerous subsidy programmes, for example for the purchase of battery-powered cars, had to be discontinued unexpectedly. As a result, sales of these vehicles plummeted.

Polarising environmental policy – the wolve

The handling of wolves remains controversial. The number of wolves living in the wild in Germany continues to rise sharply. By the end of 2023, the population was estimated at 184 wolf packs, 47 pairs and 22 individual animals. The number of grazing animals killed by wolves has also risen sharply. In 2020 the respective number reached nearly 4000. In September 2022, wolves killed Ursula von der Leyen's favourite pony. In November 2022, a majority in the EU Parliament called on the EU Commission to re-evaluate the European protection strategy for wolves. In December 2023, the EU Commission proposed downgrading the protection status of wolves and allowing population-preserving hunting. However, the corresponding proposal has not yet been implemented. The Hessian state government and various political parties have spoken out in favour of such an initiative in the run-up to the European elections. In anticipation of a change in the law at European level, Hesse has already submitted a draft law to facilitate the hunting of wolves. Among other things, the draft law stipulates that the identity of the hunters of wolves should be kept secret for fear of militant animal rights activists. Overall, the debate surrounding the wolf shows considerable potential for polarisation.

Even beyond this individual example, environmental, climate and nature conservation in Germany, which used to be largely consensual, is becoming an increasingly polarising topic. The right wing AfD in particular is benefiting from this. The Greens are predicted to suffer losses in the upcoming elections.

Hungary

Gyula Bándi

I. Empowerment in crisis/danger situations

There are many trends in Hungary, which have already been started together with the crisis/danger reasoning, going back even to the Covid19 crisis. Since that time the Government could receive an empowerment, the details of which could be found in my 2023 report (the relevant summary of this I attach, in order to provide a full picture).

The legislation, associated with environmental issues has been going on in 2023, and also in my capacity as an ombudsman for future generations, always reacted for the most important subject areas.

1. Public law contract

The first in the line was the public law contract in environmental matters – Gov. decree of 432/2023. (IX. 21.) Kormányrendelet. The possibility to use public law contract (compliance schedule) in public law has bee provided for by the administrative procedure act (Act No. CL of 2016), requiring a special legal regulation in all those areas, which might use this framework. Up till this Decree there had not been any such mandate in the field on environment, although this idea might better serve the environmental interests than the decision of the authority. The Act underlines that in case of improper implementation of the contract, the public contract should immediately be used as an enforceable decision. We have always urged the use of this option in environment. The decree made it, so seemingly everything is perfect. But… First of all, the reason behind – crisis, emergency – would definitely require a stricter enforcement than a lighter version, so the reason is not very clear. Second, the Decree does not wish to use the legal requirement, namely to convert the contract into an enforceable decision in case of non-compliance, but on the contrary, it wants to forbid the authority to intervene. And this is even more against the emergency situation. And one should not forget that the Decree did not clarify and details in connection with the conditions of using this new option. All these malfunctions have been pointed out in our notice.[14]

2. Public hearing and public participation

It was evident to use an online form of public hearing under the Covid19 situation, but the Gov. Decree 146/2023. (IV. 27.) Korm. rendelet extended the possibility to organize public hearings online, without the direct participation of the public. This was one of the reasons to issue a general notice on the importance of public participation in environmental matters[15], where on the one hand all the main reason for pubic participation have been listed and we took a special view on public hearing, underlying among others that the online format is by definition might not serve the expected effects, and might only be used in those cases, where the decisionmaker might provide all the reasons for

[14] One may find it in Hungarian: https://www.ajbh.hu/documents/10180/0/Figyelemfelhivas_hatosagi_szerzodesrol_Vegleges.pdf/58f4b6e1-6c17-c891-66e0-4a8dcd580f0a?t=1696333472617

[15] see: https://www.ajbh.hu/documents/10180/0/Figyelemfelhivas_Tarsadalmi_reszvetel.pdf

such decision. Without a proper and exceptional argumentation such a decision might itself serve as a reason to find it illegitimate.

II. Hungary as one of the main car-battery manufacturers

In the past two years Hungary wants to become a main producer for car-batteries, and nowadays also for electric cars, mostly managed by Chinese and South-Korean businesses. There are many reasons, why this is a wrong concept:

- the magnitude of production as compared with the size of the country is incomparable, mostly because of the energy and water needed,
- it is against all economic philosophies or argues not to balance the future economy, but to one-sidedly invest only in one branch of industry,
- the environmental consequences are not taken care of, using the missing mention of such industries in the EU EIA legislation. The consequence is that many of the first huge investments could not have an EIA procedure, stating that there is no significant effect (and there is no compulsory EIA listed for such issues!),
- consequently, the real risks of such massive industrial capacities have never been analysed,
- the current environmental authorities are no capable to monitor these activities in a proper way, due to the lack of personnel and technical capacities,
- there is no proper technology to treat the waste from this type of industry and the available waste management facilities are far from being sufficient,
- the decisionmakers seem to misunderstand the EPR regulations and believe – or at least seemingly suppose - that we would not face any problem of future waste management 'earthquake'.

III. The new Act on Hungarian Construction Activities

A new act (Act no. C of 2023) has been adopted with the above name, changing everything from regional and local planning to construction, building activities or cultural heritage protection. In the past less than a decade it is again a full amendment of a regulatory field which should be stable. Everything should again be restructured, the local governments must rewrite their local policies and plans, while there is even smaller room for permitting – leaving less and less chance for the interested parties to learn anything about buildings in their neighbourhood or participating in the processes. Beside the requirements related to 'visual environment of settlements', the act refers to a 'civic' or contemporary (?) good taste (???) as a basis of decision-making. And what is even more interesting, is that the possibility for exceptions from all the wonderful requirements is wider than ever, referring to the 'priority public interests', decided by the Government, which overrules every local plan or visual or landscape requirements of settlements.

The exception becomes a rule in many respects.

IV. Water act and drilling wells – second round (ombudsman for future generations as a possible legal counsel for the future)

In 2018 the Parliament amended the water act, withdrawing the permit requirements for household and irrigation wells, which do not exceed 80 meters. The President of the Republic turned to the Constitutional Court, supported by my amicus (ombudsman for future generations), collecting also the views of professional water associations, academic institutions. In its decision 13/2018. (IX.4.) the

Constutional Court, on the basis of the protection of the common heritage of future generations, the precautionary principle, terminated the act, reinforcing also the role of permits in the protection of natural values.

At the beginning of 2023, the Government began to come back with the same idea and on its proposal, the Parliament adopted practically a similar amendment of the water act, this time limiting the free-of-permit option to 50 meters, with some minor changes. In my capacity as the deputy commissioner of fundamental right I only have the possibility to turn to the commissioner and propose a constitutional supervision, practically without any answer in the merits. According to the Act CLI of 2011 on the Constitutional Court the (art. 24) the ex post review is only open for the commissioner.

Still, at the turn of the 2023/24 year I decided to try a test-case, using a different road instead of the above – seemingly only- option. This is the constitutional complaint, which is only open for 180 days after the entering into force of the given provision. This is regulated as follows:
Art. 26
(1) Pursuant to Article 24(2)(c) of the Fundamental Law a person or organization affected by a specific case may submit a constitutional complaint to the Constitutional Court if, in consequence of the application of legislation that was found contrary to the Fundamental Law
a) their rights guaranteed in the Fundamental Law were violated, and
b) the possibilities of seeking redress have already been exhausted or there is no legal remedy available.
(2) By way of derogation from Par. (1), Constitutional Court proceedings may also be initiated under Article 24(2)(c) of the Fundamental Law in duly justified cases where:
a) impairment of a right occurred directly, without a judicial decision, stemming from the application of legislation that was found contrary to the Fundamental Law, and
b) there is no legal remedy available to repair the injury, or the petitioner has already exhausted all available remedies.

At the beginning of March 2024, I sent the test case to the Constitutional Court, referring to the 2018 decision, stressing the simple fact that the Court is not in a position to defend its decisions, and claiming primarily that as an ombudsman of future generations (referred to by the act on the commissioner of fundamental rights and its deputies as a 'spokesperson' for future generations) I am acting as the legal representative of those future generations, whose heritage and consequently whose rights are affected and who are not in a position to represent themselves. At least the Court did not send it back immediately, so we are waiting for the response.

Annex (from the year 2023 report)
Empowerment in crisis/danger situations

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.

As many of the regulatory answers on the crisis situations 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.

Iceland

Aðalheiður Jóhannsdóttir

Background – EU´s Water Framework Directive and Iceland´s implementation

Directive 2000/60/EC of the European Parliament and the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1) (the WFD), became a part of the EEA-Agreement in 2007.[16] As the incorporation into the EEA took place on 28 September 2007, some adjustments to the WFD were necessary. The most important ones related to the various dates found in the WFD. However, the constitutional requirement (ratification of the Icelandic Parliament) was not in order until 1 May 2009. This date is instrumental as it equals the entry into force date in the EU, i.e. 22 December 2000. Accordingly, Iceland´s first water cycle should have begun 1 May 2018 (9 years after 1 May 2009). In line with Article 7 of the EEA-Agreement, the WFD was implemented into the Icelandic legal system with the adoption of the Act on Water Management (AWM) (36/2011), which entered into force 19 April 2011. The Environment Agency of Iceland (EP) is responsible for implementing the AWM. While the AWM incorporates many of the principles of the WFD, the AWM has generally not be followed by either the responsible central authorities or the local authorities. In spide of the EEA date adjustments to the WFD, the first River Basin Management Plan 2022–2027 (RBMP), the Programme of Measures 2022–2027 (PoM), and the Monitoring Plan 2022–2027 (MP) were ratified by the Minister for the Environment, Energy and Climate on 4 April 2022, or almost four years after 1 May 2018. Although the EFTA Surveillance Authority (ESA) has been made aware of the delay, no formal action has yet been taken against Iceland.

Further on the AWM

In line with Article 4 AWM, Iceland, along with estuaries and coastal water, has been defined as one River Basin District (RBD), which is divided into four Water Regions (West, North, East, and South). According to the RBMP, a total of 2719 water bodies have been delineated in Iceland: 1871 river water bodies, 382 lake water bodies, 77 transitional water bodies, 76 coastal water bodies and 313 groundwater bodies.[17] Information of the status of some of the water bodies is available either in the RBMP or in a centralised database (https://vatnavefsja.vedur.is/). The fact is, however, that the status of many of the defined water bodies is still unknow. The methodological approach that has been used by the responsible authority is to presume that most water bodies are fulfilling the environmental objective of a good status. Moreover, the PoM provide information on the necessary measures that need to be taken in order meet the environmental objectives of the AWM (WFD). Finally, the MP provides for a general monitoring plan. What the RBMP, the PoM, and the MP have in common is that they partially build upon old information, therefore, these instruments are in many ways incomplete.

The year 2023

The application of the AWM and recent Case-law

While the AWM came into force in 2011, its principles have thus far been poorly followed. No integration of its principles into plans and programmes has taken place. Permits, e.g., for hydropower plants and geothermal plants, or for the various polluting activities, have not been reviewed or

[16] Cf. Joint EEA Commission Decision No 125/2007, 28 September 2007.

[17] See English Summary here https://ust.is/library/sida/haf-og-vatn/Icelandic%20RBMP%202022-2027_English%20summary_version%2023.1.2023.pdf (12 May 2024).

adjusted to AWM´s principles. The same applies to permits allowing for water (cold and hot) abstraction. Moreover, the responsible authorities have only marginally applied AWM´s principes when preparing new permits.

In a recent case, cf. *ÚUA Case No 58/2022 11 January 2023 (Hnútuvirkjun)*, the ÚUA (Environmental and Natural Resources Board of Appeal) annulled a municipal development permit for a 9,3 MW hydropower plant in the river Hverfisfljót in southern Iceland. The annulment was partially based on the fact that the Energy Authority had not issued any permit for the hydropower plant (which should have taken the principles of the AWM into account), and also because of flawed arguments in relation to the evaluation of public interests and the compatibility to nature conservation objectives.

In another case, cf. *ÚUA Case No 3/2023 15 June 2023 (Hvammsvirkjun)*, a permit for a new 95 MW hydropower plant in the lower part of the river Þjórsá (longest river in Iceland), was annulled. Instrumental in the case was the fact that the holder of the permit (the National Power Company) had revealed during the procedure that it needed an exemption according to Article 18 of the AWM (Article 4(7) WFD). The ÚUA did not agree with the argument that the permit should not be annulled as it could in the future be reviewed, if necessary. As it was clear that the operation of the plant would deteriorate the water quality of the relevant surface water body the permit was annulled by the ÚUA.

The saga however, continues. Several months after the ÚUA had delivered its annulment decision, the EP, on 9 April 2024, issued a decision according to Article 18 of the AWM and accepted the power company´s assessment and arguments for the deterioration of the water body. As this part of the case is in order, the Energy Authority could re-process the original application of the power company for the permit. However, the legality of the EP´s Article 18 decision is now being challenged before the Civil Court of Reykjavík, a case lodged late in April 2024, by, inter alia, a few landowners along the river Þjórsá, arguing its incompatibility with Article 18 of the AWM and the WFD.

Ireland

Áine Ryall

Introduction

There have been very significant developments in Ireland in the period under review. Thisbrief report presents selected highlights.

Planning and Development Bill 2023

In September 2021, the Government approved a 'comprehensive' review of planning legislation to be overseen by the Attorney General and involving 'a dedicated working groupof professionals with planning law expertise'.[18] A draft Planning and Development Bill 2022 was published in January 2023. The draft Bill underwent intensive pre-legislative scrutiny before the Joint Committee on Housing, Local Government and Heritage and was subject to further refinement in preparation for full publication and consideration by the Houses of the Oireachtas (Parliament). The proposed changes to the law governing judicial review of planning decisions attracted particular attention.[19] The Planning and Development Bill 2023 was published formally in November 2023. It aims to fundamentally overhaul the current legislative framework governing planning law (i.e. the Planning and Development Act 2000 (asamended)).[20]

There is no doubt that review and revision of Irish planning law, which has become impossibly complex and fragmented, is long overdue. From that perspective, the Bill is most welcome. It is essential that Ireland has an effective and efficient planning process to ensure timely delivery of projects, in particular housing development (Ireland has a long-running and very serious housing crisis) and a range of much-needed infrastructure (including e.g. renewable energy infrastructure, wastewater treatment infrastructure and transport infrastructure). TheGuide to the Bill explains the background to its development:

The Bill ensures that the planning system remains fit for purpose to meet the needs of future population, whilst balancing key pillars of the Irish planning system such as public participation, environmental considerations and delivery of key infrastructure such as roads, housing and renewable energy.

This is achieved by enhancing clarity, improving consistency and increasing confidencein the planning system. This is achieved though the alignment of national, regional and local tiers of planning, encouraging public debate and participation at the plan-makingstage and through the review and refinement of many of the processes, parameters and timelines of the current planning system.

The Bill provides mechanisms for Government to make clear provision for national planning policy, measures and guidance in the form of the National Planning Framework and National Planning Statements; delivered through a plan-led,consistent system based on an integrated hierarchy of

[18] See further Department of An Taoiseach, 'Government launches review of planning legislation' PressRelease, 28 September 2021.
[19] See e.g. my submission to the Joint Committee, 8 March 2023.
[20] Government Press Release here and *Guide to the Planning and Development Bill 2023*.

plan-making across all tiers of planning.[21]

From the outset, multiple aspects of the Bill generated intense controversy. To take one example, the Bill provides for significant (regressive) amendments to the current legislative provisions governing judicial review of planning decisions, including the rules on standing andthe special rules governing liability for costs in environmental matters. There are serious concerns among practitioners (both lawyers and professional planners), academics and NGOs that the proposed revisions to the law governing judicial review may conflict with access to justice obligations under the Aarhus Convention and EU law, including Article 47 of the Charterof Fundamental Rights of the EU (the right to an effective remedy). The Government insists that the Bill is compatible with international and EU law obligations.

Another aspect of the Bill that it noteworthy is the proposal to overhaul and 'renew' *An BordPleanála* (the Planning Board).[22] Established in 1977, and long regarded as 'the jewel in the crown' of the Irish planning system, the Board was beset by scandal of late following a seriesof egregious governance failures. Public trust in the Board is at an all-time low. A new Chairperson is now in place and it is hoped that, with sufficient resources, the Board can regainlost ground. The proposals set out in the Bill include changing its name from An Bord Pleanála to *An Coimisiún Pleanála* (the Planning Commission) and providing for a new corporate structure, with a separation of corporate, decision-making and governance functions.

In terms of improving timeframes for decision-making, legislative change in and of itself will have limited impact. If timeframes are to be improved significantly, it is essential that the competent authorities are provided with sufficient resources and the necessary expertise to ensure they can deliver high quality, legally robust decisions in a timely manner. High quality decision-making at first instance by the relevant competent authorities should go some way towards reducing the need for judicial review.

The Bill as initiated runs to over 700 pages. It was subject to a very significant number of amendments during Select Committee Stage. Report stage is due to commence shortly and further amendments are forthcoming. The Government aims to enact the new legislation before the summer recess. This is an ambitious target. It remains to be seen how things willdevelop over the coming weeks. There is no doubt, however, that the intense controversy around this Bill is set to continue.

Planning and Environment Division of the High Court

The Planning and Environment Division of the High Court of Ireland was launched formally on11 December 2023. See Press Release from Courts Service of Ireland.[23]

The particular model that has been adopted for the new division is different to the typical specialist environmental courts that operate in other jurisdictions. The Government has opted for a special

[21] *Guide to the Planning and Development Bill 2023*.

[22] The Board describes itself on its website as: 'the national independent statutory body to determine appeals on planning and other cases as well as direct applications for strategic infrastructure and otherdevelopments.'

[23] For sample media coverage see: New planning and environment court formally launched (rte.ie).

'division' of the High Court that will manage the 'Planning and EnvironmentList'. This new judicial specialisation operates at the High Court level only, rather than as a 'stand-alone' specialist environmental court along the lines of those operating elsewhere.

The detail is found in Practice Direction HC 126: Planning and Environment List.

Selected Irish jurisprudence

From the extensive body of jurisprudence in the period under review, the following two decisions may be of interest:

[1] The decision of the High Court in *Webster and Rollo v Meenacloghspar (Wind) Limited* [2024] IEHC 136 where the plaintiffs were successful in their action in private nuisance concerning noise and vibration caused by wind turbines. Egan J observed that:

It should be noted that this is the first private nuisance claim in relation to [Wind TurbineNoise] that has run to judgment in this jurisdiction, or it appears in the United Kingdom.

[2] The decision of the Supreme Court in *Right to Know v Commissioner for Environmental Information and Raheenleagh Power Ltd* [2024] IESC 7 which concerned the definition of 'public authority' for the purposes of Directive 2003/4/EC on public access to environmentalinformation and the Irish regulations purporting to implement that Directive. The specific issue was whether Raheenleagh Power was a 'public authority'. Summary of judgment here.

References for preliminary rulings from the Irish courts

The Irish courts continue make references to the CJEU in environmental matters on a regularbasis. Two examples serve to demonstrate the wider significance of the legal issues raised inreferences originating in Ireland.

[1] *Friends of the Irish Environment v Government of Ireland* [2022] IESC 42 concerns a challenge to the validity of the adoption of the National Planning Framework and National Development Plan.[24] In this case, which is ongoing at the time of writing, the Supreme Court, sitting as a panel of 7 judges, decided to refer a number of questions to the CJEU concerningthe interpretation of the SEA Directive (Directive 2001/42/EC) in order to enable the nationalcourt to determine whether the National Planning Framework and / or the National Development Plan fall within the scope of the Directive. The Supreme Court also enquired asto whether an assessment of a particular level of detail is required for all the reasonable alternatives identified in the draft plan.

Case C-727/22 *Friends of the Irish Environment v Government of Ireland* is pending before theCJEU. The Advocate General's Opinion was delivered on 21 March 2024. No date has been published by the CJEU as yet for delivery of its judgment.

[24] Summary of Supreme Court judgment.

[2] In *Coillte v Commissioner for Environmental Information (No 2)* [2024] IEHC 28 the High Court has made a reference to the CJEU on the interpretation of Articles 2(5), 3(1) and (5)(c), 4(1)(b) and 6(1) of Directive 2003/4 on public access to environmental information.

Case C-129/24 *Coillte* is pending before the CJEU at the time of writing. The questions referredinclude whether anonymous or pseudonymous requests for environmental information are valid? – see in particular Question 2 below. These are the questions:

> **[1]** Does the word "request" in Article 6(1) of Directive 2003/4 read in the light of Article 4(1) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25June 1998 mean only a request that is valid by reference to the Directive and by reference to the transposing domestic law of the member state concerned?
>
> **[2]** Does the word "applicant" in Article 2(5) of Directive 2003/4 read in the light of inter alia Article 4(1)(b) and/or Article 6(1) and/or (2) and/or Articles 2(5) and 4(1) and(3)(b) of the Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998 mean a natural or legal person identified by their actual name and/or a current physical address, as opposed to an anonymous or pseudonymous person and/or an applicant whose contact details are identified by email only?
>
> **[3]** If the answer to the second question is No, does Article 3(1) and/or (5)(c) of Directive 2003/4 read in the light of Article 4(1) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998 have the effect of precludingnational legislation that requires an applicant to furnish his or her actual name and/orcurrent physical address in order to make a request?
>
> **[4]** If the answer to the second question is No, and the answer to the third question in general is Yes, does Directive 2003/4 read in the light of Article 4 of the Convention 11on Access to Information, Public Participation in Decision-Making and Access to Justicein Environmental Matters done at Aarhus on 25 June 1998 have the effect that wherea public authority forms the reasonable view that there is a prima facie question overthe genuineness of information regarding his or her identity provided by an applicant,the public authority is precluded from seeking confirmation as to the applicant's actual name and/or a current physical address, for the purpose of verifying the identity of the applicant, and not for the purpose of determining the interest of the applicant, even if the provision of the actual name and/or current physical address of anapplicant could indirectly create the potential for inference or speculation on the partof the public authority or otherwise as to the interest if any of the applicant referred to in Article 3(1) of the Directive.
>
> **[5]** If the answer to the second question is No, and the answer to the third question in

general is Yes, does Article 4(1)(b) of the Directive read in the light of Article 4(3)(b) ofthe Convention on Access to Information, Public Participation in Decision-Making andAccess to Justice in Environmental Matters done at Aarhus on 25 June 1998 have the effect that a public authority is precluded from seeking confirmation as to the applicant's actual name and/or a current physical address, for the purposes of determining whether a given request is manifestly unreasonable by reference to the volume, nature and frequency of other requests made by the same applicant, and notfor the purpose of determining the interest of the applicant, even if the provision of the actual name and/or current physical address of an applicant could indirectly createthe potential for inference or speculation on the part of the public authority or otherwise as to the interest if any of the applicant referred to in Article 3(1) of the Directive?

Citizens' Assembly on Biodiversity Loss

In 2022, Ireland established a Citizens' Assembly on Biodiversity Loss tasked with examining how the State can improve its response to the issue of biodiversity loss and to bring forwardproposals in that regard. It comprised 100 members, including an independent Chair and 99randomly selected members of the public. Effective implementation and enforcement of nature laws quickly emerged as a key theme in the Assembly's deliberations.

On 27 November 2022, Assembly members voted overwhelmingly in favour of recommendingthat a referendum be held to amend the Constitution with a view to protecting biodiversity. It also recommended that this proposed amendment should include a range of protections for substantive and procedural environmental rights for both people and nature (including theAarhus Convention rights).

The Assembly's report was published in April 2023. It's overall finding was stark:

[T]he State has comprehensively failed to adequately fund, implement and enforce existing national legislation, national policies, EU biodiversity-related laws and directives related to biodiversity. This must change.[25]

This strong indictment of the State's long-running failure to protect nature and biodiversity provides the essential background against which to examine and assess the Assembly's wider recommendations concerning implementation and enforcement of environmental law, including nature law. The seriousness of the Assembly's conclusion here confirms that a fundamental change in approach is required across all levels of environmental governance.

The recommendations made by the Assembly were considered recently by the Joint Committee on Environment and Climate Action. The Committee published its report in December 2023.

It remains to be seen how Government will respond to the recommendations made by the Citizens' Assembly and to the Joint Committee's report and recommendations.

[25] Report of the Citizens' Assembly on Biodiversity Loss Recommendation 2, p.13 (emphasis added).

The Minister of State for Nature, Heritage and Electoral Reform, Malcolm Noonan TD, recentlystated in *Dáil Éireann* that:

My officials have started exploring ways in which the rights of nature could be formallyrecognised, including the potential for constitutional change. Conversations are beinghad with key academics and specialists in this area with a view to setting up an expertgroup to consider the issue in detail. … Of course, other plans and policies also address some of the recommendations, including the forthcoming river basin management plan, the national marine planning framework, the Common Fisheries Policy, the climate action plan, the bioeconomy plan and the food waste management plan.[26]

It is also notable in this context that Ireland published its fourth *National Biodiversity Action Plan 2023-2030* in January 2024.

Review of Wildlife Legislation

On 20 May 2024, the Minister of State for Nature, Heritage and Electoral Reform announcedthat wildlife legislation is to be reviewed and that process will include a public consultation See Press Release here. Details of public consultation here.

[26] See *Dáil Debate* 18 April 2024, Vol 1052 No 6.

Italy

Massimiliano Montini and Emanuela Orlando

1. Outside the specific field of climate litigation, and more generally regarding developments in environmental law in Italy, it is to be noted that the Government has appointed a committee of 33 experts to revise the Environmental Code (Legislative Decree 152/2006) to put it in line with recent constitutional developments and other developments in EU and international law. The committee is formed by experts from academia, judges, engineers, police representative and representatives from three environmental associations, namely Italia Nostra, Legambiente and WWF. [https://www.mase.gov.it/notizie/ambiente-commissione-di-33-esperti-revisione-codice]

2. In October 2023, a new legislation was adopted (Law No 137 / 2023) which, among other issues, introduces some important novelties in the field of environmental protection, particularly in the sense of strengthening criminal sanctions against certain crimes against the natural heritage [< https://www.diritto.it/novita-materia-ambientale-d-l-105-2023-l-137-2023/ >]

   Firstly, Article 6 of the Law modifies article 423-bis of the Criminal Code by introducing more stringent sanctions, which can entail imprisonment up to 2 years, for those who cause fire. The Law also introduces an aggravating circumstance for those who "commit the offence with misuse of powers or violation of their duties in the performance of services in the field of prevention and combating forest fires or in order to gain profit for himself or others".

   Secondly, Article 6-bis of Law 137/2023 modifies article 30 of Law No. 157 of 1992 concerning hunting and the protection of wild animals, by introducing criminal sanctions (including imprisonment up to 2 years and a monetary sanction up to 10,000 euros) for those who kill or capture Marsican brown bears.

   Furthermore, article 6-ter of Law 137/2023 introduces modifications to the Criminal Code, to the Environmental Code (namely, Legislative Decree 152/2006) and to Legislative Decree No. 231 of 2001 by providing more stringent criminal sanctions for certain crimes against the environment and in the field of illegal dumping of waste. Specifically, the norm modifies article 255 of Legislative Decree 152/2006 on "littering"/ abandonment of waste (*abbandono dei rifiuti*) by transforming it from an administrative offence to a crime, which is now punished with a criminal sanction up to 10,000 euros, which can be doubled in case of dangerous wastes.

   Moreover, the said provision (art 6-ter (3)) introduces modifications to the Criminal Code by increasing the sanctions in case of a "pollution crime", under article 452-bis of the Criminal Code, when such a crime is committed in areas which are protected habitats, or have specific values from the point of view of landscape, history, art or archeology or where it entails harm to protected animal and plant species. As a background, it should be recalled that article 452-bis was introduced in the Criminal Code, not so long ago, by Law No. 68 of 2015, which aimed at strengthening the criminal protection of the environment by criminalizing conducts which were previously qualified as administrative offences. Specifically, article 1 of Law 68/2015 added to the Criminal Code a new Title VI-bis, which introduced six new crimes concerning the environment, including pollution, environmental disaster, traffic and disposal of radioactive material, failure to clean up, impediment of control, and illegal inspection of marine seabed. [On article 425-bis and Law 68/2015 see: https://www.camera.it/leg17/561?appro=l_inserimento_dei_delitti_contro_l_ambiente_nel_co

dice_penale#:~:text=452%2Dterdecies%2C%20che%20punisce%2C,recupero%20dello%20stato%20dei%20luoghi]

Latvia

I- institutional

New ministry (for Climate) and some climate-related activities

As reported last year, from 1 Jan.2023 **the Ministry of Climate and Energy** has been established. This year, it is planned to add to this ministry additional competence moving the department on **Environmental protection** from the Ministry so far responsible for environmental issues (i.e. the Ministry of Environmental Protection and Regional development) leaving for the latter only the responsibilities (and department) on Nature Protection, accordingly, changing its name. Thus, there are some difficulties to effectively functioning in the situation of uncertainty and quite some technical changes.

In the last Report where I presumed some potentially positive trends and developments due to a new (and knowledgeable) 'political leadership' in climate protection, the presumption hasn't realized (yet) but the political leadership has changed due to resignment of the prime minister. We have a new government since Sept.2023 with different political party leading the Climate Ministry. According to the ENGOs (active in the area), no huge success stories and positive results could be reported except a support through funding allocations and beneficial conditions (with respect to trading and buying electricity) for households to facilitate their switch to more climate-friendly measures.[27] [28]That together with the war in Ukraine and the subsequent ban on Russian gas triggered an expansion of locally installed RES for generation of electricity (mostly home-installed solar panels) as well as incentives to broaden the possibilities to use biomass as energy source in households and centralized heating systems of municipalities. State funding to the households for facilitating instalment of climate-friendly measures in their energy sources have been allocated under certain conditions[29]. However, one of the sectors where fossil resources are still widely used in Latvia is district heating, where total energy consumption is around eight terawatt-hours per year- about the same as the country's total electricity consumption today. At this moment, at political level a necessity to ensure "a full transition to renewables" has been recognized emphasizing, however, that "it is a long-term task". This task among other needs for achieving 'climate-neutrality' by 2050 is planned to be detailed through the amendments of *the Climate and Energy Plan 2021-2030* that are under the preparation in the Climate and Energy Ministry at this moment. The amendments of the Plan (and the level of ambition that would be embedded there) together with the capability of pushing through the

[27] The beneficial conditions have been limited in time as from 1 May 2024, no new entrants are admitted to the *net metering system*. Those who entered prior 1st of May and have household connections with micro-generators, or generation installations with a maximum permitted capacity of 11.1 kW or less, can use net metering until 28 February 2029.

[28] Supported activities: switching from existing fossil fuel (natural gas, coal, diesel) heating installations to more climate-friendly installations (biomass pellet boilers, solar collectors, heat pumps); purchase of new renewable energy equipment for electricity generation (solar panels, wind generators); as well as design and installation of a connection to the district heating system.

[29] E.g. (i) at least 80% of the electricity produced annually is used for self-consumption; (ii) After the implementation of the supported measures, the property has achieved a reduction in primary energy (electricity) consumption of at least 20%

Government "corridors" ambitions Climate law sooner than later are in a sense 'test' of the effectiveness of the recently established Ministry.

II- Legislation

1. Draft for the Climate law[30]

As reported last year, the draft has been announced in 2021, but it is still pending in "conciliation" stage, or rather stuck there, as no agreement reached about some main, conceptual issues, including on binding path for reducing GHG in individual sectors. Consequently, there is currently no legally binding path at the national level, and we don't have legislation containing responsibilities and commitments of other sectors at legislative level (the aim of 'the climate neutrality by 2050' is adopted only at the planning level). The new law was aimed at establishing a procedure and criteria for setting emission ceilings, delegating to the Government level to agree about the % emission reduction goals for each sector, as well as the development of measurable and effective climate protection measures. In parallel, the work is going-on with respect to amendments of the National Climate and Energy Plan (NCEP) 2021-2030 as noted above, adjusting *inter alia* to the requirements of Fit 55. This work seems to be more intense than the work on the adoption of the Climate Law. Presumably it is due to the main difference in consequences from one or another, i.e. binding goals, and trajectory (if Law is adopted) *vers.* possibilities to get funding for each sector if activities are needed for achieving climate commitments (if activities are introduced as needed in the NCEP).

At this moment, nobody was ready to predict how long it could take to get the Climate law adopted.

Litigations: no climate litigation cases have been initiated so far.

With respect to reactions after ECHR judgement in *KlimaSeniorinnen*, one could note the lack of any official reaction or activity. At the same time, the association (NGO) on human rights (HumanRights.info)[31] is organizing the discussion in the end of May "A Dialog Between Climate and Human Rights" aimed at triggering attention to *inter alia* those ECHR judgments and threats to human rights due to climate change, as well as to discuss how (and whether) different rights protection mechanisms affect climate policy and actions.

2. Amendments to the Law on the circulation of GMOs

Increased powers of the controlling institution with regard to seeds and plants due to the increasing detection of unauthorised GMOs (e.g. genetically modified ornamental aquarium fish and GM flowers), as well as the presence of GMOs in the research fields of conventional and biological crops and in conventional seeds.

3. Use of pesticides (struggle to introduce restrictions)

[30] 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).

[31] HumanRights.info – functions as a non-profit platform for human rights news and performs different projects to promote human rights in Latvia.

Discussions are on-going in the Committee of the Parliament on trends of pesticides use in Latvia and possibilities to reduce risks to health and environment. There are quite some grass-root activities initiated requiring stricter limitations. For example, the initiative "On banning the use of pesticides near populated rural housing areas", submitted to the Parliament in October 2020, calls for a ban on the use of pesticides within one kilometre of populated rural housing area.

Taking into account that initiative a working group was set up by the Ministry responsible for environmental protection in April last year with a task of developing possible solutions to limit the adverse effects of the use of plant protection products in order to ensure environmental and public health protection, taking into account economic and regional development needs.

Of course, there is a huge resistance from farmers against any restrictions who argue that pesticides are used in rather small quantities in Latvia and in principle everything is in order.

So far, there is only minor changes agreed, i.e. obligation to inform those living from the field at 100 m distance if they so request when plant protection products are to be used. Additionally, an assessment initiated about the possibilities of extending the field margins (to 20 m from 2m at this moment but with the request to be compensated from the EU rural funding) in order to minimise the risk of contamination of an aquatic environment.

III- Case law

1. **Development – status of an *object of national interest* to liquefied natural gas terminal – relieved requirements for the EIA – climate(?)** *(reported on it last year)*

The Constitutional Court dismissed the constitutional complaint of the ENGOs challenging the *Law on a liquefied natural gas terminal in Skulte* (reported about the Law and the case in 2023) claiming a breach of Art.115 of the Constitution (right to healthy environment).[32]

That was the first time that ENGOs submitted complaint challenging a law of the Parliament based on Art.115 (so far only the binding enactments of the municipalities have been challenged and one case against regulation of the Government). The Constitutional Court dismissed the complaint as inadmissible due to the lack of legal ground, however, it seems that in principle the legal standing of the ENGOs would have been accepted (at least 'doors are left open').

This Law on which I reported last year has been declared null and void by the legislator itself in December 2023.

2. **Right to property protection** (turned to environmental protection case)

Prohibition to conduct certain type of business activity – rights to property- animal protection – concerns on environmental pollution, biodiversity preservation and climate change.

[32] 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."

The report below contains rather detailed description of this case as it turned to be surprisingly rich of the Constitutional court's statements with respect to environmental and climate change concerns, as well as respect to next generation needs. This might pave the way to some climate litigations sooner or later, as so far, there are no one initiated in the context of climate change concerns.

The judgment of the Constitutional Court of 11 April 2024[33] admitted the amendments of the law introducing a prohibition to keep farmed animals "where the sole or main purpose of rearing or keeping is the production of fur" as compliant with the constitutionally protected right to property.

Constitutional complain was submitted by *BALTIC Devon mink, Gauja AB SIA and Van Ansem Participaties B.V., a trader established in* the Netherlands. The complaints strived to challenge the compatibility of a prohibition and transition period (claimed to be too short) with the right to property (Article 105) of the Constitution and Article 49 of the Treaty on the Functioning of the European Union.
The prohibition together with the 5 years transition period entered into force in 2022.
During the proceedings, the legislator provided its explanation on the need of the restrictions referring mostly to environmental and human health concerns (apart from the animal welfare).[34] As explained in the submission of the Parliament, the legitimate objective of that restriction is aimed at protecting "the right of other people to a favourable environment by preventing environmental pollution caused by oats and killing animals, by contributing to the preservation of biodiversity and by reducing greenhouse gas emissions and the risk of climate change..."[35] According to the Parliament "account should also be taken of the fact that American mink – and it is mainly they are farmed for fur production in Latvia – is an invasive species. Their rearing and keeping may lead to the extinction or extinction of other animal species."

In principle, the Constitutional Court agreed with the legislator recognizing these rights and interests aimed to be protected as legitimate objectives. The Court referred also to the CJEU case-law "recognizing environmental protection as an objective of general interest capable of justifying restrictions on economic freedoms." [36]

The Constitutional Court also linked these incentives of protecting other rights to live in favourable environment with the rights of future generations by stating that "the right of people to live in a favourable environment is to be seen not only as the rights of people in a given period, but in a broader context of sustainable development and future generations. Sustainable development involves the integrated and balanced development of the well-being of society, the environment and the economy, which meets the current social and economic needs of the population and ensures

[33] Judgement of 11 Aprils 2024 in case No 2023-09-0106.
[34] Ethical values also were recalled noting that "keeping, rearing and killing of animals solely for the purpose of obtaining fur is an unethical, cruel and inconsistent with the values of the majority of society nowadays."
[35] The study refered in the judgment states that "Fur production is two to 28 times more harmful to the environment than the production of other textile materials. For example, the production of one kilogramme mink fur has a five-fold impact on the climate than the other of the most powerful textile material in that regard, wool, of the same volume." Bijleveld M., Korteland M., Sevenster M. The Environmental Impact of Mink Fur Production. Delft: CE Delft, 2011, p.7.
[36] Judgement of 11 Aprils 2024 No 2023-09-0106 para 19.2. (referring, for example, to case Attanasio Group, C-384/08, paragraph50).

that environmental protection requirements are met without jeopardising the ability of future generations to meet their needs. **The ability of current and future generations to live in a favourable environment also depends on countries' readiness to pursue sustainable development by protecting the Earth's climate system, anticipating, preventing or neutralising the causes of climate change and mitigating its harmful effects**. Environmental sustainability is in turn closely linked to Article 115 of the Constitution, which states that the State protects the right of everyone to live in a favourable environment."

In the section (21 para) analyzing the claimants arguments that there are less restrictive measures (alternatives), i.e. requirements to improve animals' welfare, that should have been chosen instead of prohibition, the Court states that

> **Improving welfare requirements does not prevent environmental pollution** from fur farms or reduce greenhouse gas intensity and the risks of climate change, nor can it contribute to the preservation of biodiversity... In other words, the introduction of stricter welfare requirements would not rule out the risk that the farming and keeping of fur animals may harm the environment."

Accordingly, admitting that

> there are no other, less restrictive means of achieving the legitimate objectives pursued by the restriction of fundamental rights.

In this case the interests of "the public well-being and the right of others to live in a favourable environment and the protection of health" trumped the interests of particular industry to rear the animals for production of fur. The Constitutional Court pointed out the intention of the legislature

> "to mitigate the environmental damage caused by such plants, namely to prevent the risk of manure and waste water from being discharged into the ground, groundwater or surface water, to reduce the intensity of greenhouse gas emissions, and to contribute to the maintenance of the biodiversity typical of Latvia."

Stating that "such a benefit for society as a whole is more important in the present case than the rights and legitimate interests of individual economic operators". The arguments on the breach of the applicants' legitimate expectations were refused as well, noting that a reasonable transition period is envisaged. Similarly with respect to the compensation requirement. Moreover, the Constitutional Court stated that this type of restriction to the right to property is not an expropriation of property. Accordingly, from a right to property as embedded in the Constitution doesn't follow that the legislature would be obliged to provide a compensation except where no smooth transition to the new legal framework is provided.

Consequently, the Constitutional Court admitted the restriction of the applicants' fundamental rights as "proportionate" and declared the prohibiting provision introduced in the Animal Protection Law to be in conformity with Article 105 of the Constitution (right to property) and Article 49 of the Treaty on the Functioning of the European Union.

3. Forestry and SEA strategic environmental assessment – amendments of the Government Regulation – as "plan or programme" – precautionary principle – sustainability

Constitutional Court case on compliance of the amendments of the Government Regulation on the felling of trees in the forest,[37] with the right to healthy environment (Art. 115 of the Constitution). The case was initiated by several ENGOs against the amendments of the Government Regulation changing the conditions of logging the trees without however making an appropriate environmental assessment contrary to environmental legislation and thus violating constitutionally protected rights to healthy environment, principle of precautionary and sustainability.

The case got very broad resonance in society, but especially triggered broad discussions between forestry industry and ENGOs and was heard in four (full) days of public hearing before the Constitutional Court. To a large extend it was strategic litigation from the ENGOs side against growing trend of ignoring or blocking requirements on nature protection. The ENGOs won the case.

One of the main questions in this case was about a need to carry out SEA with respect to amendments that allowed logging of the trees at earlier age than previously allowed by amending (reducing) threshold of diameter of certain types of trees. One of the main arguments (including claiming application of an 'emergency exception' why the SEA wouldn't be needed even if the Court recognizes this act as falling under the concept of "plans and programmes") was the war in Ukraine that has increased the risk on shortage of energy resources. But it was clear that that argument was just pretext of the other several reasons (economic) expressed clearly in the explanation attached to the amendments prepared already some five years ago.

Having done a detailed assessment of the conditions under which and due to which the act was adopted, as well as the requirements introduced allowing logging earlier (younger trees), the Constitutional Court recognized that part of the Regulation (Annex) as falling under the requirements of the SEA Directive and Latvian legislation and thus proclaimed it void due to the lack of the SEA and thus contrary to Art.115 of the Constitution.

[37] The judgment of the Constitutional Court of 08 April 2024 No. 2023-01-03

Norway

On 11 October 2021, the Norwegian Supreme Court decided that the construction of two parts of Europe's largest wind power development were in violation of Sami reindeer herders' rights according to article 27 of the UN Covenant on Civil and Political rights.[38] After more than two years of negotiations, the Norwegian authorities finally succeeded in mediating settlement agreements between the wind power enterprises and the affected Sami reindeer herders.[39] The agreements included, inter alia, payments by the respective wind power enterprises of NOK 7 million per year per year during the remaining 25 years of the concession period to each of the two reindeer herders.[40]

Nevertheless, wind power continues to raise significant controversies in Norway. In August 2023, the Government announced their decision to electrify a major facility for the compression and shipment of LNG, Melkøya.[41] This facility is located in Finnmark, the northernmost county of Norway. Due to limited capability to transfer power to the region, combined with limited capacity in the local network and expected power shortages, this decision was highly controversial. The decisions were made without carrying out environmental impact assessments related to the need for new production of wind power in the area. Considerations of the main alternative, CO_2 capture and storage, was only assessed after the Parliament intervened and requested the assessment.

This case is illustrative of the close link between continued Norwegian petroleum exploration and wind power development. The new wind power required to cover the energy need in Finnmark will probably consume about half of all new Norwegian land-based wind power expected to be established by 2030.[42] In addition, there are plans for additional transfer of electricity from land to offshore petroleum production facilities, which might consume most added wind power developments during the upcoming decade.[43]

Norwegian offshore wind power development has also been dominated by the petroleum sector. The only major existing production, Hywind Tampen, has been established in order to provide

[38] A translation of the judgment is available here: https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2021-1975-s.pdf.
[39] See press releases in English of 19 December 2023 (https://www.regjeringen.no/en/aktuelt/agreement-between-sor-fosen-sitje-and-fosen-vind/id3019277/) and 6 March 2024 (https://www.regjeringen.no/en/aktuelt/agreement-between-nord-fosen-siida-and-roan-vind/id3028614/).
[40] Links to the agreements (in Norwegion): https://mnd-assets.mynewsdesk.com/image/upload/f_pdf,fl_attachment/m74uxj5umlvbvtzuoeb9 and https://www.aneogroup.com/contentassets/576c973785c14c7e9d1cf04576196813/1610_001.pdf.
[41] Olje- og energidepartementet, Godkjenning av endret utbyggingsplan for Snøhvitfeltet, 8. august 2023 and Olje- og energidepartementet, Equinor Energy AS - anleggskonsesjon og ekspropriasjonstillatelse for å bygge og drive nettanlegg for å elektrifisere Hammerfest LNG, 8. august 2023. See https://www.regjeringen.no/no/aktuelt/kraft-og-industriloft-for-finnmark/id2990581/ (in Norwegian only).
[42] Melkøya will have an annual need for appoximately 4 TWh compared to a projected land-based wind power production increase by 2030 of between 5 and 10 TWh, see NOU 2023: 3 Mer av alt – raskere p. 16.
[43] In 2022, the Norwegian offshore petroleum sector consumed more than 9 TWh electricity transmitted from land-based sources. This covered about 14 % of the energy needed for offshore petroleum production (Norges energidirektorat 5. mai 2023: https://www.nve.no/energi/energisystem/energibruk/energibruk-i-petroleumssektoren/). Expectations are that transfer of electricity from land will increase by between 6 and 13 TWh by 2030 (NOU 2023: 3 Mer av alt – raskere, pp. 76-79).

power to five offshore petroleum platforms. Its establishment was heavily subsidised.[44] The next major project, GoliatVind, is intended to replace electricity used in offshore petroleum production that currently is supplied from land. The project is in a relatively early stage of development but has already received significant subsidies.[45] A third project, Sørlige nordsjø II, is the first project that is somewhat delinked from the petroleum sector, but it will be located in the vicinity of existing petroleum production. While the former two projects are floating, Sørlige nordsjø II will be the first major fixed foundation offshore wind power project. This project has been awarded to Ventyr SN II AS, owned by Parkwind and Ingka-group, subsequent to an auction where potential developers competed based on how low price they could take for the electricity, i.e. how low the public subsidy of the project would be.[46] Ventyr won the auction in competition with major Norwegian petroleum companies.

Offshore wind power production is projected to be approximately three times as costly as land-based wind power in 2030, fixed foundation being slightly less costly than floating.[47] Norwegian authorities have stated a goal of allocating offshore areas for wind power projects that may contribute approximately 140 TWh by 2040.[48] The extent to which achieving this goal will be dependent on public subsidies remains uncertain.

[44] The project was supported by 2 300 million NOK through Enova and 566 million NOK through Næringslivets NOx-fond, see https://www.enova.no/bedrift/energisystem/historier/derfor-stotter-vi-hywind-tampen/ and https://www.noxfondet.no/artikler/innvilget-stotte/.
[45] https://www.northwindresearch.no/news/goliatvind-gets-2-billion-nok-for-offshore-wind-project/.
[46] https://www.regjeringen.no/en/aktuelt/ventyr-nordsjo-ii-har-vunnet-auksjonen-om-tildeling-av-prosjektomrade-for-havvind-i-sorlige-nordsjo-ii/id3030559/.
[47] NOU 2023:25 Omstilling til lavutslipp. Veivalg for klimapolitikken mot 2050 p. 81, figure 5.8.
[48] NOU 2023:25 ibid., p. 80 and Statnett, Tilknytning av nye havvindområder til land (2023) pp. 5 and 20-21.

Poland

Barbara Iwańska, Mariusz Baran

1) Amendments to the Act on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessments (hereinafter the Act) (2023)

The explanatory text to the draft amendments to the Act explain that their aim, among other things, is to improve the preparation and realization of investments, in particular linear investments for road, water and flood control investments.

Section Va entitled *"Special arrangements for certain strategic investments*" has been added to the Act (intended by the legislator to implement Article 2(4) of Directive 2011/92).

The amendment introduces a category of projects – "strategic investments (project)" . This category of projects is excluded from the standard procedure for issuing decisions on environmental conditions (including the "full" procedure for environmental impact assessments) which is applied for projects likely to have a significant impact on the environment.

Pursuant to the new regulations, a "strategic investment" may, in exceptional cases, be subject to the environmental assessment **specified in the section Va**, if individual circumstances justify taking immediate action to realize that investment, and where the following conditions are jointly met:

- no possibility of significant transboundary environmental impact of that investment;
- no negative impact on the possibility of achieving the environmental objectives from the Water Law Act;
- no alternative solutions for that investment- in the case of a strategic investment likely to have a potentially significant impact on a Natura 2000 site.

The Council of Ministers in regulation will determine the "strategic investment". The decision is guided by the importance of the planned "strategic investment" for the interests of the Republic of Poland. This leaves a large degree of discretion.

The Special arrangements for "strategic investments" means that the requirements arising from Sections III and V of the Act is excluded:
Section III of the Act concern public participation, Section V of the Act regulate the EIA of the project on the environment and on the Natura 2000 area and the obligation to obtain decisions on environmental conditions.

The Special arrangements for the "strategic project" include:

a) the investor's obligation to apply to the competent authority (regional director of environmental protection- RDOŚ) to determine the scope of the environmental assessment;
b) the investor' obligation to prepare the documentation in accordance with the scope specified by the RDOS; the documentation has to be attached to the application for an investment permit,
c) in the proceedings regarding investment permits the conditions for the implementation of the "strategic investment" are agreed with the Regional Director for Environmental Protection;

the environmental organizations have the right to participate (although public participation is excluded) only at this stage of the proceedings.

These regulations are criticized as violating the requirements of Directive 2011/92 (exceeding the scope of regulatory freedom under Article 2(4) of Directive 2011/92).
The criticism concerns:

- the scope of discretion of the Council of Ministers who determine “strategic investment” in regulation (the open criteria: importance of a strategic investment for the interests of the Republic of Poland),
- the exclusion of the classic standard environmental impact assessment with public participation,

2) Judicial review of forest management plans (FMPs)

A forest management plan is the basic document defining forest management activities in forests owned by the State Treasury. FMPs are subject to a strategic environmental impact assessment (as a plan), then approved by the Minister responsible for the environment. Forest management activities (which meet the criteria of the term “project”) are carried out on this basis.

The Court of Justice in judgment of March, 2, 2023, in case C-432/21, European Commission v Republic of Poland, held that Poland breached its obligations under EU law. The lack of judicial review of forest management plans in the context of Natura 2000 breaches obligations under Article 6(3) of the Habitats Directive in conjunction with Articles 6(1)(b) and 9(2) of the Aarhus Convention.
To this date, no changes have been made to national law to implement the judgment.

While it emphasized that administrative courts can implement in practice the effects of the judgment in case C-432/21 (with regard to judicial review of the legality of forest management plans in the context of Natura 2000), it is nevertheless postulated to introduce in law necessary amendments. The justification is to ensure that the rules governing access to court meet the requirements of clarity and precision formulated in the case law of the Court of Justice, and not be based on uncertain judicial practice. It is also important to cover by the new regulation all FMPs, regardless of whether they apply to Natura 2000 or not.

The solutions proposed so far are sectoral oriented, in the sense that their aim is to ensure judicial review of forest management plans. The possible solution include:

a) classification the approval of th FMPs by the Minister as “other than a decision or order, act or action of public administration concerning rights or obligations arising from the law” according to the Article 3(3) of the Act on Proceedings before Administrative Courts; this acts can be controlled by the courts;
b) classification the approval of the FMPs by the Minister as a decision and apply to this decision the provisions of the Act on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessments would apply, which enable NGO to file a complaint to court.

Due to the fact that in Polish legal system environmental organizations have limited access to court in case of act others then decisions issued in proceedings requiring public participation, the question if systemic solutions should be introduced, not only those limited sectoral to forest management plans.

Portugal

1. Legal initiatives:

The most noteworthy legal initiative in the current period was the adoption of a very long (190 pages long) and complex law introducing 50 changes in many laws with the purpose of "administrative simplification" and removal of administrative burdens, and facilitating the activities of investors and entrepreneurs[49]. Water law, air pollution law, waste law, packaging law, EIA, SEA, nature conservation, industrial emissions, etc etc., all were changed in different ways: reducing deadlines, adopting implicit positive acts (tacit deferral), creating presumptions, removing authorisations, replacing licences with notifications, etc. The law took one year to be prepared by a lawyer's office (the same person that was caught in the Influencer operation[50]) for the Government, for free.

After 15 months, the final effects are far away from the intended effect of simplification without environmental regression[51]. Al the parties are discontent with the law: the economic operators (are more exposed to the risk of rejection because the administration does not have time to ask for minor corrections to the projects. Can't borrow money from the banks on the basis of a tacit deferral) the NGOs (have less time to analyse longer documents), the administration (has shorter deadlines to decide. Has to reject poorly instructed requirements instead of asking for corrections).

2. Litigation and high-level corruption cases (still pending):

Large scale energy transition and digital transition projects, having significant environmental impacts and involving large profits are being developed in Portugal. Unfortunately, these projects are often associated with low transparency and high risk of influence trafficking and corruption[52]. Some examples are:

Batteries and lithium extraction - In 3 days the minister for infrastructures authorised the concession of the lithium mine to a company[53] that did not exist 3 days before. Expected profit: 180 million euros. The EIA underestimates the impacts[54]. The public prosecutor is currently proposing that the EIA is declared null and void[55].

Green hydrogen production - A consortium applied and got the recognition as an 'Important Project of Common European Interest'[56] corresponding to an investment of 4000 million euros. Suspicions

[49] https://files.dre.pt/1s/2023/02/03000/0000300192.pdf
[50] https://www.publico.pt/2023/12/03/sociedade/noticia/arguido-operacao-influencer-fez-simplex-ambiental-industrial-graca-governo-2072342
[51] https://www.lpn.pt/pt/noticias/manifesto-pseudo-simplex-ambiental-desresponsabilizar-sem-desburocratizar
[52] https://www.publico.pt/2023/11/08/politica/noticia/sao-onde-vem-sete-arguidos-caso-provocou-queda-governo-2069466
[53] http://lusorecursos.com/
[54] https://www.publico.pt/2023/11/17/azul/reportagem/polemica-litio-governo-caiu-contratos-mantemse-pe-2070460
[55] https://www.publico.pt/2024/02/08/economia/noticia/ministerio-publico-defende-nulidade-declaracao-impacto-ambiental-mina-barroso-2079683
[56] https://single-market-economy.ec.europa.eu/industry/strategy/hydrogen/ipceis-hydrogen_en

of influence trafficking involving members of the government and companies benefiting from the government's decision[57].

Data centre – Huge energy consumption[58] and partly touching priority habitats[59] the data centre proposed to be built in Sines[60] led to the fall of the previous government as a consequence of the so-called Operation Influencer [61]. This police operation consisted of a search, seizure and arrest operation in 42 locations, which included the office of the Prime Minister, the Ministry of the Environment and Climate Action, and the Ministry of Infrastructure. Five people were detained, including the Prime Minister's chief of staff, and the Mayor of Sines. The Minister of Infrastructure, was formally considered suspect and Prime Minister António Costa became the subject of a separate inquiry by the country's Supreme Court of Justice. The announcement of the operation led to the resignations of the prime minister, and the fall of the XXIII Constitutional Government of Portugal. This was the first time that the Portuguese government was brought down by a criminal investigation.

3. Portugal in the ECJ:

Several cases against Portugal are still being prepared by the Commission or are already pending in the ECJ[62]. There is the case against Portugal in relation to water (INFR(2022)2197), nature conservation[63], waste water (INFR (2022)2028), Industrial emissions[64] (INFR(2022)2085)), and on industrial activities(INFR(2022)2085) .

In the case of water management[65], the charge is not having transposed in time. In fact, the plans for the period 2022-2027 were only published in 2024[66].

[57] https://eco.sapo.pt/2023/11/07/litio-hidrogenio-e-dados-os-negocios-na-mira-da-justica/
[58] https://siaia.apambiente.pt/AIADOC/AIA3633/22045_datacentersines4_0_rnt_r1_novo2023523145033.pdf
[59] https://www.lpn.pt/uploads/fotos_artigos/files/cpublica_datacentersines4_0-sin02-06_lpn.pdf
[60] https://www.startcampus.pt/pt-pt/localizacao/
[61] https://en.wikipedia.org/wiki/Operation_Influencer
[62] https://ec.europa.eu/commission/presscorner/detail/PT/inf_23_4367
[63] https://ec.europa.eu/commission/presscorner/detail/en/ip_24_268
[64]
[65] https://ec.europa.eu/commission/presscorner/detail/PT/inf_23_4367
[66] https://apambiente.pt/agua/planos-de-gestao-de-regiao-hidrografica

Slovenia

Unprecedented floods, reasons and consequences

In 2023, Slovenia was ravaged by unprecedented and catastrophic floods, starkly contrasting to the preceding year of extreme drought in 2022. These were not just any floods, but floods of a magnitude never witnessed in our nation's history.

I mention this in the national report because the issue is closely related to the encroachment on the environment and nature over the past several decades. Finally, there is an assessment that constructions near rivers were improperly allowed. Most rivers in Slovenia are torrential. At the same time, infrastructure facilities were also built along the rivers: roads, railways and the like. It was also the easiest. Considering that many rivers flow through valleys where there is little space. However, placing infrastructure is not the same as allowing individual construction. At the same time, the watercourses were neglected: they were not cleaned regularly, and there were no spill-over areas and no dry drains. In fact, for decades, we have behaved as though none of the above is necessary. The experts have warned about this many times, but politicians have not listened. Now, difficult decisions are being made to resettle people, and there are substantial financial burdens to return to the previous situation.

Despite the growing recognition of the profession's concerns, a full implementation of their recommendations is still a challenge. The residents, understandably, are reluctant to leave their homes, which adds a complex social dimension to the issue.

It is interesting, however, that the insurance companies acted more cautiously and did not want to insure certain buildings that they considered to be at risk of flooding. Although the state allowed the construction, the insurance companies did not agree. The feature of the geomorphological structure of Slovenia also contributed to numerous landslides, which caused the same devastation as the flood. Here, too, in the past, the state was insufficiently careful and allowed construction in places where experts warned of the possibility of landslides and avalanche terrain.

Referendum on the new nuclear power plant (and a lesson of newly built thermal power plant)

There seems to be a referendum on the construction of a new nuclear power plant in Slovenia in the fall of November. At the moment, public opinion is in her favour. It is interesting, however, that the sixth unit of the Šoštanj thermal power plant, which was a terrible investment, does not change (for now) the support. Although we knew in 2012 that the thermal power plant would require all the emission coupons to which Slovenia is entitled, we built the sixth block, and the electricity prices thus increased tremendously. Electricity purchased abroad is much cheaper; therefore, the new thermal power plant is not operating because its electricity is too expensive. Also, a loss is created due to the higher price of coupons - by about 200% every year - and also due to the regulated price of electricity. Consequently, it is even cheaper if the thermal power plant does not operate and we import electricity.

The European Bank for Reconstruction and Development granted us a loan, but it was clear that there would not be enough coupons. With some foresight, you could find that the credit will be loaded into an investment operating at a daily loss. This is an extremely, extremely expensive lesson.

Emission standards for incinerators and cement plants

The Slovenian Parliament equalised the emission standards for incinerators and cement plants. I haven't had time to study this, but I see discussions in the media that this does not align with European Union law.

Obligatory photovoltaic power plants

The government passed a bylaw requiring power plants on the roofs of public buildings that are at least 1,000 square meters big. A law banning the use of gas to reduce dependence on Russia is also being prepared. They should also restrict the use of firewood and wooden pallets or the installation of new devices for heating individual houses and sanitary water. The reason is bad air (PM10 particles) and frequent inversions in the valleys, which do not allow ventilation of the valleys. Opponents predict a constitutional review.

Spain

Angel M. Moreno (Carlos III University of Madrid)
Agustín García Ureta (University of the Basque Country)

1.- Environmental laws & regulations

Since the last meeting of our network in Bern (may 2023) there have been very few environmental normative developments in Spain, at least at the national, central level. Two reasons explain this situation: on the one hand, the political efforts of the coalition-government have targeted other goals and objectives; and (b) the real "engine" of environmental law-making in Spain is EU Law. Since there were no directives to transpose during this period, no relevant legal rules have been enacted. There were just a couple of governmental regulations and they are of minor importance: for instance, Royal Decree 445/*2023*, of 13 June 2023, amended some annexes of the State act on environmental impact assessment.

At regional level there have been more new rules, basically in the field of energy transition, the best example is probably the Act of the Basque Country 1/2024, of 8 February 2024 on energy transition and climate change.

2.- ECJ rulings in infringement procedures involving Spain

At the end of the year 2023, Spain was still ranking as the EU MS with the highest number of infringement procedures instituted by the Commission. Consequently, it was not surprising that Spain was sooner or later condemned by the Court of Justice.

Thus, by judgment of March 14, 2024, the Court of Justice of the European Union condemned Spain for failing to comply with the obligations of water protection against pollution caused by nitrates from agricultural sources in eight autonomous communities, including Castilla y León, where poor water quality due to over-fertilization of land affects at least one seventh of the regional territory. By the way a judgment that is very pertinent for this Avosetta meeting…

Sweden

Jan Darpö

Recent developments in Swedish environmental law and practice 2024

General

As was reported last year, Sweden has since the fall 2022 a conservative Government ruling with the support of the right-winged nationalist Party, the *Sverigedemokraterna*. The political agenda this year has been strongly focusing on green industrialization by way of deregulation, subsidizing green steel investment and suchlike and, above all, facilitating for the development of nuclear power in the country. Legal barriers for this development have been removed and a scheme for subsidies is discussed with the EU Commission. The nuclear industry – among others, state-owned Vattenfall – has made clear that it will not move in that direction unless the taxpayers will have to share the risk and future costs. Even so, from a legal perspective, the field is now open for any such development – traditional largescale installations or SMRs – in all parts of the country. It may also be noted that already in January 2022, the Government decided to grant the application for the world's first (alongside with Finland) final repository and encapsulation plant for spent nuclear fuel.

Sweden's first climate case

Last year, I told about Sweden's first "real" climate action, the *Aurora* case, brought by a group of youngsters to the Nacka Land and Environmental Court; Climate Trials | Auroramålet (xn--auroramlet-75a.se) After the subpoena was issued against the State was, the Parties agreed to ask the court to make a request to the Supreme Court for a preliminary ruling on whether this kind of action is justiciable according to Swedish law and procedure Shortly after the ECtHRs judgement in *Klimaseniorinnen* (and simultaneous decisions on *Carême* and *Duarte Agostinho*) in the beginning of April, the Supreme Court granted leave to appeal to this request. One may only speculate, but it is hard to see that the Supreme Court will answer no to that question as European law on the matter stands after *Klimaseniorinnen*. The *Aurora* case will be very interesting to follow since the Government has taken a couple of important steps – such as the removal of the carbon reduction duty – that will increase the emissions of greenhouse gas, while at the same time it does not seem to have any clear plan on how to reach the climate goals (see below).

Forestry

The strong tendency that the Land and Environmental Courts stop controversial operations in the forest having effect on prioritized birds, other protected species and plants 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 and other species under the EU Nature Directives. As of a couple of months ago, my list of national cases since 2022 contained 11 decisions from the Land and Environmental Court of Appeal and 66 from the five Land and Environmental Courts (the first instance in such cases). Most of these were brought by the ENGOs, mainly the Swedish Society for Nature Conservation and BirdLife Sweden. The ENGOs success rate is very high, 70% and 75% respectively. These numbers are even more impressive when compared with the success rate in similar actions brought by landowners; 0% and 15% respectively. Further, in the beginning of the year, the Supreme Administrative Court rejected the legal basis for the Forest Agency's practice to cull information from the digital forest registry, vital to the knowledge on protected species and their habitats in the forest. Faced with these setbacks, the Forestry Agency has asked the

Government not for more funds in order to improve the enforcement of law, but to change the legislation. As most of this is decided on EU level, it is expected that the Government will propose barriers to ENGOs access to justice in the forest. As the Swedish system for species protection already is under scrutiny of the EU Commission, it is expected that some kind of reaction will come from Brussels in due time.

…and more..?

In my response to the questionnaire, I mentioned two important liability cases about PFAS in the drinking water. In Sweden, we also foresee the biggest criminal case ever in history this coming summer, dealing with illegal trade and disposal of waste. This, the "*Think Pink* case" also has some international ramifications.

Besides that, not much with has happened which merits international reporting. Over the year, the Government has been quite passive. This is partly due to the presidency of the EU, and partly due to internal struggles among the parties to the conservative coalition. However, the efforts to implement REDIII, CRMA and NZIA is ongoing. The first mentioned directive does not seem to pose great challenges, but both Regulations are extremely complicated to implement into our national procedural system (one authority to guide all decision-making, extremely short time limits, weakened possibilities for meaningful public participation, etc). Obviously, the authors of those pieces of legislation have very little experience of environmental procedure and no interest whatsoever in biodiversity.

Even if much is on hold, quite a number of governmental commissions have been designated or are discussed within the Governmental Offices. The subjects concern forestry, species protection, compensation schemes, simplification of environmental permitting procedures, WFD and derogation possibilities as well as the streamlining of classification of the status of water bodies, environmental crime. But on the climate issue, nothing is visible at the horizon so far…

Translation

The sign on the podium reads: The Government's Climate policy. The Minister of the Environmental, Romina Pourmokhtari, says: "*Nothing here, nothing there*". In the background, the Prime minister says to one of the coalition's other Party leaders: "*You must admit, she's GOOD!*"

Switzerland

Markus Kern

1. Direct democratic developments

On the federal level there are quite a few proposals pending, that could have a significant impact on the course of Swiss environmental policy.

a. Federal Popular Initiative "for the Future of our Nature and Landscape (Biodiversity-initiative)
Asks for a stronger protection of biodiversity on the constitutional level and contains the demand for an **increase in protected surfaces and financial means for the implementation of biodiversity**. As the initiative calls for the undiminished preservation of the core content of the protected objects the federal government is of the opinion that it would excessively reduce the leeway for authorities when assessing agricultural and energy projects.
The votation on this constitutional amendment will take place in September 2024

b. Federal Popular Initiative «for a responsible economy respecting the limits of the planetary boundaries (Environmental Responsibility-Initiative)»
Demands economic activity shall be limited to a level, where the resources used and the emissions caused allow for the preservation of the natural foundation of life. The necessary transition toward a **respect of the planetary boundaries** should be implemented within ten years. The Confederation and the cantons would be in charge of implementing this general principle while respecting the principle of social acceptability of their measures both domestically and internationally.
Government maintains that the proposed approach is too far reaching and the envisaged transition-phase too short. It is thus opposed to the proposed constitutional amendment. Currently the initiative is subject to debate in the Federal Parliament.

c. Federal Popular Initiative «for a Fair Energy and Climate Policy: Investing for Prosperity, Jobs and the Environment (Climate Fund Initiative)"
Demands the establishment of a **federal fund alimented by 0.5 to 1 percent of the GDP** in order to financially support the endeavor of decarbonization of society and economy, but also measures in favor of biodiversity.
The required signatures have been collected. The initiative will now be discussed by the government and by the Federal Parliament.

d. Federal Popular Initiative «for a Social Climate Policy – Fairly Financed through Taxation (Initiative for the Future)»
The initiative calls for a **heritage-tax** of 50 % on assets above 50 Mio. Swiss francs. The revenue from the tax shall be used for measures targeted at the climate crisis.
The required signatures have been collected. The initiative will now be discussed by the government and by the Federal Parliament.

2. Debate Protection from Noise vs. Densification

These days, the Federal Parliament discusses a modification of the Environmental Protection Act concerning the protection from noise. The debate is focused on the restrictions with regard to the construction of buildings in areas with high noise pollution. The origins of the debate lay a few years back, when a local authority came up with the so called “ventilation window practice”. According to this approach, it would suffice to respect the noise limit values for planning purposes with regard to one open window per room (the ventilation window), whereas the other windows would be considered to remain closed. This approach was followed in about half of the Swiss cantons. Then, however, the Federal Tribunal ruled that the approach violated the law, conceding at the same time that “refraining from building in areas with high noise pollution … may contradict the spatial planning interest in economical land use and inward densification.” Thus, there is a **conflict between two environmental interests** (protection from noise vs. densification in order to minimized the consumption of soil).

Currently Parliament is debating to introduce a formal legal basis for the “ventilation window practice” in order to allow for further inward densification of the settlement zones. In this context, one of the Chambers of Parliament would like to go even further by allowing to do the planning based on entirely closed windows, under the condition that there is an automatic ventilation installed in the building.

United Kingdom

Richard Macrory

1. Major reform to environmental assessment law

UK law has implemented the 1985 directive, but post-Brexit has leeway to depart. Provisions in the Local Government and Regeneration Act 2023 represent the most dramatic change to date, though the new legislation is very much a framework, still requiring regulations to flesh out the detail.

The Government felt that in practice far too many assessment studies by developers had become overlong, over expansive, something of an industry for consultants and written defensively to protect against any possible legal challenge by NGOs and third parties. Occasionally the courts would intervene saying that environmental assessment was meant to an aid for decision makers not a legal obstacle course, but largely in vain.

There was considerable truth in these criticisms, but it remains uncertain whether the new approach by Government will resolve them. Many of the core elements of environment assessment will remain (non-technical summary, alternatives, public participation etc.) but in future the focus of any assessment study will now be on specific environmental outcomes (known as **Environmental Outcomes Reports**) defined in regulations by Government, and whether the proposed development will assist or hinder their achievement. The procedures will replace both SEA and EIA.

There is a non-regression duty built into the legislation – Environmental Outcome reports may only be made only if the government is satisfied the regulations will not result in *"environmental law providing an overall level of environmental protection that is less than that provided by environmental law at the time this Act is passed."*

The Office for Environmental Protection reported on the subject. It accepted many of the criticisms of current environmental assessment in practice but was concerned that the new proposals wouldn't necessarily address key problems. One is that many of the planning officers in local planning authority are extremely young (after some years of experience in the public sector many get hired by consultants at higher rates of pay) – this means that they will play safe with the scope of environmental assessment telling developers to cover everything rather than carrying out robust scoping. After 20 years or so of litigation on environmental assessment in the national courts, the basic principles are now pretty well settled. There is a real danger that by introducing new legislation, this will simply open floodgates to a whole new raft of legal challenges against development.

2. Banning of sandeel fisheries: First Trade and Cooperation Agreement Challenge by European Commission

In March 2024 the Governments (and the Scottish Government) decided on environmental grounds to ban permanently sandeel fishing in the Scottish and English waters of the North Sea to all boats whether from the UK, EU or elsewhere.

Under the Trade and Cooperation Agreement, following Brexit, the UK has just over 3% and the EU over 96% of the sandeel quota in EU and UK waters. Until June 2026 they are operated as jointly managed stock with both the UK and EU countries having mutual access to each others exclusive zones. Denmark holds the bulk of the EU quota, with around 35% allocated to areas within UK waters - Denmark estimated the value of its sandeel catches in UK waters is around £3 million a year.

On 16 April 2024 the European Commission requested consultations with the UK, the initial steps of the dispute settlement mechanism of the EU-UK Trade and Cooperation Agreement. Under Art 494 of the Agreement, the parties agreed to have regard to a number of principles relating to fishing including:

(e)taking due account of and minimising harmful impacts of fishing on the marine ecosystem and taking due account of the need to preserve marine biological diversity;

(f)applying proportionate and non-discriminatory measures for the conservation of marine living resources and the management of fisheries resources, while preserving the regulatory autonomy of the Parties;

3 Office for Environmental Protection. https://www.theoep.org.uk/office-environmental-protection

The post-Brexit environmental watchdog body remains small (around 70 staff including ten lawyers) but has been flexing its muscles over the last year or so. A full list of its case-work to date in potential breaches of environmental law – and the mostly successful resolutions – can be found at https://www.theoep.org.uk/investigations Many of these, though important, are quite technical and it is doubtful that NGOs would have taken many of these cases to court.

Nature Protection

SPAs

In March 2024 it launched an Investigation concerning the Government's apparent failure to implement legal requirements concerning Special Protection Areas - it had not created new sites or adapted existing ones in accordance with long-standing recommendations from its key scientific advisory body. The equivalent watchdog bodies in Scotland and Wales launched investigations on the same day, the first time the bodies had coordinated action across the UK.

Farming and ammonia emissions

During 2023 OEP had arguments with the Northern Ireland environment ministry on its advice to local planning authorities concerning ammonia emissions from new intensive farming developments. OEP considered the advice illegal because it too generous to farmers (a very powerful lobby in Northern Ireland) and out of step with stricter advice in other parts of the UK. In September OEP used its powers for the first time to start proceedings for an urgent judicial review. The Northern Ireland ministry backed down before the case went to court.

Water

In May 2024 it published a major report of the implementation of the Water Framework Directive and implementing regulations in England. It found that government was not on track to meet the environmental objectives for water bodies, and identified areas where implementation is not in accordance with revisions. Government has 3 months to respond.

Environmental Improvement Plan Review

In January 2024 OEP published its first statutory annual review of the Government's progress in meeting long term goals in its Environment Improvement Plan and long-term statutory environmental targets. A 200 page report, it concluded that the Government was still largely off-track for most of its ambitions, and that far clearer implementation plans need to be developed. As the Chairman of OEP noted, *"Deeply concerning adverse environmental trends continue. With the depleted state of our natural environment and the unprecedented pace of climate change, it does seem to many that we are at a crossroads. It is not easy for us as a nation to choose the right path, the right trajectory and to travel together at the pace needed, but we simply must"*