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Comparative law study on the licensing of wind power stations ("windmills") and litigation thereon

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Foreword

The construction and operation of windmills meet two major environmental ambitions: the increased use of renewable energy sources and also the reduction of emissions of greenhouse-gases from, inter alia, the energy sector. On the other hand, windmills are often disputed by individuals and by the public, alleging problems of noise and shadowing but also, for example, the adverse effects on the landscape.

The comparative law study is based on the answers to a questionnaire (see Annex).

Answers were sent from 9 countries, namely Austria (**AT**), Bulgaria (**BG**), Germany (**DE**), Estonia (**EE)**, Finland (**FI)**, Hungary (**HU**), Italy (**IT**), Lithuania (**LT**) and Sweden (**SE**). From Spain (**ES**) general comments were given.

Each questionnaire for comparative law studies is influenced by the domestic law of the author's country. In Germany, litigation on the licensing of wind mills plays an important role in the administrative jurisprudence. The main purpose of the survey was to get an overview of how the conflict between landscape protection and production of "green energy" is tackled in the several countries.

Legislation

The first experience when compiling the answers was that the problematic is not the same in the different countries. An indication may be the legal base of the matter. The basic legislation is in some countries (**BG, HU, IT, LT**) energy law, in others (**AT**, **DE, FI, SE**) environmental law. In **Estonia** no special legislation exists for this matter.

Approval procedure

The kind of license(s) depends on the number, size and capacity of the windmills. For smaller windmills usually a building permit (**AT**, **DE, FI, SE**) or a notification (**IT, SE**) is sufficient.

Only in **Germany** and **Italy** the permit comprises construction *and operation* in all cases. Partly (**AT, EE, HU, LT**) the operation permit is based on energy law. In **Finland** an environmental permit for the operation is required, if the windmill is built close to inhabitants.

A concentration effect of the license is provided in **Austria** (wind farms, subject to an EIA), **Germany** (generally, except small engines)**, Italy** (single authorisation) and **Sweden** (license under the Environmental Code).

In all countries a distinction is made in several ways between single windmills and a wind farm. But there is no uniform definition of the term "wind farm". Furthermore there are differences according to the procedure (**DE, LT**), kind of license (**IT, SE**), need of planning (**FI**), necessity of an EIA (**AT, DE, EE, FI, HU, SE**).

Concerning the requirement of an Environmental Impact Assessment (EIA) the Directive 2011/92/EU is to be taken into consideration. This Directive provides an obligation by virtue of EU law for projects listed in Annex I. Wind power engines are not listed in Annex I. For projects listed in Annex II the Member States shall determine the necessity of an EIA either through a case-by-case-examination or thresholds or criteria set by national law. In the Annex II 3. (i) "Installations for the harnessing of wind power for energy production (wind farms)" are listed. Thresholds and criteria for a mandatory EIA are provided in **Austria** (from 20 MW or at least 20 engines onwards with at least 0, 5 MW each), **Germany** (from 20 wind mills), **Estonia** (from 5 wind mills with an output of at least 7, 5 MW), **Finland** (from 10 wind mills and at least 30 MW), **Hungary** (from 10 MW), **Italy** (wind farms or turbines with more than 60 kW) and **Sweden** (detailed rules).

Thresholds and criteria for a case–by-case examination are set by: **Germany** (3 until less than 20 wind mills), **Hungary** (600 KW or 200 kW if a protected area is affected), and **Lithuania** (over 30 kW). In **Sweden** it is furthermore up to the discretion of the public authority to request an EIA.

In EIA cases public participation is mandatory by virtue of EU law. Apart from these cases and except of planning procedures public participation is mandatory in some countries (**AT, HU**) only, in others (**IT,SE**) it is in any case possible.

Prerequisites for approval

A crucial point is the necessity of general land use planning (on urban or regional level), because planning principally comprises a *margin of discretion*. A distinction is to be made between *the necessity* of previous planning and the *possibility* to regulate the matter on local or regional level by communities or regional authorities. A relevant land use planning is a precondition for the approval in **Lithuania** (unless not exceeding 350 kW), in **Estonia** and **Finland** in case of wind farms only. In other countries (**AT, BG, DE, HU, SE)** the *possibility* of a regulation by land use planning is recognized.

General rules on restriction in certain areas exist in some countries, namely**: Austria** (depending on the regional planning), **Finland** (wilderness areas in Lapland), **Italy**

(archaeological, artistic, historical sites and landscapes), **Lithuania** (military areas), **and Sweden** ("sites of national interest").

The minimum distance to dwelling areas is often an issue of political disputes. In states with a federal structure, like Austria, Germany and Spain various regulations on this item can be found. In **Hungary** the minimum distance is *100 m,* in **Bulgaria** *500 m*. But In Bavaria, for example, a new act provides a distance of 10 times the height, which means in practice *1500 – 2000 m*. In some countries (**EE, FI, IT, LT, SE**) only guidelines exist.

The minimum distance to neighbouring plots (which are mostly used for agricultural purposes) does not play a significant role in all countries.

Technical standards on noise pollution are introduced in all countries. For systems that operate day and night the night value is relevant. Apparently 40 dB(A) as threshold in dwelling areas is generally recognized (see the answers from **DE, FI** and **SE**). The answers to the question, whether the so called "infrasound" (low frequency sound which can not be heard by the human ear) is recognized as harmful were partly negative (**DE, EE, LT)** and partly cautious (**BG, FI, IT, SE**). The answer from **Hungary** only was affirmative. It seems that until now there are no internationally recognized technical standards in this field. Shadowing seems not to be an essential issue (**BG**, **FI**, **HU:** no rules or standards, **DE**: guidelines only, **EE**: general rules apply, **IT**: civil code applies, **SE**: developed by case law). Species protection plays a significant role in all countries.

In **Sweden** only a margin of discretion is explicitly conferred to the public authority in license cases. In **Italy** it is in theory not excluded but in practice limited. In the other countries the approval is not at the discretion of the public authority. But in the field of planning, discretion is recognized (see the answers from **DE, EE, and FI**).

Litigation

The rules on legal standing of individuals can be divided into three groups:

1. "Actio popularis" (**EE**) or the right to defend the protection of the environment **(LT**)

2. The plaintiff must have a "legitimate interest" (**BG**, **HU**), a "specific interest" (**IT,** similar **FI**) or has to be "concerned" (**SE**).

3. According to the "protective norm doctrine" individuals must invoke the infringement of a rule the purpose of which is to protect their rights (**DE)**.

Generally wide access to justice is conferred to non governmental organizations (NGOs). In **Germany** only, there are partly restrictions.

For the legal standing of local communities mostly the general rules apply. In **Germany** the right on self administration may be invoked (only).

The scope of judicial review even if legal standing was granted, is limited in **Germany** only (according to the "protective norm doctrine"). This doctrine is challenged by the Aarhus Compliance Committee (Findings and recommendations with regard to communication ACCC/C/2008/31, adopted on 20 December 2013, Decision V/9h at the fifth Meeting of the Parties) and by the European Commission in the infringement procedure C-137/14 (see the opinion of the Advocate General from 21 May 2015).

The exclusion of objections which were not correctly submitted in the administrative procedure is provided in **Germany** and **Estonia** only. This principle is challenged in the above mentioned infringement procedure (Commission v Germany).

Findings and recommendations

1. For the approval of wind power stations various legal rules apply. A concentration on a single decision which comprises construction and operation replacing all other licenses, and which is delivered by a single public authority in a single procedure ("concentration effect") is in favour of the operator, the public authorities and the public concerned.

2. Wind power projects are often disputed in the public, especially in countries with a high population density. For that reason public participation in the decision making procedure should not be limited to cases where an EIA is to be carried out. Public participation should be generously granted by the national legislation.

3. In the approval procedure waging of interests takes place, even if binding rules are to be applied. Typically for that is a conflict between landscape protection and the production of "green energy". A convenient tool to tackle this conflict is planning either as a general, previous regulation on local or regional level or as project-based planning by local or regional authorities.

4. Regulations on minimum distances to dwelling areas are quite different in the countries. Some countries have binding rules and others only guidelines. Minimum-standards may facilitate the decision-making and the practice more foreseeable. On the other hand, such

standards disregard the specific conditions in the surroundings of the windmill and the application tends to be rigid. The approach by guidelines is therefore to be preferred.

5. The approval of wind power stations is an environmental matter in the meaning of the Aarhus Convention. For that reason wide access to justice shall be granted, especially for NGOs.

Annex

Questionnaire

Licensing of wind power stations ("windmills") and litigation thereon

I. License

1. On which legislative act is the license for a windmill based? Which kind of license is needed?
2. Is there a difference between construction and operation?
3. Is a difference to be made between a single windmill and a wind farm?
4. Is a general land use planning (on urban or regional level) a precondition for licensing? If not, is nevertheless the local community empowered to regulate the construction of windmills?
5. Does the license include other administrative decisions (concentration effect) e.g. an environmental impact assessment (EIA)?

II. Approval procedure

1. Is an EIA to be carried out?
2. Is public participation provided even if an EIA is not necessary?
3. Is there an obligation to submit objections within a certain time frame?

III. Prerequisites for approval

1. Are there general rules on geographical areas where windmills are principally not allowed?
2. Are there general rules regarding the minimum distance to dwelling areas?
3. Are there general rules on the minimum distance to neighbouring plots even outside settlements?
4. Are there ordinances or administrative regulations or generally recognized technical standards regarding

a) Noise pollution

b) Shadowing

5. Is infrasound (low frequency sound) recognized as harmful?
6. Does species protection (bats, birds) play a significant role? Are there general rules in that matter? Which means of investigation are available?
7. Describe how the conflict between the public interest in "green energy" and landscape protection is tackled in your country in practice.
8. Is a margin of discretion conferred to the public authority which decides on the license?

IV. Litigation

1. What are the preconditions for the legal standing of

a) Individuals,
b) Non governmental associations (NGOs),
c) Local communities?

2. Is the scope of judicial review limited in these cases? Does the so-called “protective norm doctrine” apply?

3. Are the objections which were not correctly submitted in the administrative procedure excluded in the judicial procedure?

4. How is the chance of success before the court? Can you provide statistics?

V. Remarks to topics which where not addressed in the questionnaire