



REPORT

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**Acceleration of permit granting procedures in Germany, France, Spain, Sweden and on the EU level**

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## Part 1 Introduction to the Report

The Paris Agreement of 12/12/2015 established the foundation for mitigating climate change and re-shaping the global economy in a climate-friendly way. The parties to the Agreement specifically set the goal of limiting the global temperature increase to 1.5 degrees Celsius if possible and, in any case, to well below two degrees Celsius above pre-industrial levels.

The expansion of renewable energy undeniably plays a major role in pursuing this goal. According to the European Commission's idea, the share of renewable energy in the EU's gross electricity consumption must thus be increased to at least 42.5% by 2030 (or 45 % on a voluntary basis).

In addition to making sufficient land available for renewable energy installations, accelerating the relevant approval procedures and improving the staffing and financial resources of the competent authorities are now generally regarded as essential to achieving this goal.

After extensive stakeholder consultations, the European Commission adopted the first acceleration measures in December 2022 and presented further acceleration proposals, which have been agreed upon in the trilogue between the European Parliament, the Council, and the Commission on 30 March 2023. The legislation has still formally to be adopted which will probably be the case by June or July 2023. Whether the measures that are finally adopted at the EU level will be effective and sufficient in terms of such acceleration depends on how well they fit into existing EU law as well as on the way of implementation at national level.

This report presents the views of the law firms from four different Member States – Sweden, Spain, France, and Germany – on this topic. The results of the joint reflections made within the framework of this expert report should serve as a stimulus for further discussions at both the European and national level to strengthen the legislative and administrative measures to current acceleration efforts regarding permitting procedures and to contribute to an efficient implementation of adopted measures.

The first part of the report presents an evaluation of the status quo. Using examples, reasons for the duration of approval procedures (which was assessed as too long in all four countries) will be identified at the national level. Furthermore, this report presents measures that have already been adopted at the national level to address the problem of lengthy permitting procedures. The report focuses on renewable electricity generation projects (particularly wind energy installations, PV systems and geothermal installations) but deals also with infrastructure projects such as with grid connection and grid expansion as well as storage technologies which are indispensable for the transformation process. With regard to storage technologies, an overview on batteries is given and the general situation of thermal storage facilities and electrolyzers is described. Regarding European Law, the first part of the expert report provides a general overview of the division of competences between the EU and the Member States in the area of permit granting procedures relevant to the matter at hand and the areas

of European and international law that must be taken into account in the development of acceleration measures.

Based on the analyses of the status quo at national level, the second part of the expert report outlines, classifies and evaluates the acceleration measures already adopted at the European level as well as those for which a legislative procedure has already been launched.

The third part of the expert report contains proposals for further acceleration measures on the EU level as well as general suggestions regarding the implementation of relevant European legal acts into the respective national laws. These proposals are based on the status quo of obstacles to an accelerated expansion of renewable energy installations within the legal systems of Germany, France, Spain, and Sweden, i.e. they mirror the deficits on the national level taking into account the respective national particularities.

## **Part 2 Status quo in Sweden, Spain, France, and Germany**

### **A. Executive Summary**

#### **I. Competence of the European legislator**

- The European legislator has an existing competence to adopt acceleration measures regarding permitting procedures and can effectively exercise this competence without violating Member States' competences and European law principles. However, the European legislator must at the same time ensure that any acceleration measures are aligned with the existing international and European law. In this context, in particular, the European environmental and nature conservation law as well as the international and European law on public participation must be mentioned.

#### **II. General permitting situation**

- The analysis of the status quo of the permitting situation of renewables installations in Germany, France, Sweden, and Spain shows first that the permitting procedures and authorities involved differ a lot between these countries.
- While the same procedure applies in Spain and Sweden for every renewable energy source, the legal framework and thus the procedures differ depending on the renewable energy source in Germany and France.
- The statutory requirements for the approval of installations are not all regulated in these Member States on the same (national, regional, or local) level and the regulations passed on one level (e.g., national) may even be applied by authorities on a different level (e.g., national, regional or local), which makes the procedures very complex. There are also often different permits needed which are issued by different authorities.
- However, the common ground is that all these procedures are administrative procedures judged by administrative courts and that they often involve the participation of the public and weighing of interests. The latter can be regarded as a chance if renewables are given a priority.

#### **III. Duration of the procedures**

- It is not easy to compare the duration of the permitting procedures in the Member States in question, because either no official statistics exist or because the duration differs greatly even within one and the same technology depending on the circumstances of the individual case. However, from the available data or experience (if not otherwise specified below) it is possible to conclude that while in Sweden the permit procedures do normally not exceed the deadlines stipulated in Art. 16 of the current Renewable Energy Directive (RED III), this is very much the



case in Germany, France, and Spain. The following tables give a very general overview on the length of approval procedures (appeal procedures not included) in Germany, France, and Sweden:

Energy source	Germany	France
Wind	The shortest average duration of a procedure at state level is <b>12.1 months</b> , the longest <b>38.2 months</b> . <sup>1</sup>	The average duration of the permit-granting process for environmental permits relating to onshore wind farms is <b>eighteen months</b> . In practice, the permit-granting process can last <b>less than a year and up to six years</b> .
Solar	Standard building permit procedures can take <b>up to twelve months or longer</b> . Simplified building permit procedures tend to be in the range of about <b>three months</b> . In some cases, an urban land use plan is mandatory prior to the approval procedure. The average duration of the procedure for drafting comprehensive urban land use plans for solar installations is about <b>1.5 to 2.5 years</b> .	Small installations up to <b>1 month</b> .  Larger installations up to more than <b>24 months</b> .
Electrolysers	The first application phase, in which the application along with the technical and planning documents are prepared, takes about <b>one to two years</b> . The second phase (review of the application documents for their completeness, participation of the specialist authorities and the public) should take a <b>maximum</b>	If the electrolyser is not part of a bigger industrial or renewable energy project, it can be estimated that the time required to obtain the necessary permits for the installation of an electrolyser will be <b>between three to six months</b> (if the electrolyser is not subject to authorisation under the regime of classified facilities) or <b>two to three</b>

<sup>1</sup> Onshore Wind Energy Agency (FA Windenergie), *Dauer förmliche Genehmigungsverfahren (mit UVP-Pflicht) für Windenergieanlagen an Land* [Duration of formal permitting procedures (with an obligatory EIA) for onshore wind energy installations].

	<b>of seven months in the formal procedure with the possibility of a one-time extension of three months.</b> However, the public authorities often request additional information, which may lead to considerable delays.	<b>years</b> (if an authorisation under the regime of classified facilities is required).
Storage	No data available.	If the installation of stationary batteries is the project in itself, then the duration of the granting procedure shall, in principle, be limited to <b>two to three months</b> , provided that no recourse has been filed against the building permit (if any).
Geothermal	The entire permitting procedure takes <b>at average 5 years.</b>	The time to obtain an exclusive research permit is, <b>at a minimum, 3 years</b> , and it takes <b>at least 2 years</b> to obtain an exploitation permit. However, it can take <b>up to ten years</b> from the granting of an exclusive research permit to the application for an exploitation permit.
Grid connection	No data available.	No data available.
<b>Sweden (all renewable energy sources)</b>		
	▶ Permit procedures in Land and Environment Court (new permit environmentally hazardous activities)	<b>Median 501 days</b> from filing of application acc. to statistics for 2021 <sup>2</sup>
	▶ Permit procedure in the Land and Environmental Court or the Environmental Permit Office (MPD) (new permit environmentally hazardous activities)	<b>Median 299 days</b> from filing of application acc. to statistics for 2021 <sup>3</sup>

<sup>2</sup> See the report "Uppdrag att samla in och analysera statistik för miljötillståndsprövningen för år 2021" dated 2022-05-13, NV-06961-21.

<sup>3</sup> See the report "Uppdrag att samla in och analysera statistik för miljötillståndsprövningen för år 2021" dated 2022-05-13, NV-06961-21.

▶ Notification procedures with the municipalities (new permit environmentally hazardous activities)		<b>Approx. 1 - 6 months<sup>1</sup></b>
▶ Other permits, exemptions etc. from or notifications to the County Administrative, Board, municipality, or other authorities		<b>Approx. 1 - 6 months</b>
▶ Building permit		<b>Approx. 3 months</b>
▶ New local plan		<b>Approx. 1 - 2 years</b>
<b>Spain</b>	Solar (Previous Administrative Authorisation and Construction Administrative Authorisation together)	Wind (Previous Administrative Authorisation and Construction Administrative Authorisation together)
Valencia	<b>10 to 30 months</b>	<b>No data available.</b>
Galicia	<b>9 months to 20 months</b>	<b>22 months to 11 years</b>
Andalusia	<b>18 months to 34 months</b>	<b>15 months to 21 months</b>
State level	<b>17 months to 36 months</b>	<b>18 months to 35 months</b>

#### IV. Identified obstacles

- The answer to the question which obstacles and to what extent lead to longer permitting procedures also differs between the Member States here in question and even within these Member States depending on the renewable energy source or technology. However, our analysis shows that in all these countries it seems to be an obstacle that permitting procedures are designed as individual procedures in which the requirements have to be examined from scratch for each and every single project. This leads to long or at least prolonged procedures, because:
- Too many too complex restrictions requiring a big amount of documentation (and even additional documentation in the course of the procedure) prevail over too little privileges and the competent authorities are not sufficiently staffed to deal with this situation efficiently. An additional obstacle in this respect in Spain seems to be an insufficient coordination between the authorities involved. However, it looks like in Sweden, thanks to a generally well-functioning and efficient public sector in which the authorities are given the necessary resources to maintain and obtain the expertise needed, the permitting procedures are handled efficiently.

- However, the outcome of the procedure is often (and this applies particularly to Sweden) uncertain because of the multitude of necessary assessments which often require the interpretation of complex or vague legal requirements, the weighting of conflicting interests and/or the involvement of the public or authorities which can either block the project or change their opinion in the course of the procedure. This is even in Sweden still regarded as the main problem. Finally, once granted, the approvals can be individually challenged with a suspensive effect, which can result in even further delays for the renewable energy installation still not being built long after the start of the approval process. This is less of a problem in Sweden, were the sufficiently trained staff handles the permit applications usually not only efficiently but also correctly.
- Regarding grid connection, the regulatory picture is inconsistent between the Member States surveyed.
- In France, Germany and Sweden no permit is required for the connection to the grid. The bottleneck in Germany, France and Spain is the slow pace of grid development.
- While the grid connection procedure in Germany and France is relatively complicated, it is well established.
- In Spain, a new regulation on capacity tenders and the process of granting grid access and connection permits itself have emerged as one of the main obstacles in the procedures for implementing RES projects.
- In Sweden, RES operators apply to and contract with the relevant grid owner. If the grid capacity is sufficient, the RES installations are usually connected to the grid within two years. Environmental permits and a concession are required if the grid needs to be expanded to accommodate the electricity from the newly connected RE installations. This extends the grid connection period to an average of three years.
- Unfortunately, statistics on the length of grid connection procedures are not available for Germany, France and Spain.

## **V. Best practices and recent legislative amendments**

- Best practices with regard to accelerating or streamlining permitting procedures for renewable installations are based on quite recent legislative measures; it is therefore difficult to assess their effect on the duration of permitting procedures in practice.
- In Sweden, the general procedural structure for environmental permits provides that the permit procedure is handled by different permitting authorities depending on the size and the

impact of the project in question. This already strongly contributes to shorter permitting procedures for minor projects and frees resources for bigger and more complex projects.

- While therefore in Sweden, no major legislative measures have been discussed to reduce the duration of the permit procedures, in Germany, France and Spain the legislator has already adopted considerable measures in this respect.
- These measures concern on the one hand procedural measures (e.g., in the event of inactivity of an authority, presumption of a positive opinion of the authority in question after the expiry of a deadline; simplified procedures for less complex projects like repowering projects or ground-mounted solar installations; digitalisation of procedures; introduction of one-contact points)
- On the other hand, the national legislators also introduced some substantive law amendments (e.g., presumption of overriding public interest of renewables in the weighing of conflicting interests or concretisation of certain legal approval criteria) or judicial procedural law (e.g., one less instance in judicial review or deadlines for court decisions).
- However, in some cases it has already become clear that some measures like e.g., introduced shorter deadlines, will in practice not lead to shorter procedures unless the competent authorities are better staffed. In addition, it is important that the acceleration measures do not lead to more judicial disputes, which would result in a problem shifting and not problem solving.

## **B. European legal framework for acceleration measures regarding permitting procedures for renewable installations**

### **I. Introduction**

To what extent can measures aiming at accelerating permitting procedures in the Member States be agreed at the EU level? This question must be answered before an overview of the current permit granting situation in the selected Member States is given and further considerations are made.

Clarifying questions of competence are of decisive importance for the legality of any acceleration act to be enacted in the future. Therefore, the division of competence between the EU and the Member States resulting from EU primary law will initially be discussed.

Secondly, potential substantive barriers under European and international law, which need to be taken into consideration by any measures aiming at accelerating permit-granting procedures, will be examined.

## II. Executive summary

- Does the EU have the competence to streamline and accelerate permitting procedures for renewable energy installations?
  - An additional competence for further acceleration measures could potentially be conferred to the European Union [EU] by the Member States. However, given the range of existing competences (in particular, see the competences in the energy and environmental policy), there does not appear to be a clear need for such a new EU competence.
  - This is shown by the choice of the legal basis for the Renewable Energy Directive (RED II)<sup>4</sup> and the Emergency Regulation<sup>5</sup>, the RED III<sup>6</sup> and RED IV<sup>7</sup> proposal as well as the TEN-E Regulations 2013 and 2022<sup>8</sup>. Furthermore, the EU's competences also include implied powers which – where this is necessary – complement the explicitly conferred competences to allow the EU to fully comply with the substantive authorisation. (see flexibility clause of Article 352 of the Treaty of the Functioning of the European Union (TFEU)<sup>9</sup> Finally, Article 122 serves as a legal basis for emergency measures (as was the case for the Emergency Directive).
- Is EU regulation on streamlined and accelerated permitting procedures for renewable energy installations in line with the existing principles of European law and European energy policy and which limits are there to be observed by the EU?
  - Given the various energy policy strategies of Member States, it has long been understood that a cost-efficient, rapid, and widespread expansion of the use of sustainable renewables in line with the objectives of the European Green Deal and the REPowerEU initiative requires coordinated action at the EU level (i.e. subsidiarity principle is observed). In addition, the proportionality principle must be respected. There is ample discretion for the European legislative bodies in deciding how to

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<sup>4</sup> Directive (EU) 2018/2001 of the European Parliament and Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328, 21.12.2018, p. 82–209.

<sup>5</sup> Known as "RED V" by the Brussels stakeholder community.

<sup>6</sup> Directive No. 2023/2413 of the European Parliament and of the Council of 18/10/2023 amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652.

<sup>7</sup> Proposal for a Directive of the European Parliament and of the Council of 18/05/2022 amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, COM/2022/222 final.

<sup>8</sup> Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure, OJ L 115, 25.4.2013, p. 39–75 (also called TEN-E Regulation), repealed in May 2022 by Regulation (EU) 2022/869, OJ L 152, 3.6.2022, p. 45–102.

<sup>9</sup> Treaty on the Functioning of the European Union of 13/12/2007, OJ C 326, 26.10.2012, p. 47–390.

proceed, but they will also have to respect the nationally defined regulatory frameworks, leaving some room for legal flexibility.

- In general, most acceleration proposals are likely to be considered in line with the Commission's objective under the European Green Deal for faster decarbonisation and the substantial increase of renewable energy projects, with the aim of reducing dependence on Russian fossil fuels as well as in respect of environmental criteria, especially those formulated under of the European Climate Change Act (Regulation (EU) 2021/1119).<sup>10</sup>
- However, at the same time it must be ensured that any acceleration measure and that climate law, in particular environmental and nature conservation law, are aligned as they partially differ in the interests they aim to protect. In principle, this also applies to international and European law on public participation requirements in decision-making, although the existing international and European framework conflict less with acceleration measures, as they only provide for a minimum degree of harmonisation regarding procedures requiring public participation and the parts of the public that must be involved.

### III. Regulatory competences of the EU

#### 1) Delimitation of EU competences – the principle of conferral

The European Union derives its existence from the continuing will of its Member States, which establishes and limits its legislative powers. This means that the European Union can neither empower itself nor act without power being conferred to it by its Member States.<sup>11</sup>

One of the main principles of European law is therefore the principle of conferral. Competences not conferred upon the Union in the Treaties<sup>12</sup> remain with the Member States (Article 5(2) TEU<sup>13</sup>).

In other words: Every legal act of the EU requires an explicit or implicit legal basis in primary law. It also depends on the respective competence what measures may be implemented or what laws may be passed. Moreover, the competence determines the procedure in which the EU can act.<sup>14</sup> For these

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<sup>10</sup> Cf. the explanatory memorandum of the proposal of 09/11/2022 for a Council Regulation laying down a framework to accelerate the deployment of renewable energy, COM(2022) 591 final.

<sup>11</sup> Cf. Nettesheim in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union* [EU law], Art. 1(9) TFEU.

<sup>12</sup> These are the Treaty on the Functioning of the European Union ("TFEU") and the Treaty on European Union ("TEU"), cf. Article 1(3) TEU.

<sup>13</sup> Treaty on European Union of 13/12/2007, OJ C 326, 26.10.2012, p. 13–390.

<sup>14</sup> Cf. Nettesheim in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union* [EU law], Art. 1(9) TFEU.

reasons, the choice of the right competence as the underlying basis for a measure or a legal act is very important.<sup>15</sup>

Notwithstanding certain special competences<sup>16</sup>, the competences conferred on the European Union are either exclusive<sup>17</sup> or shared with the Member States<sup>18</sup>. In addition, in some areas, the EU may carry out<sup>19</sup> actions to support, coordinate or complement the actions of the Member States. The regulations establishing competence can be found in the corresponding substantive provisions of TFEU and TEU.<sup>20</sup> According to Article 2 (2) TFEU shared competences mean that the Member States shall exercise their competence only to the extent that the EU has not exercised its competence. However, the EU must observe the subsidiarity principle in Article 5 (3) TEU when adopting legal acts, which means that it shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.

Furthermore, there are co-existing implied powers and the flexibility clause of Article 352 TFEU<sup>21</sup>: Implied powers can only ever be assumed if the Treaties grant the Union substantive competence for the area in question. Even then, implied powers only apply to those areas where they are absolutely necessary to fully comply with the substantive authorisation.<sup>22</sup> In this regard, Article 352(1) subparagraph 1 TFEU, states the following: “if action by the Union should prove necessary within the framework of the policies defined in the Treaties to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures”.

Other than that, the transfer of new explicit competences to the European Union is only possible within the framework of a Treaty amendment with ratification by all Member States under the principle of conferral.<sup>23</sup> The interpretation of existing competence provisions must thus not equal an amendment of the Treaties.<sup>24</sup>

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<sup>15</sup> Cf. Calliess in: Calliess/Ruffert, *EUV/AEUV* [TEU/TFEU], Art. 5(10).

<sup>16</sup> Cf. Art. 2(3) TFEU, Art. 5 (coordination of economic and employment policies) and Art. 2(4) TFEU, Art. 24 TEU (common foreign and security policy).

<sup>17</sup> Cf. Art. 2(1) TFEU, Art. 3 TFEU.

<sup>18</sup> Cf. Art. 2(2) TFEU, Art. 4 TFEU.

<sup>19</sup> Cf. Art. 2(5), sentence 1, Art. 6 TFEU.

<sup>20</sup> Cf. Nettesheim in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union* [EU law], Art. 1(11) TFEU.

<sup>21</sup> Cf. Nettesheim in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union* [EU law], Art. 1(13) TFEU.

<sup>22</sup> Cf. Nettesheim in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union* [EU law], Art. 1(16) TFEU.

<sup>23</sup> Cf. Calliess in: Calliess/Ruffert, *EUV/AEUV* [TEU/TFEU], Art. 5(7).

<sup>24</sup> Cf. Calliess in: Calliess/Ruffert, *EUV/AEUV* [TEU/TFEU], Art. 5(12).



## 2) Limits to the exercise of EU competences

Before going into detail on the specific EU competences in the context of permit-granting procedures, it has to be noted that the exercise of EU competences is limited by two additional principles of European law: the principle of subsidiarity and the principle of proportionality.

### a) The principle of subsidiarity

The principle of subsidiarity means that in areas which do not fall within its exclusive competence, the EU may act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States – at central level or regional and local level – but can, due to the scale or effects of the proposed action, be better achieved at the EU level.<sup>25</sup>

It has long been recognised that a cost-efficient, rapid, and widespread expansion of the use of sustainable renewables in line with the objectives of the European Green Deal and the REPowerEU initiative cannot be achieved by Member States alone due to the different energy policy strategies of Member States but requires coordinated action at EU level. The subsidiarity principle as defined above can therefore be considered as observed by the EU when it adopts European legal acts aiming at streamlining and accelerating permitting procedures for renewable energy installations).<sup>26</sup>

### b) The principle of proportionality

The principle of proportionality means that the content and form of any EU action must not exceed what is necessary to achieve the objectives of the Treaties.<sup>27</sup> If for instance a recommendation is sufficient to reach the goals which the EU measure is aiming for, then a recommendation should be issued and not e.g., a directive. The same applies to the content of the legal act: if basic regulations are sufficient then more detailed provisions must be omitted. With other words, the principle of proportionality concerns the intensity of a measure in terms of its binding effect and in terms of its regulatory density.<sup>28</sup> Therefore, if minimum provisions of EU law are sufficient, then suggested EU measures may have to be limited in their intensity or density and allow for the continued existence of national regulations.<sup>29</sup>

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<sup>25</sup> Cf. Art. 5(3)(1) TEU.

<sup>26</sup> Cf. the explanatory memorandum of the proposal of 09/11/2022 for a Council Regulation laying down a framework to accelerate the deployment of renewable energy, COM(2022) 591 final.

<sup>27</sup> Cf. Art. 5(4), sentence 1 TEU.

<sup>28</sup> Geiger/Kirchmair in: Geiger/Khan/Kotzur/Kirchmair, EUV/AEUV, Art. 5, recital 18.

<sup>29</sup> Cf. Geiger/Kirchmair in: Geiger/Khan/Kotzur/Kirchmair, *ibid*; cf. recital 8 of the Regulation (EU) 2022/2577 (Emergency Regulation).

### 3) Specific EU competences in the context relevant for the matter at hand

The competences which have so far been relevant in the context of the acceleration of permit-granting procedures and/or renewable energy installations concern the areas of “environment”, “trans-European networks” and “energy”.<sup>30</sup> Most relevant are the energy and the environment competences. Both are shared competences. However, the energy policy solidarity clause (Article 194(1) TFEU) leads in practice to the understanding that energy policy measures are better governed at the Union level. Comparably, the environmental competence, while shared, has in practice been broadly interpreted, giving prevalence to the EU in most cases. The most recent measure, called the Emergency Regulation, was based on Article 122 TFEU, which allows for emergency measures if severe difficulties arise in the supply of certain products, notably in the area of energy. In the following, all four areas of competence will be discussed briefly.

#### a) Energy

If the objectives specified in Article 194(1) TFEU are being pursued, the European Union is granted a specific shared competence in energy policy under Article 194(2) TFEU, first subparagraph. One of those objectives is to promote the development of new and renewable forms of energy (point (c)).

As the phrase “without prejudice to the application of other provisions of the Treaties” implies, there may be issues with delineation in relation to other bases of competence.<sup>31</sup> Particularly, it is still controversial under which circumstances a legal act should be founded on Article 192 TFEU or Article 194 TFEU.<sup>32</sup> Although this delimitation is no longer of overriding importance for the legislative procedure, as most of the relevant bases of competence refer to the ordinary legislative procedure, it plays a considerable role, among other things, for the Member States’ remaining room for manoeuvre.<sup>33</sup>

In this regard, while the EU must demonstrate that requirements of the principle of subsidiarity are fulfilled in the case of shared competence, this is not necessary in the area of energy policy. The energy policy solidarity clause<sup>34</sup> creates a rebuttable presumption that certain objectives of energy policy measures cannot be successfully regulated at a national level and are better governed at the Union

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<sup>30</sup> Cf. Art. 4(2) TFEU point (e), (h) and (i).

<sup>31</sup> Cf. Callies in: Callies/Ruffert, *EUV/AEUV* [TEU/TFEU], Art. 194 (3) TFEU.

<sup>32</sup> See further references in Callies in: Callies/Ruffert, *EUV/AEUV* [TEU/TFEU], Art. 194 (15) TFEU. Note that the legal basis for the RED II – Directive (EU) 2018/2001 was solely Art. 194(2) TFEU whereas the proposal for the RED IV – Directive is based on two legal bases: Art. 194(2) TFEU and Art. 192(1) TFEU (see for more details below, IV.1.).

<sup>33</sup> Cf. Callies in: Callies/Ruffert, *EUV/AEUV* [TEU/TFEU], Art. 194(19), (25) TFEU as well as Art. 114 (136) et seq. TFEU, and Art. 193 TFEU; Scherer/Heselhaus in: Dausen/Ludwigs, *Handbuch des EU-Wirtschaftsrechts* [Handbook on EU commercial law], O. Environmental law recital 74.

<sup>34</sup> Cf. Art. 194(1) TFEU according to which the objectives described in Art. 194 (1) TFEU are to be pursued on the basis of three general principles: in a spirit of *solidarity between Member States*, in the context of the establishment or functioning of the internal market, and taking into account the need to preserve and improve the environment.

level as a corrective to the principle of subsidiarity.<sup>35</sup> There is no room for Member States to act unless and to the extent that the Union has exercised its authority.

However, according to Article 194(2) TFEU, second subparagraph, a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply remains unaffected by such EU measures.<sup>36</sup> This is a substantive limit to the EU's competence<sup>37</sup> and means that the EU cannot shape a comprehensive energy policy but must respect the preliminary decisions of the Member States in this regard and can only build on these within the framework of its energy policy.<sup>38</sup> Furthermore, the right of Member States to take required actions to safeguard their energy supply in the circumstances specified in Article 347 TFEU remains unaffected, according to Declaration no. 35<sup>39</sup>, Article 194.

## **b) Environment**

Article 192(1) TFEU, subparagraph 1 confers on the European Union the specific shared competence in the area of the environmental policy when the goals listed in Article 191(1) TFEU are being pursued.<sup>40</sup> In principle, the ECJ regards a reference to the environmental policy as sufficient and has, for instance, very broadly interpreted the environmental policy competence of the EU, opening it even to provisions of environmental criminal law, to the extent that these safeguard the implementation of EU environmental law.<sup>41</sup>

The substantive reservation of sovereignty of the Member States under Article 194(2)<sup>42</sup> corresponds in the EU's environmental competence to the procedural regulation of Article 192(2), subparagraph 1 TFEU. This means that the Union has a regulatory competence in the field of environmental policy but can only exercise this competence in a special legislative procedure with unanimity in the Council<sup>43</sup>

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<sup>35</sup> Cf. Art. 2(2), subpara. 2 TFEU.

<sup>36</sup> Without limiting the scope of Art. 192(2), subpara. 1 (c).

<sup>37</sup> Cf. Kreuter-Kirchhof, *EuZW* 2017, 829.

<sup>38</sup> Cf. Callies in: Callies/Ruffert, *EUV/AEUV* [TEU/TFEU], Art. 194 TFEU(29): This is also why the Governance Regulation (EU) 2018/1999 only provides for soft steering mechanisms to increase the share of renewable energy and Directive (EU) 2018/2001 (RED II) does not contain any binding national overall targets but is limited to setting a binding overall European target.

<sup>39</sup> Cf. annex to the TFEU.

<sup>40</sup> Cf. Scherer/Heselhaus in: Dausen/Ludwigs, *Handbuch des EU-Wirtschaftsrechts* [Handbook of EU commercial law], O. Environmental law, recital 75; these goals are: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular, combating climate change.

<sup>41</sup> Cf. Scherer/Heselhaus in: Dausen/Ludwigs, *Handbuch des EU-Wirtschaftsrechts* [Handbook of EU commercial law], O. Environmental law, recital with reference to ECR 2005, I/7879 (para. 46 et seq., esp. 48), "Environmental Criminal Law" and ECR 2007, I/9097 (esp. para. 66), "Maritime Environmental Criminal Law".

<sup>42</sup> Cf. above (b).

<sup>43</sup> Cf. Kreuter-Kirchhof, *EuZW* 2017, 829.

if the regulation substantially affects the energy mix or the structure of energy supply.<sup>44</sup> The same applies for measures affecting town and country planning.<sup>45</sup>

### c) Trans-European Networks

The competence of the European Union in “trans-European networks” in the sectors of transport, telecommunication and energy was introduced into the former European Community Treaty by the Treaty of Maastricht in 1992.<sup>46</sup> Therefore, it is an example of a very specific competence which has been conferred to the European Union through an amendment to the TFEU. In addition, this competence is worth mentioning in the present paper for three other reasons:

First of all, the existence of special provisions in the TFEU for European network expansion and demand planning within the policy field of Trans-European Networks (TEN), including the field of energy infrastructure, demonstrates that the EU has not yet received a comprehensive competence in the field of spatial planning from the Member States, let alone location and technical planning to specific sectors and projects.<sup>47</sup>

Secondly, it is noteworthy that the TEN-E Regulation<sup>48</sup> already includes strict and directly applicable requirements for the Member States to streamline the planning and approval procedures. However, this only applies to selected TEN-projects (“one-stop shop authority”, rules on transparency and early public participation, limitation of approval procedures for Projects of Common Interest (PCI) to 3 years and 6 months).<sup>49</sup> Although approval for projects falling under this Regulation is set to 3,5 years, in reality the permitting procedures take longer, due to – most likely – similar reasons as identified in the present report with regard to renewable energy installations.

The issuance of the TEN-E Regulation was based on Article 172 TFEU and met with criticism, as it could have been more appropriate to base it on the energy chapter of the Treaty, specifically on Article 194(1) point (d) in conjunction with Article 194(2) TFEU. However, the extensive procedural

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<sup>44</sup> Cf. Art. 192(2), subpara. 1 (c).

<sup>45</sup> Cf. Art. 192(2), subpara. 1 (b).

<sup>46</sup> Buschle in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht* [EU law], para. 6 and the procedure stipulated in Art. 48 TEU.

<sup>47</sup> Cf. Pielo in: Säcker, *Berliner Kommentar zum Energierecht* [Berlin commentary on energy law], preliminary remarks on sections 43 to 45b, subs. 28; however, see Art. 192(2) subpara. 1 point (c), which indirectly confirms the limited (“measures affecting [...]”) regional planning and land use competence of the EU; cf. also Callies in: Callies/Ruffert, *EUV/AEUV* [TEU/TFEU] (6<sup>th</sup> edn 2022) Art. 192 TFEU, recital 30.

<sup>48</sup> Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure, OJ L 115, 25.4.2013, p. 39–75 (also called TEN-E Regulation), repealed in May 2022 by Regulation (EU) 2022/869, OJ L 152, 3.6.2022, p. 45–102.

<sup>49</sup> Cf. Pielo in: Säcker, *Berliner Kommentar zum Energierecht* [Berlin commentary on energy law], preliminary remarks on sections 43 to 45b, subs. 30.

requirements under the TEN-E Regulation were deemed to be absolutely necessary in the interest of the European energy network.

#### **d) Temporary emergency measures**

Article 122 TFEU played a central role in the crisis management of the COVID-19 pandemic.<sup>50</sup> According to Article 122(1) TFEU, the Council, acting on a proposal from the Commission and in a spirit of solidarity between Member States, is allowed to decide on the measures appropriate to the economic situation, particularly in the event that serious difficulties arise in the supply of certain goods, especially in the energy sector.

Based on this article, the Emergency Regulation<sup>51</sup> was adopted on 19 December 2022 because of the high risk of the complete shutdown of Russian gas supplies in light of Russia's invasion of Ukraine as well as the uncertain outlook for alternatives. This poses a significant risk of a potential disruption of energy supplies, which could result in an increase in energy prices and increased pressure on the EU's economy.<sup>52</sup> Therefore, the Emergency Regulation focused in particular on specific technologies and types of projects which can be quickly deployed and have an immediate effect on the objectives of reducing price volatility and reducing the demand for natural gas (small-scale solar installations, re-powering of existing renewable energy installations or heat pumps).<sup>53</sup>

#### **4) Instruments of action**

The primary law gives the EU legislator leeway in selecting the instrument of action.<sup>54</sup> The EU legislator can either use one of the categories not exhaustively listed in Article 288 TFEU (regulations, directives, decisions, recommendations and opinions) or provide for in the relevant legal basis (e.g., "guidelines" in Article 171 TFEU).<sup>55</sup>

European legislative bodies have ample discretion in choosing the form of action. However, new EU rules will also have to respect the nationally defined regulatory frameworks, leaving some room for legal flexibility.

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<sup>50</sup> Cf. Khan/Richter in: Geiger/Khan/Kotzur/Kirchmair, *EUV/AEUV* [TEU/TFEU] (7<sup>th</sup> edn 2023) Art. 122 TFEU, recital 13.

<sup>51</sup> Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJ L 335, 29.12.2022, p. 36–44 (Emergency Regulation).

<sup>52</sup> Cf. recital 22 Emergency Regulation.

<sup>53</sup> Cf. recital 5 Emergency Regulation.

<sup>54</sup> Cf. Art. 296(1) TFEU.

<sup>55</sup> Cf. Giesberts/Tiedge, *NVwZ* 2013, 836, 840.

#### **IV. Necessary alignment with substantive requirements of European and international law**

Regarding concrete substantive regulations of its legal acts, the European legislator has – within its competences – wide discretionary power.<sup>56</sup> However, when proposing measures to accelerate permit-granting-procedures for renewable energy installations, the EU must take its existing law into consideration.

In general, every acceleration proposal is likely to be in accordance with the European Commission's Green Deal objectives for a faster decarbonisation and a significant increase in renewable energy projects, with the aim of reducing dependence on Russian fossil fuels as well as in respect of environmental criteria, particularly those established under the European Climate Change Act (Regulation (EU) 2021/1119).<sup>57</sup>

The purpose of the following section is not to demonstrate with which EU rights, freedoms, or principles potential further acceleration measures are comply with but rather to highlight areas of EU law which any future acceleration measures may collide and must therefore be aligned with.

##### **1) Nature protection law**

In the context of measures aiming at accelerating permit-granting procedures for renewable energy installations, the existing European law to be considered is mainly the law aiming at the safeguard of nature and wildlife (in particular the Habitats Directive<sup>58</sup> and the Birds Directive<sup>59</sup> but also the Water Directive<sup>60</sup> and the EIA Directive<sup>61</sup>, all together in the following "nature protection law"). Therefore, acceleration measures may require alignment with this respective European secondary legislation. Here, however, it must also be considered that these secondary legal acts are also partially based on international law, e.g., the Bern Convention.<sup>62</sup>

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<sup>56</sup> Cf. Giesberts/Tiedge, *NVwZ* 2013, 836, 840 and footnote 61.

<sup>57</sup> Cf. the explanatory memorandum of the proposal of 09/11/2022 for a Council Regulation laying down a framework to accelerate the deployment of renewable energy, COM(2022) 591 final.

<sup>58</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7–50.

<sup>59</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L 20, 26.1.2010, p. 7–25.

<sup>60</sup> Directive 2000/60/EC of the European Parliament and of 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. 1–73.

<sup>61</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive), last amended by Directive 2014/52/EU, OJ L 26, 28.1.2012, p. 1–21.

<sup>62</sup> Convention on the Conservation of European Wildlife and Natural Habitats, Berne, 19/09/1979 (Article 6 et seq.)

In particular, the **missing standardisation or concretisation** inside the area of species protection law has been identified as one of the obstacles to accelerated permit-granting procedures.<sup>63</sup> This concerns not only the interpretation of legal prohibitions but also of sufficient measures aimed at preventing the violation of these legal prohibition or of exemptions from these legal prohibitions.

For instance, **only the deliberate capture or slaughter of animals or birds is specifically prohibited** by the Habitats Directive's Article 12(1) point (a) and the Birds Directive's Article 5 point (a). However, the ECJ interprets the criterion of intent very broadly, with the mere acceptance of impairments also qualifying as intent.<sup>64</sup> In addition, according to the ECJ, Article 12(1)(a) Habitats Directive is to be interpreted in relation to individual specimens and not a specific species, i.e. the killing of a single specimen can already lead to the rejection of a project.<sup>65</sup>

Such broad interpretation could be limited by the introduction of a specific requirement according to which the criterion of killing in connection with the construction of projects is only fulfilled if the risk of killing listed species increases in a significant way.<sup>66</sup> However, due to the complexity of nature and the multitude of circumstances to be considered, the legal term "significance" is not easy to determine as it requires nature conservation expertise<sup>67</sup> for its uniform application. The result is legal uncertainty and a negative effect on the length of the permit-granting procedures.

**Another example is protective or preventive measures**, e.g., addressing a significantly increased risk of deliberate capture or killing of animals/birds. The authorities applying the law are responsible for the concretisation of these requirements by taking findings of nature conservation into account.<sup>68</sup> However, the problems of concretisation principally correspond here with the problem regarding the criterion of significance.<sup>69</sup>

**The application of exemption regulations<sup>70</sup>** is also associated with uncertainties, which are due, among other factors, to vague legal terms and unclear requirements in the underlying legislative

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<sup>63</sup> Cf. Stiftung Energieumweltrecht, *Reformansätze zum Genehmigungsrecht von Windenergieanlagen* [Approaches to reform the law governing permits for wind energy installations], 28/01/2022, p. 17 et seq., 27 et seq.

<sup>64</sup> Cf. ECJ, 04/03/2021 – C-473/19 and C-474/19, marg. no. 51.

<sup>65</sup> Cf. ECJ, 04/03/2021 – C-473/19 and C-474/19, marg. no. 54.

<sup>66</sup> In German law see sec. 44 subs. 5 sentence 2 no. 1 Federal Nature Conservation Act (BNatSchG).

<sup>67</sup> Cf. Bick/Wulfert, *Der Artenschutz in der Vorhabenzulassung aus rechtlicher und naturschutzfachlicher Sicht* [Species protection in the approval of projects with regard to legal and nature conservation issues], NVwZ 2017, p. 346 (348).

<sup>68</sup> Cf. Bick/Wulfert, NVwZ 2017, p. 346 (348).

<sup>69</sup> Cf. Stiftung Energieumweltrecht, *Reformansätze zum Genehmigungsrecht von Windenergieanlagen* [Approaches to reform the law governing permits for wind energy installations], 28/01/2022, p.28. In German law section 44 sec.5 subs. 2 no. 1 BNatSchG requires "necessary, professionally recognised protective measures".

<sup>70</sup> E.g. Art. 16 Habitats Directive, Art. 9 Birds Directive and Art. 4 Water Directive.

acts.<sup>71</sup> European species protection law has so far left it to the Member States to define public interests and the principles of their weighting.<sup>72</sup> (Due to the uncertainties under the current European nature protection law concerning the permissible degree of generalisation and presumptions regarding renewable energy, public authorities are currently still making decisions on a case-by-case basis, which affects the duration of permit-granting procedures).<sup>73</sup>

## 2) Law on public participation

Furthermore, it may be necessary to adapt any new rules regarding the acceleration of permit-granting procedures for renewable energy technology to the requirements of international and EU law on public participation.

At the international level, the **Aarhus Convention**<sup>74</sup> is of particular relevance. It guarantees the public's right to receive environmental information held by public authorities, the public's right to participate in environmental decision-making and the public's right to access to justice, i.e. review by a court of law or an independent and impartial body other than a court of law. In particular, the Aarhus Convention imposes the obligation to ensure early public participation, when all options are open and effective public participation can take place (Article 6(4)). In addition to the Aarhus Convention, the **Espoo Convention**<sup>75</sup>, which sets out the obligations of Parties to assess the environmental impact of certain activities at an early stage of planning, and the **SEA-Protocol**, which ensures that Parties integrate environmental assessment into their plans and programmes at the earliest stages, are of relevance in this respect.<sup>76</sup>

Requirements for public participation in approval procedures can also be found in secondary EU legislation such as the **Directive on Environmental Impact Assessment**<sup>77</sup>, the **Industrial Emissions**

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<sup>71</sup> Cf. Stiftung Energieumweltrecht, *Reformansätze zum Genehmigungsrecht von Windenergieanlagen* [Approaches to reform the law governing permits for wind energy installations], 28/01/2022, p. 29.

<sup>72</sup> Cf. regarding e.g., German case law on this topic: Riese/Brennecke, *UWP 2021*, 108 (113 et seq.).

<sup>73</sup> Stiftung Umweltenergierecht, *Reformansätze zum Genehmigungsrecht von Windenergieanlagen*, 28/01/2022, p. 30 et seq.

<sup>74</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998; previously Principle 10. of the Rio Declaration on Environment and Development of 14/06/1992, which emphasised, among other things, public participation in administrative decisions; cf. Köck, *ZUR 2016*, 643, 646 et seq.

<sup>75</sup> Convention on Environmental Impact Assessment in a Transboundary Context of February 25, 1991.

<sup>76</sup> Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context of March 12, 2004.

<sup>77</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive), OJ L 26, 28.1.2012, p. 1–21.



**Directive**<sup>78</sup> and the **Seveso III Directive**<sup>79</sup>. Regarding environmental plans and programs public participation is also required according to the **Public Participation Directive**<sup>80</sup>, the **Strategic Environmental Assessment Directive**<sup>81</sup> and once again the **Seveso III Directive**.

Despite these European law provisions on public participation, which only provide for a minimum degree of harmonisation regarding procedures requiring public participation and the parts of the public that must be involved<sup>82</sup>, the Member States still have some discretion concerning the specific structure of the participation procedures. Therefore, there is some room for simplification and acceleration.<sup>83</sup>

When it comes to the aspect of digitalising public participation, the rights of citizens without an internet connection must be safeguarded, which is the guiding principle of European and international law.<sup>84</sup> In keeping with this principle, online access to documents subject to public inspection is not sufficient and an alternative means of access must be ensured. Other than that, there are no specific form requirements regarding public access to documents.<sup>85</sup> It seems thus possible to shift administrative procedures to an online format under international and European law.<sup>86</sup>

## C. Analysis of the permitting procedures in Germany

### I. Introduction

#### 1) Distribution of tasks within the German federal system

In Germany, the procedure for approving installations is subject to a federal system. Three different vertical levels have to be considered: **the federal level, the level of 16 individual federal states and the level of the respective municipalities**. Shared tasks and competences are further characteristics

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<sup>78</sup> Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on Industrial Emissions, OJ L 334, 17.12.2010, p. 17–119 (IE Directive).

<sup>79</sup> Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, OJ L 197, 24.7.2012, p. 1–37 (Seveso III Directive).

<sup>80</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment, OJ L 156, 25.6.2003, p. 17–25 (Public Participation Directive).

<sup>81</sup> Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programs on the environment, OJ L 197, 21.7.2001, p. 30–37 (SEA Directive).

<sup>82</sup> Cf. e.g. explicitly recital 3 of the EIA Directive.

<sup>83</sup> Cf. the Act to ensure proper planning and permitting procedures during the COVID 19 pandemic (*Planungssicherstellungsgesetz – PlanSiG*) in Germany.

<sup>84</sup> Cf. Thomas/Jäger, *NZBau 2020*, 623 (625); cf. also the explanatory memorandum to the draft Act to ensure proper planning and licensing procedures during the COVID 19 pandemic (PlanSiG), Bundestag Printed Paper 19/18965, p. 13.

<sup>85</sup> Cf. Art. 6(2) Aarhus Convention (“either by public notice or individually as appropriate”) and in particular Art. 6(2) EIA Directive (“electronically and by public notices or by other appropriate means”).

<sup>86</sup> Cf. Thomas/Jäger, *NZBau 2020*, 623, 625.

of such federal system. This means that there is no provision for or possibility of the higher level to interfere with the decision-making process at the other levels.

Whether installations are to be approved at the federal, state, or municipal level depends on the legal provisions governing the respective installation. In this context, it is important to note that a major share of the legislative power, i.e. the exclusive or concurrent competence (*konkurrierende Kompetenz*), is assigned to the federal level. A large number of statutory requirements for the approval of installations are thus enshrined in federal law. Furthermore, concurrent competence means that federal states may only act if the federal legislator has not yet fully dealt with the respective legal matter. In certain cases, e.g., where installations may be installed and operated, municipalities are entitled to stipulate more specific requirements.

There is a difference between having the legislative power and applying respective federal and state laws. In most cases, the latter is a task of the federal states in their own right. As a result, the federal states may establish their public authorities and determine the structure of administrative proceedings themselves. Certain tasks may well be delegated to other levels, including to the individual municipalities.

This complexity often results in a legal provision being stipulated at a level that is different from the level of applying the legal provision. An acceleration of approval procedures thus depends on the political will and willingness of all levels (at federal, state, and municipal levels) to change the status quo.

## **2) Planning and permitting procedures in Germany**

Installations can be approved in two ways: Firstly, approval for a project can be obtained in a permitting procedure (*Genehmigungsverfahren*). In permitting procedures, the competent public authority will, in short, assess whether the statutory preconditions for approving the installation are met. If this is the case, there is an entitlement to being granted the permit. On the other hand, a decision on the approval of an installation can be made in a planning procedure (*Planungsverfahren*). An essential characteristic of planning procedures is that the relevant aspects and, respectively, interests must be gathered and, in a second step, weighed against each other. The decision is then made as a result of this weighing of the relevant aspects and interests. In short, there is thus no entitlement to the approval of the installation but merely an entitlement to appropriate consideration being given to all relevant aspects and, respectively, interests.

The procedure for the approval of installations is, in most cases, initiated by an application of the installation operator to that effect. However, it can also be initiated by the public authority (*ex officio*).

### **a) Permitting procedures**

Permitting procedures result in administrative acts, usually specific individual requirements and prohibitions stipulated by a public authority. These administrative acts, for example, approve the

construction and operation of a certain installation or grant another right, for example for certain activities (e.g., the exploration of free-to-mine natural resources [*bergfreie Bodenschätze*]). For one, the decision on whether a permit is granted depends on substantive provisions (e.g., compliance with specific noise levels). Furthermore, formal requirements such as the competence of a public authority, the specific procedure (application, documents and expert opinions, participation of other public authorities etc.) and the form of the permit are important for the lawfulness of a permit.<sup>87</sup>

An installation may be subject to a permitting requirement for two reasons: Firstly, a certain, specifically designated project may be subject to a permitting requirement by law if a regulation explicitly contains a permitting requirement (e.g., wind energy installations with a total height of more than 50 metres under immission control law). Secondly, projects may overall be subject to a prior permitting requirement with the law stipulating, as the case may be, specific exceptions (e.g., the permit requirement under building law for certain ground-mounted solar installations and, respectively, the absence of such requirement for certain solar installations on buildings).

The competent permit authority will decide on the admissibility of the project subject to the scheme of assessment set out in the respective sectoral law. The procedure will be held with or without public participation which usually depends on the size of the project.<sup>88</sup> In this context, permitting procedures frequently only have a restricted concentrative effect (*Konzentrationswirkung*), which means that further decisions of other public authorities may be required regarding other areas of law and in separate procedures.

A permit does not necessarily cover the project as a whole. There is a possibility of partial permits (*Teilgenehmigungen*; cf. e.g., sec. 8 Federal Immission Control Act [*Bundesimmissionsschutzgesetz – BImSchG*]) or provisional decisions (*Vorbescheide*; cf. sec. 9 BImSchG) containing decisions on certain parts of a project and, respectively, preliminary questions thereto. We will go through the details when presenting the respective permits below.

## **b) Planning procedures**

The planning procedure serves to coordinate diverging interests with a permanent effect. It is characterised by a comprehensive gathering of information and a comprehensive weighing of all public and private interests concerned<sup>89</sup>. This weighing typically results in a wider discretion for the planning authority (*Planungsträger*) compared to permitting procedures.

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<sup>87</sup> Reimer in: Schoch/ Schneider, *VwVfG*, preceding sec. 63 marg. no. 42.

<sup>88</sup> For building law: Stürer in: Stürer, *Bau- und FachplanungsR*, marg. no. 2568.

<sup>89</sup> Reimer in: Schoch/Schneider, *VwVfG*, preceding sec. 63 marg. no. 34.

The first key element of any planning procedure is the assessment as to whether there is a justification for the specific planning (*Planrechtfertigung*). If the specific planning is not necessary, a planning procedure is inadmissible.<sup>90</sup> Within the respective planning procedure, the planning authority will decide – within the framework of the task assigned to it by law and based on the resulting requirements for the weighing – which objective the specific planning is to pursue. The specific planning must, however, comply with certain rules; in addition to the planning objectives and their specifications in planning guidelines, planning principles, optimisation requirements etc., the standards of the weighing requirement have to be adhered to as well. This means that all public and private interests in favour of and against the project must be weighed against each other in every permit procedure.

In this context, the (individual) planning authorities will coordinate their respective planning with each other. If planning involves more than one level (e.g., a federal state and a municipality), the lower planning level will adjust the plans according to the respective higher level. Vice versa, however, the lower planning authorities must be allowed to participate in the planning at the higher level. In this respect, the higher planning authority must take into account the planning at the lower level (“principle of countervailing influence”, *Gegenstromprinzip*).<sup>91</sup>

### 3) Judicial review

Permitting and planning decisions are principally subject to judicial scrutiny by administrative courts. The administrative jurisdiction in Germany has a three-tier structure: the court of first instance principally is an administrative court (*Verwaltungsgericht*), the court of second instance is a higher administrative court (*Oberverwaltungsgericht*, in some federal states known as *Verwaltungsgerichtshof*), and the Federal Administrative Court (*Bundesverwaltungsgericht*) is the court of third instance.

In certain cases, the higher administrative court is the first and only court ruling on the facts of a case. This concerns certain larger projects defined by law, particularly projects with far-reaching consequences and supra-regional importance.<sup>92</sup> Moreover, the Federal Administrative Court may be the competent court of first and last instance for certain transport projects defined by law as projects of particular importance.<sup>93</sup>

If an administrative decision in a planning or permitting procedure is contested, there will be a comprehensive judicial review of its lawfulness. This, however, requires that the person bringing an action against the approval can assert that their rights have possibly been violated by the administrative decision (sec. 42 subs. 2 Code of Administrative Court Procedure [*Verwaltungsgerichtsordnung* –

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<sup>90</sup> *BVerwGE* 125, 116.

<sup>91</sup> Reimer in: Schoch/Schneider, *VwVfG*, preceding sec. 63 marg. no. 40.

<sup>92</sup> Ziekow in: Sodan/Ziekow, *VwGO*, marg. no. 3.

<sup>93</sup> Berstermann in: *BeckOK VwGO*, sec. 50 marg. no. 9a.

**VwGO**]). This standard applies not only to the addressees of a decision on the approval of an installation (*Zulassungsentscheidung*) but also to third parties bringing an action against a permit granted to another party, e.g., the neighbour; special provisions may apply to the right of (e.g., environmental) associations.<sup>94</sup>

Furthermore, injunctive relief (*vorläufiger Rechtsschutz*) can be sought. Injunctions are aimed at slowing down the implementation of an administrative act to avoid that legal positions “are lost” until a decision is issued in the main proceedings, which most frequently takes several years.<sup>95</sup> In injunctive relief proceedings, the respective relevant interests are weighed against each other. In this context, the administrative court will also take into account the potential prospects of success in the main proceedings. However, an anticipation of the decision in the main proceedings is generally to be avoided.

## II. Wind

### 1) Executive summary

- The approval procedure (*Zulassungsverfahren*) is complex.
- The permit for wind energy installations is subject to various obstacles.
- Policymakers as well as legislators are currently striving for an acceleration of approval procedures.
- Some proposals for acceleration have already been implemented.

### 2) Brief description of permit-granting procedure

#### a) Substantive law

The installation and operation of wind energy installations usually poses a number of different legal issues. Thus, the right location for a project is a commonly asked question. As wind energy installations are mainly set up in “undesigned outlying areas” (areas with no development plan located outside of a municipality – *unbeplanter Außenbereich*; sec. 35 Federal Building Code [*Baugesetzbuch – BauGB*]), their privileged admissibility in these areas (sec. 35 subs. 1 no. 5 BauGB) and the representations in land use plans, as well as any objectives of spatial planning (sec. 35 subs. 3 BauGB), are of practical relevance. If at the spatial planning level, certain areas are designated, for example, as areas suitable for wind energy, this means, in short, that wind energy installations are to be installed and operated primarily in these areas (*Konzentrationsplanung*) and are generally not to be set up and

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<sup>94</sup> Schmidt-Kötters in: *BeckOK VwGO*, sec. 42 marg. no. 154.

<sup>95</sup> Schoch in: Schoch/ Schneider, *VwGO*, preceding sec. 80 marg. no. 1.

operated at other sites (*negative Ausschlusswirkung*). The specifics of the lawful procedure have been developed by case law based on complex criteria. A conclusive planning concept thus must take into account “hard” and “soft” exclusion zones and provide for certain areas with potential (*Potenzialflächen*) in which land may be designated for wind energy installations (*Konzentrationsflächen*). In this context, “ample room” is to be “made” for wind energy.<sup>96</sup> The standards are demanding and the procedure for the designation of areas is correspondingly prone to errors. For the realisation of a project, this means that the question of choosing the “right” location alone is often associated with legal uncertainties.

If wind energy installations are to be set up close to other structural installations, the requirement of consideration (*Rücksichtnahmegebot*) may have to be examined in regard to a potential visual obstruction.<sup>97</sup>

In addition to the preconditions of the Federal Immission Control Act, the provisions under nature conservation law must be examined as well. The installation and operation of a wind energy installation could, for example, violate the provisions for the protection of wild animals of specially protected species (in sec. 44 subs. 1 Federal Nature Conservation Act [*Bundesnaturschutzgesetz – BNatSchG*]) or be inadmissible due to the location within a landscape protection area pursuant to sec. 26 Federal Nature Conservation Act.

Furthermore, the building regulations of the federal states must be adhered to, which includes, for example, regulations regarding the stability and distance to other uses of land, the Aviation Act (*Luftverkehrsgesetz – LuftVG*) in regard to aviation security and military interests (sec. 18a Aviation Act) and regarding the protection of historical monuments and sites.

### 3) Procedural law

Wind energy installations that are higher than 50 metres require a permit under the BImSchG.<sup>98</sup> The BImSchG is a federal law and sets out two types of permitting procedures (*Genehmigungsverfahren*): the formal and the simplified procedure. Furthermore, a separate decision may be issued in respect of individual aspects through a provisional decision (*Vorbescheid*)<sup>99</sup> or a partial permit (*Teilgenehmigung*)<sup>100</sup>. This means that it is possible to subdivide the permitting procedure.

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<sup>96</sup> Federal Administrative Court (BVerwG) decision of 15/09/2009 – 4 BN 25/09, *BeckRS 2009*, 39251, marg. no. 8.

<sup>97</sup> See Higher Administrative Court (OVG) of Münster decision of 30/03/2017 – 8 A 2915/15, *BeckRS 2017*, 106448; Higher Administrative Court of Münster decision of 26/07/2017 – 8 B 396/17, *BeckRS 2017*, 122301, marg. no. 19.

<sup>98</sup> Sec. 4 subs. 1 sentence 3 BImSchG in conjunction with sec. 1 subs. 1, Annex 1 no. 1.6 of 4. BImSchV (4<sup>th</sup> Federal Immission Control Ordinance).

<sup>99</sup> Sec. 9 BImSchG.

<sup>100</sup> Sec. 8 BImSchG.

Whether the approval is granted in a formal or simplified procedure depends on the number of wind energy installations. The formal procedure applies to wind farms with at least 20 wind energy installations as well as to wind energy installations subject to an environmental impact assessment; whether an environmental impact assessment is necessary once again depends on the number of wind energy installations.<sup>101</sup> Accordingly, wind farms of more than 20 wind energy installations higher than 50 metres are always subject to an environmental impact assessment. In order to determine whether there is an obligation to carry out an environmental impact assessment, a provisional assessment will be carried out; in the case of wind farms with 6 to 20 wind energy installations that are higher than 50 metres, a general preliminary assessment (*allgemeine Vorprüfung*) will be carried out and for 3 to 5 wind energy installations, a site-specific preliminary assessment (*standortbezogene Vorprüfung*) must be undertaken.<sup>102</sup> If there is no obligation to carry out an environmental impact assessment, the provisions of the simplified procedure apply.

The initiation of a permitting procedure requires a written application together with all documents relevant for the assessment. Within one month of receipt of these documents, the public authority usually has to assess the completeness of the documents and, as the case may be, request missing documents.<sup>103</sup> In both the formal and the simplified procedure, the immission control authority will seek the opinion of all other specialist authorities affected by the project (sec. 10 subs. 5 sentence 1 Federal Immission Control Act). The reason for this is the installation-related concentrative effect (*Konzentrationswirkung*) of the permit under German immission control law,<sup>104</sup> which means that the immission control authority will also examine whether other permits, such as the building permit (*Baugenehmigung*), should be granted.<sup>105</sup> It is of particular practical relevance for the admissibility of the project under building law that the respective municipality on whose territory the wind energy installation(s) is (are) to be installed agrees (*Einvernehmen*) thereto (cf. sec. 36 BauGB, see subsection "location" above).

Section 10 subs. 3 BImSchG provides for public participation as an additional step in the formal procedure. This step is omitted in the simplified procedure. In order to enable public participation, the project is regularly announced in the official bulletin and on the internet or in local daily newspapers.<sup>106</sup> After the announcement, the application as well as the corresponding documents are to be made available for public inspection for one month.<sup>107</sup> Objections against the project can be lodged within

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<sup>101</sup> For these installations, this follows from sec. 2 subs. 1 lit. c 4<sup>th</sup> BImSchV.

<sup>102</sup> Sec. 7 subs. 1 and 2 UVPG (Environmental Impact Assessment Act) in conjunction with Annex 1 no. 1.6.1-2 UVPG.

<sup>103</sup> Sec. 7 subs. 1 of 9<sup>th</sup> BImSchV (Ordinance governing the permitting procedure).

<sup>104</sup> Sec. 13 BImSchG.

<sup>105</sup> The concentrative effect does, in particular, not extend to water law permits and authorisations.

<sup>106</sup> Sec. 10 subs. 3 sentence 1 BImSchG.

<sup>107</sup> Sec. 10 subs. 3 sentence 2 BImSchG.

up to two weeks after expiry of the inspection period.<sup>108</sup> It is at the discretion of the public authority whether a date will be fixed for public discussion afterwards.<sup>109</sup>

At the end of the application procedure, a permit will be issued on the basis of circumscribed power if all preconditions are met, which means that it is obligatory for the public authority to issue the permit if the stipulated preconditions are met. In the simplified procedure, this should be the case within three months, in the formal procedure within seven months after receipt of the complete application. In both cases, the public authority may extend the deadline by a further three months.<sup>110</sup>

Prior to 2021, there were no particular provisions applicable to the “repowering” of wind energy installations, i.e. the replacement of old wind energy installations with new installations<sup>111</sup>. Therefore, a new and full assessment had to be carried out in each case, not taking into account any existing load of the surrounding area resulting from the operation of the old wind energy installations stating that the law did not provide for “grandfathering of the load” (*Belastungsbestandsschutz*).<sup>112</sup>

Procedure	Level of Complexity
Permit-granting procedure	●●●●●

(● low → ●●●●● high)

#### 4) Information on the duration of the procedure

The duration of the procedure depends on various circumstances; it will take longer if an environmental impact assessment has to be carried out or if there are technical issues relating for instance to species protection and if the immission control authority requests further additional expert statements.

Permitting procedures for onshore wind energy installations with an environmental impact assessment have an average duration of 23 months, repowering projects an average duration of 18 months. The shortest average duration of a procedure at state level is 12.1 months, the longest 38.2 months.<sup>113</sup> However, it is to be noted that the procedure will only be deemed initiated when all evidence and expert opinions necessary according to the immission control authority have been submitted. It often

<sup>108</sup> Sec. 10 subs. 3 sentence 4 BImSchG; In some cases, the law provides for a deadline of one month for lodging objections.

<sup>109</sup> Sec. 10 subs. 6 BImSchG.

<sup>110</sup> Sec. 10 and 19 BImSchG.

<sup>111</sup> Böttcher/Faßbender/Waldhoff, *Erneuerbare Energien*, § 9. *Onshore-Windenergieanlagen* [Renewable energy sources, sec. 9. onshore wind energy installations], marg. no. 13.

<sup>112</sup> Higher Administrative Court (OVG) of Greifswald decision of 08/05/2018 – 3 M 22/16, *BeckRS 2018*, 19247, marg. no. 79 et seqq.

<sup>113</sup> Onshore Wind Energy Agency (FA Windenergie), *Dauer förmliche Genehmigungsverfahren (mit UVP-Pflicht) für Windenergieanlagen an Land* [Duration of formal permitting procedures (with an obligatory EIA) for onshore wind energy installations].



takes several additional years to get to this point in time. Permitting procedures without an environmental impact assessment took on average 16 months.<sup>114</sup> Legal proceedings are another factor delaying the installation of wind energy installations as a permit may not be used if an appeal was filed with suspensive effect against the approval of a wind energy installation.

Duration of procedure	
Installations without environmental impact assessment	●●● / ●●●● on average 16 months
Installations with environmental impact assessment	●●●● / ●●●●● on average 23 months

(● low → ●●●●● high)

## 5) Relevant obstacles

### a) Location

Not enough space is designated for wind energy installations. One of the reasons for this is the complexity of the criteria developed by case law. On the other hand, municipalities have also used their competences to “prevent wind energy installations under the guise of governance”<sup>115</sup> or as a mere “fig leaf” for planning<sup>116</sup>. The argument of visual obstruction restricts the choice of sites for wind energy installations.<sup>117</sup>

Moreover, there is a shortage of staff at the immission control authorities and other authorities involved in the approval procedure for wind energy installations.

### b) Substantive requirements under the Federal Immission Control Act

Immissions that primarily precluded the installation of wind energy installations were shading and reflections (affected, for example, weather radars)<sup>118</sup> or the issue of admissible vibrations (affected seismic monitoring). Furthermore, the assessment of sound immissions is subject to uncertainties as there is no fixed procedure for the forecasting of sound immissions.<sup>119</sup>

<sup>114</sup> Onshore Wind Energy Agency (FA Windenergie), Dauer und Kosten des Planungs- und Genehmigungsprozesses von Windenergieanlagen an Land [Duration and Costs of the planning and permitting procedures of onshore wind energy installations], p. 29.

<sup>115</sup> Administrative Court (VG) of Ansbach judgment of 02/03/2005 – AN 9 K 04.02028, *BeckRS 2005*, 36068, marg. no. 27.

<sup>116</sup> Federal Administrative Court (BVerwG) judgment of 17/12/2002 – 4 C 15/01, *NVwZ 2003*, 733, beck-online.

<sup>117</sup> See, for example, Administrative Court (VGH) of Munich judgment of 29/05/2009 – 22 B 08.1785, *ZUR 2009* issue 10, 497, beck-online.

<sup>118</sup> Onshore Wind Energy Agency (FA Windenergie), *Weterradar* [Weather radar] <https://www.fachagentur-windenergie.de/themen/radar-und-funkanlagen/weterradar/> accessed 22 March 2022.

<sup>119</sup> Federal Administrative Court (BVerwG) decision of 28/07/2022 – *NVwZ 2022*, 1634, marg. no. 14.

### c) Nature conservation law

Samples showed that species protection was the most frequent reason for the denial of permits for wind energy installations.<sup>120</sup> Potential claimants may, in particular, be environmental associations as they have a right to lodge an action which is enshrined in sec. 2 subs. 1 and sec. 3 subs. 1 Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz – UmwRG*).

In landscape protection areas, alterations are not completely forbidden. However, according to sec. 26 subs. 2 BNatSchG (in conjunction with the respective state law), all actions are forbidden that would alter the character of an area or which are not compatible with the purpose of its special protection. In the past, courts have repeatedly confirmed such an incompatibility with the purpose of special protection,<sup>121</sup> which meant that no permits were issued for the respective wind energy installations.

### d) Other building law

In terms of building law, one of the reasons for a permit not being issued for wind energy installations is that the competent municipality does not agree to the intended location.<sup>122</sup>

### e) Aviation and military security

Studies showed that the number of permits not granted due to reasons of aviation security (VHF omnidirectional range, VOR/DVOR) has indeed been decreasing, but is still considerable.<sup>123</sup> Further obstacles in the area of aviation are military interests, most frequently low-level flight routes of helicopters and the minimum altitude for military use.<sup>124</sup>

### f) Protection of historical monuments and sites

Since 2017, the protection of historical monuments and sites (*Denkmalschutz*) has repeatedly been mentioned as a reason for the rejection of a wind energy installation.<sup>125</sup> The main problem here is the fact that there are no specific provisions laying down what is to constitute an adverse effect of wind energy installations on historical monuments or sites.<sup>126</sup>

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<sup>120</sup> Tucci, F., *Hemmnisse beim Ausbau der Windenergie an Land* [Obstacles to the expansion of onshore wind energy].

<sup>121</sup> Administrative Court (VG) of Göttingen judgment of 17/04/2008 – 4 A 64/05, *BeckRS 2008*, 38791; Higher Administrative Court (OVG) of Münster decision of 13/03/2008 – 8 A 4583/06, *BeckRS 2008*, 39424.

<sup>122</sup> Tucci, F., *Hemmnisse beim Ausbau der Windenergie an Land* [Obstacles to the expansion of onshore wind energy], 13.

<sup>123</sup> German Wind Energy Association (BWE), *Umfrage: Luftverkehr und Windenergie* [Survey: aviation and wind energy], 5.

<sup>124</sup> BWE, *Umfrage: Luftverkehr und Windenergie* [Survey: aviation and wind energy] (Bundesverband WindEnergie 2022) 5.

<sup>125</sup> Franziska Tucci, *Hemmnisse beim Ausbau der Windenergie an Land* [Obstacles to the expansion of onshore wind energy], 13.

<sup>126</sup> Schmidt, M., Sailer, F., *Reformansätze zum Genehmigungsrecht von Windenergieanlagen* [Approaches to reform the law governing permits for wind energy installations], 38 et seq.

### **g) Legal protection**

Permits can be challenged by third parties if there is reason to believe that their rights are violated. Due to the long duration of legal proceedings, particularly given the three-tiered course of appeal (administrative court, higher administrative court, federal administrative court) it may well take several years to obtain a final and binding decision.

### **h) Scope of the assessment**

The number and scope of specialist investigations, especially regarding species protection law, has been mentioned over and over as particularly challenging.<sup>127</sup>

### **i) Procedural law**

An environmental impact assessment is one of the factors delaying a permitting procedure for wind energy installations. Furthermore, the collection of documents and expert opinions (if requested by the immission control authority) may take a considerable amount of time. The repeated requests for submission of additional documents by the authority cancel out the effectiveness of the statutorily defined decision deadlines; these additional documents cannot be challenged in isolation.<sup>128</sup> Moreover, the state of completeness which marks the starting point of the decision deadline is not clearly defined; it is at the discretion of the immission control authority.<sup>129</sup>

## **6) Evaluation of already adopted acceleration proposals**

Particularly in the last few years, the legislator addressed the challenges of expanding onshore wind energy. This was partially due to developments on the European level,<sup>130</sup> and partially due to general endeavours to move forward with the energy transition and comply with international climate goals.<sup>131</sup>

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<sup>127</sup> Schmidt, M., Sailer, F., *Reformansätze zum Genehmigungsrecht von Windenergieanlagen* [Approaches to reform the law governing permits for wind energy installations], 1.

<sup>128</sup> Dietlein in Landmann/Rohner (eds), *Umweltrecht* [Environmental law], marg. no. 57.

<sup>129</sup> Roscher, M., *Hintergrundpapier Vollständigkeit von Genehmigungsanträgen* [Background paper completeness of permit applications], 17 et seq.

<sup>130</sup> For instance, the European Union Directive on the Promotion of the Use of Energy from Renewable Sources (RED II) set a binding target for 2030 for the EU accompanied by individual targets for each MS that MS need to fulfill.

<sup>131</sup> German Bundestag, Entwurf eines Gesetzes zur Erhöhung und Beschleunigung des Ausbaus von Windenergieanlagen an Land [Draft law to increase and accelerate the expansion of onshore wind energy installations] (Bundestag printed paper 20/2355 2022) 1.

## a) Procedural law

To shorten waiting times for opinions of the specialist authorities,<sup>132</sup> the legislator has added a provision to the Federal Immission Control Act according to which it is presumed that an involved public authority does not wish to submit an opinion if it fails to respond within a period of one month. A decision is then made based on the factual and legal situation at that point in time.

With regard to repowering, the Federal Immission Control Act reduced the regulatory assessment programme to the additional adverse effects caused by the new installation. In addition, the permit for the repowering of up to 19 wind energy installations is granted in a simplified procedure.

## b) Location

As of 2023, a Wind Energy Area Act (*Windenergieflächenbedarfsgesetz – WindBG*) applies, which sets out binding proportions of land per federal state that must be designated for wind energy installations. However, its implementation takes place in two steps and does not have to take place until 2027 or 2032. In 2027, all federal states are required to designate the first part of the proportion that they are required to designate for wind energy installation. This is then followed by the second step in 2032, when the total proportion of land has to be designated. Furthermore, the classification of renewable energy sources as being in the “outstanding public interest” and the qualification of renewable energy sources as a priority concern in the weighing of protected interests (cf. sec. 2 Renewable Energy Sources Act (*Erneuerbare-Energien-Gesetz – EEG* 2023)) is intended to have a steering effect. The legislator hopes that this will, among other things, reduce the amount of justification required by the public authorities and thus save time in the approval procedure.<sup>133</sup> In addition, a regulation in the Federal Building Code which has been passed but has not yet come into force, is intended to ensure that a visual obstruction is generally not deemed to exist in case of a distance of 300 metres.

## c) Nature conservation law

A standardised test was introduced in species protection law for certain breeding bird species, which is based on certain distances (sec. 45b BNatSchG). However, it cannot be excluded that the

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<sup>132</sup> German Bundestag, *Beschlussempfehlung und Bericht des Ausschusses für Umwelt, Naturschutz und nukleare Sicherheit zu dem Gesetzesentwurf der Bundesregierung – Drucksache 19/27672 – Entwurf eines Gesetzes zur Umsetzung von Vorgaben der Richtlinie (EU) 2018/2001 des Europäischen Parlaments und des Rates vom 11. Dezember 2018 zur Förderung der Nutzung von Energie aus erneuerbaren Quellen Neufassung) für Zulassungsverfahren nach dem Bundes-Immissionsschutzgesetz, dem Wasserhaushaltsgesetz und dem Bundeswasserstraßengesetz* [Recommendation and report of the Committee on the Environment, Nature Conservation and Nuclear Safety on the draft act on the implementation of requirements of Directive (EU) 2018/2001 for approval procedures under the Federal Immission Control Act, the Federal Water Act and the Federal Waterways Act] (Bundestag Printed Paper 19/30954 2021) 11.

<sup>133</sup> Schlacke et al. *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?* [Accelerating the energy transition: introduction of a new paradigm by the Easter Package?], *NVwZ* 2022, 1577.

possibilities of disproving the legal presumptions reduce the acceleration potential in individual cases.<sup>134</sup> In addition, it remains to be clarified whether the designation of certain protected species satisfies the ECJ's *Skydda Skogen* judgment since from the ECJ's point of view, protection under the Birds Directive is not limited to species listed in Annex I thereto.<sup>135</sup>

From 01/02/2023, wind energy installations, including ancillary installations, may also be installed and operated in a landscape conservation area if they are located in a wind energy area (*Windenergiegebiet*) unless the areas are located in a Natura 2000 site.<sup>136</sup>

#### **d) Legal protection**

Since 2020, an objection and rescissory action by a third party against the approval of a wind energy installation under immission control law have had no suspensive effect. This means that even if a decision granting a permit is challenged in court, the permit can be used. However, this does not apply if the suspensive effect is ordered in summary proceedings. In addition, at the end of 2020, the Higher Administrative Court was given first-instance jurisdiction for the erection of wind energy installations requiring a permit under immission control law. This shortens the course of appeal and accelerates the court decision.

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<sup>134</sup> Schlacke et al. *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?* (NVwZ 2022, 1577) [Accelerating the energy transition: introduction of a new paradigm by the Easter Package?].

<sup>135</sup> European Court of Justice (ECJ) judgement of 04/03/2021 – Cases C-473/19 and C-474/19, *ZUR* 2021, 292, marg. no. 31 et seqq.

<sup>136</sup> Sec. 26 subs. 3 BNatSchG (new version).

Proposal	Complexity	Effectiveness
Procedural law: Statement public authority	●●●	●●●●
Procedural law: Repowering	●●●	●●●●
Location	●●●●●	●●●●●
Nature conservation law	●●●●●	●●
Legal protection (suspensive effect)	●●●	●●●
Legal protection (course of appeal)	●	●●●●

(● low → ●●●●● high)

### III. Solar

#### 1) Executive summary

- The approval requirements for rooftop solar installations are moderate, special interests, in particular the protection of historical monuments and sites (*Denkmalschutz*), may increase the complexity.
- The approval of ground-mounted solar installations usually requires comprehensive land use planning procedures (*Bauleitplanverfahren*) as a first step, which require the draft of two independent plans (with coordinated content), i.e. a development plan (*Bebauungsplan*) for legalizing a project in terms of planning law and a preparatory land use plan (*Flächennutzungsplan*). Privileges are available to a certain extent but are not yet common.
- The drafting of comprehensive land use plans (*Bauleitpläne*) is often complex and time-consuming.
- Statutory approaches to optimise/accelerate the procedures are partly in place or currently being developed.

#### 2) Brief description of permit-granting procedure

The approval of rooftop solar installations and ground-mounted solar installations, regardless of its "size", respectively its installed capacity, is subject to the building regulations (*Bauordnungen*) of the federal states. Hence, regarding permitting under German building law, it does not matter whether a rooftop solar installation has a capacity of 100 kW or 1 MW, is planned by a company or a private person. In particular, these regulations provide for an assessment of the admissibility of such installations under construction and planning law as well as an assessment of other public law requirements.

Rooftop solar installations have to meet the approval requirements stipulated in the building regulations of the respective federal states. They are usually exempt from a building regulation procedure.

Despite such an exemption, rooftop solar installations remain subject to the requirements under public law and the authority of the building supervision (*Bauaufsicht*) remains unaffected. The installation owner is responsible for ensuring that the requirements are met. There are rarely any obstacles in terms of construction and planning law. In particular, rooftop solar installations installed on buildings in undesignated outlying areas (areas with no development plan located outside of a municipality – *Außenbereich*) that are used in an admissible manner can be privileged if they are structurally subordinate to the building<sup>137</sup>. In addition, there may be additional permit requirements under specialist law, particularly regarding the protection of historical monuments and sites. As rooftop solar installations are exempt from a building regulation procedure, separate permits may have to be obtained.

Besides the approval under the building regulation of the respective federal state, the approval requirements under construction and planning law pursuant to sec. 29 et seqq. BauGB are relevant for ground-mounted solar installations. Ground-mounted solar installations also have to meet the approval requirements stipulated in the building regulations of the respective federal states. These state-specific regulations are based on the Model Building Regulation (*Musterbauordnung*) of the Conference of the Building Ministers (*Bauministerkonferenz*) and are similar to each other in their main principles. Ground-mounted solar installations may be approved in standard or simplified building permit procedures (*Baugenehmigungsverfahren*). Ground-mounted solar installations within the scope of application of a development plan (*Bebauungsplan*) may also be approved in a permit exemption procedure (*Genehmigungsfreistellungsverfahren*). In Bavaria, ground-mounted solar installations are exempt from a building regulation procedure if the respective installation complies with the statute (*Satzung*) of the respective municipality.

As ground-mounted solar installations require a large amount of land, they are usually installed in undesignated outlying areas within the meaning of building law. Within these areas, they are only admissible if they qualify as privileged projects<sup>138</sup> or as other projects in undesignated outlying areas<sup>139</sup>. In most cases, ground-mounted solar installations do not or only to a limited extent meet these requirements, e.g., as a serving project belonging to an agricultural or forestry business (sec. 35 subs. 1 no. 1 BauGB) or a market gardening business (sec. 35 subs. 1 no. 2 BauGB). A privileged status pursuant to sec. 35 subs. 1 no. 1 BauGB also requires that the ground-mounted solar installation only covers a minor part of the operating area. Usually, a privileged status is accorded only to small and medium-sized ground-mounted solar installations attached to such businesses that use at least part of the electricity generated by these installations. Agrivoltaic installations are a special case, as the solar panels produce electricity and also serve an agricultural, forestry or market-gardening purpose.

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<sup>137</sup> Cf. sec. 35 subs. 1 no. 8 BauGB.

<sup>138</sup> Pursuant to sec. 35 subs. 1 nos. 1 to 8 BauGB.

<sup>139</sup> Pursuant to sec. 35 subs. 2 BauGB.

Irrespective of the operational use of electricity, such purpose of special protection can establish the “serving function” as required for the privileged status within the above meaning.

If the requirements for the privileged status<sup>140</sup> are not met, ground-mounted solar installations may, in individual cases, be admissible under construction and planning law.<sup>141</sup> However, this requires that the implementation or use of a project does not affect any public interests.

Due to the strict approval requirements in undesignated outlying areas, the construction and planning law admissibility of ground-mounted solar installations is usually ensured by drafting a development plan<sup>142</sup>. Development plans are drafted by cities, towns and municipalities within the framework of their planning sovereignty in the form of municipal statutes. Development plans are drafted in a formalised procedure. The main procedural steps include: the determination and evaluation of relevant public and private interests regarding the ground-mounted solar installation,<sup>143</sup> the conduct of an environmental impact assessment,<sup>144</sup> the drafting of the plan drawing and reasoning including an environmental report,<sup>145</sup> public participation at an early stage and a formal public participation stage,<sup>146</sup> the early and formal notification of authorities and other public bodies (*Träger öffentlicher Belange*), each linked to providing them with the possibility of submitting a statement,<sup>147</sup> the fair weighing of public and private interests relevant to the planning,<sup>148</sup> the municipality’s resolution on the development plan as a statute<sup>149</sup> and the customary announcement to enforce the development plan as a municipal statute.<sup>150</sup>

Development plans have to be adapted to the objectives of spatial planning (*Raumordnung*) and, generally, have to be developed on the basis of a land use plan (*Flächennutzungsplan*). Therefore, the land use plan is usually amended in parallel proceedings (*Parallelverfahren*) simultaneously with the development plan. Land use plans and development plans which, as an exception, are not developed on the basis of a land use plan are subject to approval by the higher administrative authority competent under the provisions at state level.<sup>151</sup>

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<sup>140</sup> Pursuant to sec. 35 subs. 1 BauGB.

<sup>141</sup> Pursuant to sec. 35 subs. 2 BauGB.

<sup>142</sup> Cf. sec. 30 BauGB.

<sup>143</sup> Cf. sec. 2 subs. 3 BauGB.

<sup>144</sup> Cf. sec. 2 subs. 4 BauGB.

<sup>145</sup> Cf. sec. 2a BauGB.

<sup>146</sup> Cf. sec. 3 subs. 1 and 2 BauGB.

<sup>147</sup> Cf. sec. 4 subs. 1 and 2 BauGB.

<sup>148</sup> Cf. sec. 1 subs. 7 BauGB.

<sup>149</sup> Cf. sec. 10 subs. 1 BauGB.

<sup>150</sup> Cf. sec. 10 subs. 3 BauGB.

<sup>151</sup> Cf. sec. 10 subs. 2 BauGB.



Procedure	Level of complexity
Approval of rooftop solar installations	● / ●●●
Drafting of comprehensive land use plans for ground-mounted solar installations	●●●● / ●●●●●
Approval of ground-mounted solar installations on the basis of a development plan	● / ●●
Approval of ground-mounted solar installations without an existing development plan for privileged installations	●●●● / ●●●●●

(● low → ●●●●● high)

### 3) Information on the duration of the procedure, evaluation

For privileged ground-mounted solar installations or ground-mounted solar installations that are admissible in individual cases as other outlying area projects under construction and planning law, the granting of an approval in the building regulation procedure is sufficient. However, such approvals are still the exception and not the rule, leaving little empirical data on the duration of the approval procedures. The duration of approval procedures is highly case-specific. Determining and evaluating the relevant public interests is time-consuming, particularly in regard to an assessment of the adverse effects of a project and compensation measures under nature conservation law (*naturschutzfachliche Eingriffsbilanzierung*) and species protection. For this purpose, long-term surveys are usually required, which should at least cover a full breeding/vegetation period. Other time-consuming procedural stages include coordination with other public authorities, inspections of the documents proving that the installation complies with structural building requirements or the engagement of neighbouring parties or the public. As a result, building permit procedures can take up to twelve months or longer, depending on the quality and completeness of the application documents. Some federal states have stipulated specifications on the maximum duration of standard building permit procedures. Simplified building permit procedures are usually subject to shorter deadlines upon expiry of which the respective installation is deemed approved. These deadlines tend to be in the range of about three months. For the official start of the procedure, the application must be submitted in the correct form and include all application documents. Permit exemptions require an existing development plan and do not apply to privileged projects with no development plan.

If the requirements<sup>152</sup> are not met, the drafting of a development plan is mandatory prior to the approval procedure. The duration of the comprehensive land use plan procedure extends the overall time needed to implement a ground-mounted solar installation. The implementation of procedures is a matter of municipal planning sovereignty. There are no official statistical surveys on the duration

<sup>152</sup> Cf. according to sec. 35 BauGB.

of comprehensive land use planning procedures for ground-mounted solar installations. Based on our experience, the average duration of the procedure for drafting comprehensive land use plans for solar installations (*solare Bauleitpläne*) is about 1.5 to 2.5 years. There may be shorter procedures with a duration of approximately 10 months or longer procedures with a duration of over 2.5 years.

Based on our experience, lawsuits against solar development plans (*solare Bebauungspläne*) are unusual. The low number of lawsuits can be traced back to the regulations on the preservation of comprehensive land use plans.<sup>153</sup> According to these sections, only certain procedural and formal flaws are significant for the legal validity of such plans. In addition, comprehensive land use plans can also be brought into force retrospectively through a supplementary procedure to rectify flaws.<sup>154</sup> Even material flaws may be regarded as immaterial after one year following the date of publication.<sup>155</sup> This does not apply to perpetual flaws (*Ewigkeitsfehler*) (e.g., missing resolutions or announcements).

Duration of procedure <sup>156</sup>	
Approval of rooftop solar installations	● / ●●●●
Comprehensive land use plan	●●●● - ●●●●●●
Approval of ground-mounted solar installations on the basis of a development plan	● - ●●
Approval of ground-mounted solar installations on the basis of a privilege without an existing development plan	●●● - ●●●●●

(● low → ●●●●● high)

**4) Presentation of the relevant obstacles, both from procedural and from substantive law**

**a) Substantive law**

The possibilities for obtaining privileges for ground mounted solar installations<sup>157</sup> have so far essentially been limited to “serving” ground-mounted solar installations<sup>158</sup>, which must be subordinate to

<sup>153</sup> Cf. sec. 214 et seq. BauGB.

<sup>154</sup> Cf. sec. 214 subs. 4 BauGB.

<sup>155</sup> Cf. sec. 215 BauGB.

<sup>156</sup> There are no official statistical surveys on the duration of land use planning procedures. The size/capacity of a solar installation may increase the complexity of the proceedings, because a bigger installation may cause more intense conflicts with other public or private issues which have to be solved. In general, the size/capacity is not a relevant factor (yet) in order to determine the necessity to set up a land-use plan.

<sup>157</sup> Under sec. 35 subs. 1 BauGB.

<sup>158</sup> Within the meaning of sec. 35 subs. 1 nos. 1 and 2 BauGB.

another project. This results in significant restrictions in terms of the installation size, locations, and use of electricity. For agrivoltaic installations, such restrictions apply to a lesser extent.

Therefore, the drafting of comprehensive land use plans prior to the approval of installations is a common approach. The relevant public and private interests must be determined and evaluated during the drafting of the plan. This is a time-consuming and complex task, particularly in terms of environmental interests, e.g., regarding the assessment of the adverse effects of a project and compensation measures under nature conservation law or species protection. Conflicts in planning between the ground-mounted solar installations and other interests can be resolved by weighing them up (exceptions include species protection), though the requirement for (priority) conflict resolution is a necessary element of a fair weighing up. Conflict resolution may lead to delays in the drafting of development plans. In addition, conflicting spatial planning objectives can also lead to considerable obstacles, particularly as a result of priority areas designated for agriculture or other uses. Such objectives under planning law can have an exclusion effect on ground-mounted solar installations, which can usually only be solved using deviation procedures (*Zielabweichungsverfahren*).

## **b) Procedural issues**

The main procedural obstacles consist in the drafting process of comprehensive land-use plans and the different approval practices for ground-mounted solar installations under state law.

The municipalities have planning sovereignty. Municipalities decide on the drafting of comprehensive land use plans. There is no obligation to initiate procedures. If there are several potential ground-mounted solar installation sites in the territory of municipality area, the choice and decision for a specific ground-mounted solar project may already pose an obstacle. The procedures for drafting comprehensive land use plans are highly formalised and time-consuming, in particular due to the required resolutions of the municipal councils, the envisaged participation of the public and the authorities or other public bodies. The fact that the municipal councils hold their regular meetings only a few times per year (only once per quarter) frequently causes delays. The conduct of an environmental impact assessment is also time-consuming due to the necessary collection of data. The fact that the land use plan is subject to a permitting requirement may lead to further delays. Due to the development requirement stipulated,<sup>159</sup> a development plan is usually only implemented after the permit for the land use plan has been issued. The decision on the permit is to be made within three months, although the time limit may be extended by up to three further months.<sup>160</sup> A permit is deemed granted if it is not refused within the specified time limit, stating the reasons for such refusal.

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<sup>159</sup> Under sec. 8 subs. 2 BauGB.

<sup>160</sup> Cf. sec. 6 subs. 4 BauGB.

Even though the approval procedures for ground-mounted solar installations in the building regulations of the federal states are similar, they are applied differently. In Bavaria, ground-mounted solar installations within the scope of development plans are exempt from a building regulation procedure if they comply with the statute of the respective municipality; however, similar ground-mounted solar installations, for example in Brandenburg, are subject to standard building permit procedures. Two authorities assessing the same issue and the repeated involvement of authorities are considered obstacles that prolong the procedure. Permit exemptions and, respectively, a statutory exemption from a building regulation procedure is more efficient in terms of time. However, they increase the individual responsibility of installation owners.

The approval of ground-mounted solar installations on the basis of a privileged status without a development plan is also granted by the building permit authorities. The approval requirements are to be examined exclusively in the respective procedures. This makes the approval procedures even more complex.

## 5) Evaluation of already adopted acceleration proposals

Following the introduction of **sec. 2 Renewable Energy Sources Act EEG (2023)** in the context of the Easter Package, the construction and operation of renewable energy installations “are in the overriding public interest and serve public security. Renewable energy sources are to be given priority in the respective weighing of protected interests (*Schutzgüter*) until electricity generation in Germany is almost carbon neutral.” It is to be expected that ground-mounted solar installations will prevail against other interests. Nevertheless, this provision will not be able to replace the proper determination and evaluation of the interests affected in the individual case. This time-consuming procedural step will still have to be carried out. In addition (and as a priority), conflicts are still to be settled in the context of planning.

As introduced by the “Act on the immediate improvement of framework conditions for renewables in urban development law” (*Gesetz zur sofortigen Verbesserung der Rahmenbedingungen für die erneuerbaren Energien im Städtebaurecht*), sec. 35 subs. 1 no. 8 lit. b) BauGB creates an explicit privilege for ground-mounted solar installations (200-metre corridor alongside motorways and railways of the superordinate network (*übergeordnetes Netz*) within the meaning of sec. 2b General Railway Act (*Allgemeines Eisenbahngesetz* – AEG) with at least two main tracks) so that no comprehensive land use planning is required for these ground-mounted solar installations. For other ground-mounted solar installations there is still the narrow possibility of obtaining a privileged status as a project serving an agricultural or forestry business.<sup>161</sup> Otherwise, comprehensive land use planning procedures must continue to be carried out to create the conditions for approval under construction and planning law. The introduction of an explicit privilege for certain ground-mounted solar installations is a fundamental

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<sup>161</sup> Within the meaning of sec. 35 subs. 1 no. 1 or no. 2 BauGB.

change to the system. The law also introduces a privilege for ground-mounted solar installations to be installed on former opencast lignite mines.<sup>162</sup>

The draft act on strengthening digitalisation in the comprehensive land use planning procedure and amending other provisions (*Entwurf eines Gesetzes zur Stärkung der Digitalisierung im Bauleitplanverfahren und zur Änderung weiterer Vorschriften*) is intended to accelerate the drafting of comprehensive land use plans. The draft act proposes, among other things, changing the formal participation procedure to a digital standard and optimising participation in the amendment of draft plans. In addition, approval periods for land use plans and development plans which do not derive from a land use plan are to be shortened by one month. Shorter deadlines would be appreciated. The other procedural changes take technical developments and the increased use of digital communication into account. Whether this act will lead to a significant acceleration of procedures is yet to be seen.

The second act amending the Federal Spatial Planning Act and other provisions (*Zweites Gesetzes zur Änderung des Raumordnungsgesetzes und anderer Vorschriften*) is intended, among other things, to simplify the implementation of deviation procedures. This provides great opportunities for resolving conflicts between ground-mounted solar installations and agricultural or other priority areas. In addition, a new version of sec. 15 of the Federal Spatial Planning Act (*Raumordnungsgesetz – ROG*) is intended to introduce a more streamlined spatial impact assessment. The granting of an accelerated approval of ground-mounted solar installations depends on whether a spatial impact assessment is required for the individual case. This is dealt with very differently across the federal states, depending on the size of the area, which shall be used for a solar project in hectares.

Proposals	Complexity	Effectiveness	Reduction of duration
Introduction of sec. 2 Renewable Energy Sources Act (EEG)	●●	●●●●● - ●●●●●●	●●●●● - ●●●●●●
<i>Gesetz zur sofortigen Verbesserung der Rahmenbedingungen für die erneuerbaren Energien im Städtebaurecht</i> [Act on the immediate improvement of framework conditions for renewables in urban development law]	●●●	●●●● - ●●●●●	●●● - ●●●●

<sup>162</sup> Cf. sec. 249b subs. 2 BauGB.

Proposals	Complexity	Effectiveness	Reduction of duration
<i>Entwurf eines Gesetzes zur Stärkung der Digitalisierung im Bauleitplanverfahren und zur Änderung weiterer Vorschriften</i> [Draft act on strengthening digitalisation in the comprehensive land use planning procedure and amending other provisions]	●● - ●●●	●●●	●●
<i>Zweites Gesetzes zur Änderung des Raumordnungsgesetzes und anderer Vorschriften</i> [Second act amending the Federal Spatial Planning Act and other provisions]	●●●	●●● - ●●●●	●● - ●●●

(● low → ●●●●● high)

#### IV. Geothermal

##### 1) Executive summary

- For geothermal multi-stage and very complex approval procedure under mining law are applicable.
- There is no concentrative effect (*Konzentrationswirkung*) of the approval procedure under mining law: building permit (*Baugenehmigung*). A water law permit (*wasserrechtliche Erlaubnis*) additionally required.
- A newly adopted provision in mining law aims to accelerate the procedure.
- The Federal Government recently announced the promotion and accelerated expansion of geothermal energy for the purpose of heat supply.

##### 2) Brief description permit-granting procedure

###### a) Overview

The approval of geothermal projects requires various permitting procedures.

The most important one is the multi-stage approval procedure under mining law in accordance with the BBergG. This procedure requires several permits. For drillings to depths of 1,000 metres or more,

it is also necessary to carry out a planning approval procedure (*Planfeststellungsverfahren*) (including an environmental impact assessment and a spatial planning procedure (*Raumordnungsverfahren*) in which the compliance of the project with the requirements of regional policy is assessed (*Raumverträglichkeit*)). Since the approval procedure under mining law does not have a concentrative effect, a separate water law permit pursuant to the WHG and, respectively, the water acts of the federal states is generally required for the use of groundwater. The mining authority of the federal state in whose territory the project is to be realised is responsible for both the approval procedure under mining law and the water law permit. The latter must be granted in agreement (*Einvernehmen*) with the water authority. In addition, a building permit to be granted by the competent building authority is required for installations located above ground, such as the geothermal power plant.

## **b) Approval procedure under mining law**

The approval procedure comprises two stages: the exploration stage, in which the project developer is granted the right to explore the natural resources (geothermal energy) in a specific area (*Bewilligungsfeld*), and the extraction stage, in which the project developer extracts the geothermal energy and operates geothermal power plants in the long term. Geothermal energy is classified as a free-to-mine natural resource (*bergfreier Bodenschatz*) and as such it is not covered by the legal status of ownership of the land in which it is found and from which it is extracted. As a result, a mining licence (exploration licence <sup>163</sup>and, respectively, an extraction licence <sup>164</sup>is necessary for both the exploration and extraction of geothermal energy.

The specific steps associated with the exploration and extraction in the form of operating plans are reviewed and approved by the mining authorities involving other affected authorities. Operating plans constitute independent administrative acts approved upon written application by the project developer. The mining authorities have no discretion in this context, i.e. the project developer is legally entitled to being granted a permit unless there are statutory grounds for refusal.

For certain geothermal projects (drilling to depths of 1,000 metres or more in nature conservation areas or bird sanctuaries or drilling involving rock fracturing under hydraulic pressure), a planning approval procedure<sup>165</sup> replaces the operating plan approval. The planning approval procedure includes an environmental impact assessment with participation of the public and authorities, prior to which a spatial planning procedure is to be carried out by the competent federal state.<sup>166</sup> In such case, the project developer must also submit a long-term framework operating plan (*Rahmenbetriebsplan*).<sup>167</sup>

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<sup>163</sup> Pursuant to sec. 7 BBergG.

<sup>164</sup> Pursuant to sec. 8 BBergG.

<sup>165</sup> Sec. 57c BBergG in conjunction with sec. 1 Ordinance on the Environmental Impact Assessment of Mining Projects (*UVP-V Bergbau*) and sec. 57a BBergG.

<sup>166</sup> Sec. 15 Spatial Planning Act (ROG) in conjunction with sec. 1 no. 16 Spatial Planning Ordinance (RoV).

<sup>167</sup> Sec. 52 subs. 2a BBergG.

The project developer must file with the mining authorities a detailed work programme to demonstrate that the planned exploratory operations are adequate with regard to type, scope and purpose, and will be executed within a suitable timeframe. Furthermore, the financial viability of the project must be proven.

In addition, the mining authorities examine whether the geothermal project adversely affects other public interests, such as nature conservation and immission control, military interests or spatial planning and groundwater protection. The project developer must present the scope, technical implementation, and duration of the project in detailed operating plans. In accordance with sec. 21 subs. 2 of the Repository Site Selection Act (*Standortauswahlgesetz – StandAG*), the mining authority assesses in agreement with the Federal Office for the Safety of Nuclear Waste Management (*Bundesamt für die Sicherheit der nuklearen Entsorgung – BASE*) whether the geothermal project could adversely affect an area that may be considered an adequate site for the final disposal of radioactive waste.

### c) Additional permits

Since a geothermal project usually involves the use of groundwater, a specific water law permit is required.<sup>168</sup> This permit is granted by the mining authority in agreement with the water authority in a separate approval procedure.<sup>169</sup> In contrast to permits under mining law, the mining authorities have discretionary power regarding the granting of water law permits. In practice, it is particularly relevant whether the geothermal installation presents a hazard to the drinking water.

For installations located above ground, such as the geothermal power plant, which feed the geothermal heat into the district heating network or convert it into electricity (these activities do not fall within the scope of extraction under mining law), a building permit is required. This building permit is granted by the building authority in a separate permitting procedure in accordance with the building regulations of the federal states. If geothermal installations are built in the undesignated outlying area (*Außenbereich*) located outside of a municipality with no legally binding development plan (*Bebauungsplan*), the admissibility of the project may prove difficult and is a case-by-case decision, since geothermal installations are not privileged by law in undesignated outlying areas. However, authorities and courts often recognise geothermal installations as local businesses (*ortsgebundene Betriebe*) of the public heat or power supply according to sec. 35 subs. 1 no. 3 of the BauGB.<sup>170</sup> In addition, a geothermal project must comply with the requirements of sections 22 et seqq. BImSchG, even though a permit according to BImSchG is not required for geothermal installations.

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<sup>168</sup> Sec. 8 subs. 1, sec. 2 subs. 1 sentence 1 no. 3, sec. 9 subs. 1 nos. 2, 4, 5 WHG.

<sup>169</sup> Sec. 19 subs. 2 WHG.

<sup>170</sup> Sec. 35 subs. 1 no. 3 BauGB; Federal Administrative Court (BVerwG), judgment of 16/06/1994 – 4 C 20.93, NVwZ 1995, 64.



Procedure	Level of complexity
Permit-granting procedure	●●●●●
Planning approval procedure	●●●●●

(● low → ●●●●● high)

### 3) Information on the duration of the procedure, evaluation

- The entire permitting procedure takes on average 5 years.
- The project implementation period is 5 to 7 years, with about half of the time being required for site identification and geoscientific investigations.<sup>171</sup>

### 4) Presentation of the relevant obstacles, both from procedural and from substantive law

#### a) Substantive law

- No admissibility of multiple geothermal projects at the same site at different depths
  - According to mining law, it is not possible to divide a site-specific permit for deep geothermal projects into different depths assigned to different purposes. Therefore, geothermal energy may not be used by different operators in different depth horizons, e.g., on the one hand for electricity generation and on the other hand for heat supply purposes. As a result, there is no possibility of efficiently exploiting geothermal energy at a specific site.<sup>172</sup>
- No statutorily privileged status according to the BauGB in undesignated outlying areas
  - Authorities and courts frequently recognise a privileged status of geothermal installations as “local businesses of the public heat or power supply” within the meaning of sec. 35 subs. 1 no. 3 BauGB. Nevertheless, the examination and discussion in individual cases often leads to delays, especially if the authorities involved in the approval procedure hold different legal opinions.<sup>173</sup>

<sup>171</sup> Cf. *Bericht der Bundesregierung über ein Konzept zur Förderung, Entwicklung und Markteinführung von geothermischer Stromerzeugung und Wärmenutzung* [Report of the Federal Government on a concept for the promotion, development and market introduction of geothermal electricity generation and heat utilisation] of 14/05/2009, Bundestag Printed Paper 16/13128, 7.

<sup>172</sup> Report of the Federal Government on geothermal electricity generation, Bundestag Printed Paper 16/13128, 16; Große, ZUR 2009, 535.

<sup>173</sup> Report of the Federal Government on geothermal energy, Bundestag Printed Paper 16/13128, 16; Bundesverband Geothermie *Update Genehmigungsrecht* [update of the German Geothermal Association (BVG) on the law governing permits] of 23/09/2022, 5.

- **Low acceptance by the public** (concerns about earthquakes, subsidence of buildings) can lead to an increased number of lawsuits against geothermal projects and thus to procedural delays.
- Very high technical, geological and economic risks
  - Compared to other renewable energy projects, geothermal projects entail a very high investment risk even before the start of the approval procedure.

#### **b) Procedural issues**

Prolongation of the procedure may occur due to an environmental impact assessment or any preliminary assessment relating thereto.

#### **5) Evaluation of already adopted acceleration proposals**

##### **Geological Data Act (*Geologiedatengesetz – GeolDG*) of 2020**

Access to geological data (e.g., geological layers, temperature conditions) can significantly facilitate the planning of geothermal projects and reduce the risk of discovery and damage from drilling<sup>174</sup>. The Geological Data Act, which came into force in 2020, obliges authorities to secure geological data that have been obtained in the context of a commercial activity and make them publicly available after certain deadlines.

**Evaluation of the new regulation:** It is controversial whether the current regulation complies with constitutional law.<sup>175</sup> In addition, there is no nationwide database so far.<sup>176</sup>

##### **Act amending the Federal Mining Act (BBergG) and amending the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung – VwGO*) of 14 June 2021**

The Act primarily serves to accelerate the repurposing of opencast lignite mines due to the decision to phase out coal by 2038 and provides procedural privileges for the rapid cessation of coal mining operations. Moreover, the Act serves to implement the procedural requirements of the RED II on the promotion of the use of energy from renewable sources within the scope of the Federal Mining Act and thus geothermal energy. The Act provides for the following new regulations:

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<sup>174</sup> Federal Ministry for Economic Affairs and Climate Action (BMWK), *Eckpunktepapier für eine Erdwärmekampagne – Geothermie für die Wärmewende* [Key elements paper for a campaign promoting geothermal energy for the heat transition] of 11/11/2022; Bundesverband Geothermie *Update Genehmigungsrecht* [Update of the German Geothermal Association (BVG) on the law governing permits] of 23/09/2022, 20 et seq.

<sup>175</sup> Administrative Court (VG) of Mainz, decision of 16/11/2022, 4 L 383/22.MZ.

<sup>176</sup> BMWK, *Eckpunktepapier* [Key elements paper] of 11/11/2022.

- Longer term of the main operating plan (up to 4 years) is possible if the operating process of the geothermal project is foreseeable and not dynamic.<sup>177</sup>
- Establishment of a “single management body” (*einheitliche Stelle*) to coordinate the approval procedure for operating plans at the extraction stage – for renewable energy projects only<sup>178</sup>
  - Single management body according to sections 71a to 71e Administrative Procedure Act (*Verwaltungsverfahrensgesetz – VwVfG*)
  - The single management body provides a procedure manual and draws up a timetable.
- Decision deadlines for mining authorities in the case of geothermal projects for power generation

**Evaluation of the new regulations:** Some procedural privileges of the Act (e.g., jurisdiction of higher administrative courts (*Oberverwaltungsgericht – OVG*) in the first instance; statutorily enshrined longer terms for operating plans) apply only to the cessation of opencast lignite mining and not to geothermal projects.

The scope of sec. 57e Federal Mining Act does not include the exploration stage and the granting of mining permits. Therefore, the new regulation does not lead to a relevant simplification of the entire approval procedure.<sup>179</sup>

The decision deadlines do not apply to geothermal installations serving the heat supply, although geothermal energy has high potential precisely for heat generation and is to be promoted in this regard.<sup>180</sup>

Moreover, sec. 57a Federal Mining Act does not streamline the procedure so that the procedure as a whole is not shortened.<sup>181</sup>

Proposals	Complexity	Effectiveness
Longer term of the main operating plan	●	●●●

<sup>177</sup> Sec. 52 subs. 1 sentences 3 to 5 BBergG.

<sup>178</sup> Sec. 57e BBergG.

<sup>179</sup> Statement of the German Geothermal Association (BVG) on the Federal Government’s draft act amending the BBergG and VwGO, version of 23/02/2021.

<sup>180</sup> Federal Ministry for Economic Affairs and Climate Action (BMWK), *Eckpunktepapier für eine Erdwärmekampagne – Geothermie für die Wärmewende* [Key elements paper for a campaign promoting geothermal energy for the heat transition] of 11/11/2022; Bundesverband Geothermie *Update Genehmigungsrecht* [Update of the German Geothermal Association (BVG) on the law governing permits] of 23/09/2022, 10.

<sup>181</sup> Statement of the German Geothermal Association (BVG) on the Federal Government’s draft act amending the BBergG and VwGO [in German only], version of 23/02/2021.

## V. Electrolysers

### 1) Executive summary

- The permit is usually granted in a procedure involving public participation under the BImSchG).
- The permit procedure remains the same regardless of the size and emission potential of installations. Particularly for smaller installations, this proves to be an obstacle.
- The provisions for determining an admissible location should be improved.

### 2) Brief description permit-granting procedure

The law governing approval and permits for installations provides for a choice:

If requested by the project developer, electrolysers can be approved via a planning approval procedure (*Planfeststellungsverfahren*).<sup>182</sup> In the planning approval procedure, all authorities affected in their area of responsibility and the public are involved. The planning approval procedure encompasses the assessment of the provisions to be complied with regarding the approval of the electrolyser.

Alternatively, an approval according to the immission control law procedure (*immissionsschutzrechtliches Verfahren*) can be taken into consideration if hydrogen production is "on an industrial scale".<sup>183</sup> When an electrolyser constitutes production "on an industrial scale" cannot be judged with certainty from a legal point of view. There is no clear definition of "industrial scale" or case law to date. Criteria can be: the production is for commercial purposes, series production for an undefined group of customers, no individual production, no personal collaboration of the plant operator.<sup>184</sup> Since the case law interprets the term "on an industrial scale" broadly, it is likely to be the case in general. The public must be involved in this permitting procedure too. In addition, the permit authority obtains the comments of those public authorities whose area of responsibility is affected by the project. Apart from water law permits, the immission control permit includes other permits, e.g., the building law permit.

<sup>182</sup> Sec. 43 subs. 2 no. 7 Energy Industry Act (*Energiewirtschaftsgesetz – EnWG*).

<sup>183</sup> Sec. 4 subs. 1 sentence 1 Federal Immission Control Act in conjunction with no. 4.1.12 of Annex 1. to the 4th Federal Immission Control Ordinance (4. BImSchV).

<sup>184</sup> *Schäfer/Wilms*, ZNER 2021, 131 et seq.

In certain cases, an environmental impact assessment must also be carried out. The assessment depends, in particular, on how electrolysis is integrated into a further production process to manufacture a product on an industrial scale.<sup>185</sup> If only hydrogen is produced on an industrial scale, a general site-specific preliminary assessment has to be conducted.

If the electrolyser is not classified as an “industrial scale” installation, an electrolyser is subject to a building permit (*Baugenehmigung*). The lower building supervisory authority, which is usually the municipality or the district, is responsible for issuing a building permit. If the intended location is situated within the area of a development plan (*Bebauungsplan*), the admissibility under building law is determined according to the conditions of the respective development plan. In general, the establishment and operation are likely to be admissible in a commercial or industrial area as well as in certain supply areas. If the location is situated in an “unplanned inner area” (areas within a municipality with no development plan – *unbeplanter Innenbereich*), the admissibility of the project depends on the specific local conditions, in particular, on how the project fits into the surrounding area. In the undesignated outlying area (areas with no development plan located outside of a municipality – *Außenbereich*), the project may classify as a privileged project in the undesignated outlying area if the electrolyser serves a public supply function or can be classified as a subordinate installation, e.g., to wind energy installations.

Depending on the handling of wastewater, the water supply and any substances hazardous to water, an independent water law permit is also required in accordance with the Federal Water Act (*Wasserhaushaltsgesetz – WHG*).

If the electrolyser is added to an existing plant or project (brownfield project), it is also possible that the existing permit according to immission control law or the existing planning decision (*Planfeststellungsverfahren*) for the project can be changed without the need for a new permit or planning decision for the electrolyser. However, this also requires an amendment procedure, which does not mean a relevant simplification of the procedure.

As part of the permit procedure, the intervention regulations under nature conservation law according to the BNatSchG and, if applicable, the requirements for special areas of conservation as defined in the EU's Habitats Directive 92/43/EEC (*FFH-Gebiete*) become relevant.

Procedure	Level of complexity
Permit-granting procedure	●●●●

<sup>185</sup> Number 4.1 Appendix 1 Environmental Impact Assessment Act (*Gesetz über die Umweltverträglichkeitsprüfung – UVPG*).

(● low → ●●●●● high)

### 3) Information on the duration of procedure, evaluation

As far as we know, a period of one to two years must be estimated for the procedure in the first phase of the application, in which the application along with the technical and planning documents are prepared. In the second phase, the permit authority reviews the application documents for their completeness, followed by the permit procedure with the participation of the specialist authorities and the public. This procedural step should take a maximum of seven months in the formal procedure with the possibility of a one-time extension of three months. However, all the necessary documents must be available. In this respect, the public authorities often request additional information, which may lead to considerable delays. In terms of process duration, a distinction can be made between small and larger installations. Following the proposal of the "Ausschuss Anlagenbezogener Immissionsschutz / Störfallvorsorge (AISV) in der Länderarbeitsgemeinschaft Immissionsschutz (LAI)" (Federal/ federal states working group on immission control), a small installation means an electrolyser with a nominal electrical output of up to 1 MW and a larger installation with a nominal electrical output of more than 1 MW.

Duration of procedure	
Small installations (under 1 MW)	●●●
Larger installations (more than 1 MW e.g., for a wind park)	●●●

(● low → ●●●●● high)

### 4) Presentation of the relevant obstacles, both from procedural and from substantive law

#### a) Substantive law

The classification of electrolysers in Annex 1 to the 4th Federal Immission Control Ordinance (4. Bundesimmissionsschutzverordnung – **BlmSchV**) means that a permit procedure with public participation is required for all "industrial scale" installations", regardless of their size. The implementation of this procedure leads to considerable administrative effort with corresponding costs and a prolonged duration of the procedure.<sup>186</sup> Furthermore, the current classification results in electrolysers being categorised as installations subject to the EU's Industrial Emissions Directive 2017/75/EU<sup>187</sup>. Among other

<sup>186</sup> We do not have any data on exactly how many months the procedure will be prolonged. However, an extension will take place in any case due to the public and authority participation.

<sup>187</sup> On why this classification is incorrect: Bringewat, ZNER 2022, 21; LEE.SH, *Kurzstellungnahme zur genehmigungsrechtlichen Situation systemdienlicher Elektrolyseure* [Short opinion on the permit regulations governing electrolysers serving the needs of the grid], 3.

things, a baseline report pursuant to sec. 10 subs. 1a Federal Immission Control Act is thus to be prepared and submitted irrespective of the size of the installation and the environmental consequences to be expected. This also constitutes an obstacle to the approval of the installation due to a considerable increase in the effort required in terms of content and time.

The building law admissibility of electrolyzers in the outlying area does not sufficiently reflect the demand for electrolyzers. This is because locations suitable for the efficient and grid-serving use of electrolyzers in the sense of sector coupling for the green hydrogen production from renewable energy sources are oftentimes situated on sites for which no development plan exists.<sup>188</sup> The classification as a site-specific infrastructure does not efficiently help as electrolyzers are usually not stationary. Similarly, an “included privilege” (an expanded scope of a privilege covering an activity closely linked to an already privileged project – *mitgezogene Privilegierung*) is not sufficient, as electrolyzers usually do not serve a privileged project in the outlying area e.g., a wind energy installation.

## **b) Procedural issues**

Given the limited experience public authorities have with permits for electrolyzers and the corresponding lack of know-how regarding the technical functioning of electrolyzers, the potential danger and statutory preconditions are misjudged. This ultimately results in increased requirements for the documents to be submitted and several expert opinions to be provided, which delays the permitting procedure.

Another obstacle is the lack of digitalisation and the resulting increase in bureaucracy. In this connection, the large volume of the documents to be submitted is problematic, as the preparation of the expert opinions is expensive and time-consuming; it subsequently also causes delays in the ensuing assessment, which are not justified by the risk potential of electrolyzers.

## **5) Evaluation of already adopted acceleration proposals**

The “Act on the immediate improvement of framework conditions for renewables in urban development law” (*Gesetz zur sofortigen Verbesserung der Rahmenbedingungen für die erneuerbaren Energien im Städtebaurecht*)<sup>189</sup> creates three explicit privileges for projects producing or storing hydrogen in outlying areas. The privileges are linked to a spatial-functional connection with renewable energy installations.

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<sup>188</sup> German Hydrogen and Fuel Cell Association (DWW), *Planungs- und Genehmigungsverfahren-Beschleunigung von Elektrolyseuren Regulatorische Vorschläge zur Änderung der 4. BImSchV und des UVPG* [Accelerating planning and permitting procedures for electrolyzers, regulatory proposals to amend the 4<sup>th</sup> Immission Control Ordinance and the Environmental Impact Assessment Act] 2022, 13 (available at: <https://dww-info.de/wp-content/uploads/2023/04/20220331-DWV-GGSC-Vorschlaege-Genehmigungsbeschleunigung-Elektrolyseure-min-1.pdf>).

<sup>189</sup> Federal Law Gazette [BGBl.] | 2023 no. 6 of 11/01/2023.

The privileges are only admissible under additional, restrictive conditions. The projects may not exceed a certain structural size. The limits of the Major Accidents Ordinance (*Störfallverordnung*) must be complied with when a hydrogen storage facility is used, the electricity used to produce hydrogen must come from renewable energy installations and the renewable energy installation may not be connected to any other hydrogen project.

In special areas designated in the development plan for the use of solar energy, industrial and commercial areas, these projects are admissible under the above conditions. In industrial and commercial areas, a stand-alone installation for the utilisation of solar energy must also be available.

The law makes more land available for the installation of electrolyzers. At the same time, a legal construct to establish a privilege for an electrolyser to be situated in an outlying area is no longer necessary. These restrictive requirements for the granting of privileges uphold the principle of keeping the outlying area as free as possible from development. Since these installations will be incorporated into the law, there should no longer be any difficulties of interpretation about the area with an existing development plan.

Proposals	Complexity	Effectiveness
<i>Gesetz zur sofortigen Verbesserung der Rahmenbedingungen für die erneuerbaren Energien im Städtebaurecht</i> [Act on the immediate improvement of framework conditions for renewables in urban development law]	●●	●●●●

(● low → ●●●)

**VI. Storage**

**1) Executive summary**

- We only assess battery storage system as a short-term storage system in contrast to long duration storage systems like hot water storage tanks or hydrogen storage.
- Battery storage systems, except for large-scale storage systems, are only subject to a permitting procedure under building law (*baurechtliches Genehmigungsverfahren*).
- There are no special regulations for the permitting procedure of storage systems for renewable energies or power grid-serving storage systems.



## 2) Brief description

A battery storage system is a rechargeable storage system for electricity on an electrochemical basis, consisting of accumulators, wiring, inverters and a transformer.<sup>190</sup> This includes e.g., a lithium-ion battery as well as an iron flow battery. In contrast to hydrogen storage in the context of renewable energies, battery storage is used in particular for short-term storage of minutes to several days, but not for long duration energy storage of up to several months. The rapid response capability of battery storage is particularly helpful for grid stability.

This includes e.g., a lithium-ion battery as well as an iron flow battery. In contrast to hydrogen storage in the context of renewable energies, battery storage is used in particular for short-term storage of minutes to several days, but not for long duration energy storage of up to several months. The rapid response capability of battery storage is particularly helpful for grid stability.

The law governing approval and permits for installations provides for a choice:

If requested by the project developer, battery storage systems with a nominal capacity of 50 megawatts or more (large-scale storage systems) can be approved via a planning approval procedure (*Planfeststellungsverfahren*) unless they are subject to sec. 126 of the Federal Mining Act (*Bundesberggesetz – BBergG*).<sup>191</sup> In the planning approval procedure, all authorities affected in their area of responsibility and the public are involved. The planning approval procedure encompasses the assessment of the provisions to be complied with regarding the approval of the storage systems.

There is no obligation to carry out an environmental impact assessment and no requirement to obtain a permit under the BImSchG.

Alternatively, a permit under building law may be requested for battery storage systems. The lower building supervisory authority, which is usually the municipality or the district, is responsible for issuing a building permit. In exceptional cases, battery storage systems can be exempt from a building permit if they are used for the public supply of electricity.<sup>192</sup> Therefore, they may only be up to 5 metres high and have a gross floor area of up to 10 sq. metres. Their suitability for a permit under building law depends on the area in which the battery storage system is to be installed. If the intended location is situated in the area of a development plan (*Bebauungsplan*), the admissibility under planning law is determined according to the regulations of the respective development plan.

For a battery storage system classifying as an installation that uses substances hazardous to water, a suitability test regarding these substances is not required under the WHG. Depending on the

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<sup>190</sup> See legal definition in sec. 2 no. 9 Electricity Tax Act (*Stromsteuergesetz – StromStG*).

<sup>191</sup> Sec. 43 subs. 2 sentence 1 no. 8 Energy Industry Act (*Energiewirtschaftsgesetz – EnWG*).

<sup>192</sup> Sec. 61 subs. 1 no. 4 b) Model Building Regulation (*Musterbauordnung – MBO*).

construction method and the substances used in the storage system, a notification according to sec. 40 Ordinance on installations for handling substances hazardous to water (*Bundesanlagenverordnung – AwSV*) may be required.

Procedure for Battery storage systems	Level of complexity
▶ Permit-granting procedure	●●

(● low → ●●●●● high)

### 3) Presentation of the relevant obstacles, both from procedural and from substantive law

#### a) Substantive law

In terms of substantive law, there are no specific obstacles for battery storage systems or hot water storage tanks. The conditions at the respective individual site of construction are relevant.

#### b) Procedural issues

There are no specific procedural obstacles for battery storage systems or hot water storage tanks.

### 4) Evaluation of already adopted acceleration proposals

Based on the legislative memorandum of the “Act on the immediate improvement of framework conditions for renewables in urban development law” (*Gesetz zur sofortigen Verbesserung der Rahmenbedingungen für die erneuerbaren Energien im Städtebaurecht*), battery storage systems as installations serving the production of hydrogen qualify as privileged projects, thereby increasing the sites available in outlying areas, at least for battery storage systems that are part of such installations. However, battery systems that are operated as storage for wind farms or solar parks and do not also serve the production of hydrogen are not privileged.

## VII. Grid connection

### 1) Executive summary

- There is almost no legal regulation of distribution grid expansion exists at federal level except for the newly introduced specialised planning procedure.
- The established grid connection process for RE installations is complicated, yet well established.
- Most problems generally arise due to a lack of technical grid expansion.
- Very few lawsuits are filed regarding grid connection of RE installations to distribution grids since the procedure is generally well established.

- To accelerate the grid connection process, the first grid operator receiving an installation operator's grid connection request should be obliged to establish the connection to the grid.

## 2) What is the legal framework for distribution grids?

In Germany, four transmission grid operators operate the energy transmission throughout the entire federal state. At the moment, transmission grids work with a voltage of 220 or 380 kilovolt (kV).<sup>193</sup> The distribution grid delivers the electricity to the consumers. It contains three different levels: high voltage (i.e. 60 kV to 220 kV), medium voltage (i.e. 6 kV to 60 kV), and low voltage (i.e. 230 or 400 V).<sup>194</sup>

Generally, power line construction in Germany is subject to strict planning control. Depending on the grid level, it includes a multi-stage technical requirement and investment planning, a route-finding procedure and finally the planning approval (*Planfeststellung*)/planning permission (*Plan-genehmigung*). Since the operators of electricity generation installations are, in principle, free to choose their location according to general planning law, the grids must be expanded according to their decisions.

The laws at federal level do not contain any provision whatsoever regarding the approval and construction of power lines for distribution grids. Only high-voltage overhead lines above the voltage level of 110 kV of either the transmission or the distribution grid,<sup>195</sup> offshore connection lines and certain cross-border DC high-voltage lines, both of which have the function to connect an energy installation with either the closest transmission or the closest distribution grid,<sup>196</sup> are subject to a planning approval.<sup>197</sup> The main reason for this loophole regarding these power lines is their lower risk potential. The aim also is an accelerated grid expansion. The most relevant regulations for all power lines can be found in various areas of law (in particular, in the energy industry law, regional planning law, nature conservation law, building law, immission control law as well as in the road and air traffic law).<sup>198</sup>

The relevant applicable law also includes planning law and the law governing permits. The planning law for the energy industry includes planning at federal level and at state level, regional planning, and urban land use planning at the municipal level. In this context, regional planning forms an important basis for the planning of all power lines. Spatial planning (*Raumplanung*) is generally understood to

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<sup>193</sup> Federal Ministry for Economic Affairs and Climate Protection, Ein Stromnetz für die Energiewende [An electricity grid for the energy transition], available at <https://www.bmwk.de/Redaktion/DE/Dossier/netze-und-netzausbau.html> (last visited 31 May 2023).

<sup>194</sup> Ibid.

<sup>195</sup> Cf. Pielow, in Säcker: Berliner Kommentar zum Energierecht, EnWG § 43 marg. no. 9.

<sup>196</sup> Ibid. Sec 43 marg. No. 11 and 14.

<sup>197</sup> Cf. Sec. 43 EnWG.

<sup>198</sup> Cf. Nill-Theobald/Theobald, *Energiewirtschaftsrecht, Einführung* [Introduction into the energy industry law], XLVII et seq.

mean the comprehensive, supra-local and supra-disciplinary organisation of space based on existing or yet to be developed guiding principles. Regional and specialist plans in terms of spatial planning (*Raumordnungspläne*) include, *inter alia*, the sites and routes to be secured for infrastructures. The federal states are obliged to draw up an overall multidisciplinary plan, including long-distance roads, railways, waterways, and energy lines, as well as regional plans.<sup>199</sup>

The planning of transmission and distribution grids of all voltages is regulated by the construction and planning law (*Bauplanungsrecht*) in the broadest sense as well as specialised planning (*Fachplanung*) for the necessary grid expansion. More precisely, public law governs the local planning, and the law regarding the use of land by the municipalities applies. Comprehensive land-use plans (*Bauleitpläne*), i.e., development and land-use plans, may contain relevant provisions for power lines. No permit under the building regulations (*Bauordnungen*) of the federal states is required for the installation of power lines.<sup>200</sup> In our experience, hardly any problems with the legal framework occur. Obstacles for grid operators would rather arise at the level of power line planning and in negotiations on rights of way and sometimes also in relation to the registration of corresponding easements.

Specialised federal planning for transmission grids was implemented for more than a decade ago in 2011<sup>201</sup>, specialised planning for distribution grids only recently. To accelerate grid expansion, the German legislator recently introduced specialised planning for distribution grid operators as well<sup>202</sup>: They shall submit to the regulatory authority a plan for their respective electricity distribution network (network expansion plan) for the first time by 30 April 2024 and thereafter every two years by 30 April of each calendar year. The network expansion plan shall be prepared in accordance with a regional scenario to be established to ensure integrated and forward-looking network planning.

### 3) Grid connection requests

Generally, German grid operators are obliged to operate a reliable, stable grid in a non-discriminatory manner.<sup>203</sup> This includes their obligation to connect all installation operators (including fossil ones) to their grid and, if technically required, to expand their grid's capacity to take off more energy from installation operators. If an installation operator<sup>204</sup> requests to be connected to the grid, the grid operator issues a feed-in confirmation (*Einspeisungszusage*), (confirming that the installation operator is allowed to feed the electricity produced in its installation into the distribution grid). Since 1 January

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<sup>199</sup> Cf. sec. 13 subs. 1 ROG.

<sup>200</sup> Cf. Art. 1 sec. 2 and Art. 57 sentence 1 no. 5b of the Bavarian Building Regulation (*Bayerische Bauordnung – BayBO*) and sec. 1 subs. 2 no. 3 in conjunction with sec. 61 sentence 1 no. 5c Brandenburg Building Regulation (*Brandenburgische Bauordnung – BbgBO*).

<sup>201</sup> According to Federal Grid Expansion Acceleration Act Transmission Grid (NABEG).

<sup>202</sup> Cf. sec. 14d EnWG.

<sup>203</sup> Cf. sec. 11 EnWG.

<sup>204</sup> We refer here to power suppliers.

2023, grid operators operate a *joint* internet platform for all connection requests.<sup>205</sup> From 1 January 2024<sup>206</sup>, grid operators must ensure that installation operators are automatically transferred from this internet platform to the website of the competent grid operators upon request regarding installations with a maximum installed capacity of 30 kilowatts.<sup>207</sup> Acceleration measures in this respect have thus already been implemented.

#### a) Renewable Energy (“RE”)

As regards RE installations, the legal situation is slightly different. The RED II imposed several requirements on the Member States. In the absence of a decision by the distribution system operator within one month following the notification, the installation may be connected. Hence, the German EEG in its current 2023 version had to be amended to implement these provisions. The German scheme for connecting RE installations to the grid<sup>208</sup> may be described as follows: In principle, RE installation operators are entitled to priority connection (“without undue delay”) of their RE installation. This is the case regardless of its installed capacity to the general supply grid, which is to be established by the grid operator<sup>209</sup>. Grid operators are obliged to connect RE installations to their grid even if they need to expand their grid to ensure such connection.<sup>210</sup> Installation operators wishing to connect their RE installations to the grid need to contact the competent grid operator. The ensuing grid compatibility check aims at determining the appropriate grid level and the respective grid operator: the low-voltage, medium-voltage, or high-voltage, i.e., 60-220 kV (see above), grid.

After receiving the request to connect a RE installation, the grid operator must determine the statutory grid connection point (*Netzverknüpfungspunkt*), the route thereto, and undertake a grid compatibility check. A decisive criterion for determining the statutory grid connection point is the most cost-effective electricity connection line<sup>211</sup> to save grid charges otherwise to be paid by electricity consumers. This procedure ensures that both, the RE installation operators’ need for a fast grid connection and the need of the grid operators (and their customers) to save grid charges, are met.<sup>212</sup>

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<sup>205</sup> Sec. 14e EnWG.

<sup>206</sup> Sec. 14e EnWG.

<sup>207</sup> For connection requests for plants with a larger installed capacity, the existing procedural steps for enquiries with the distribution grid operators must be followed.

<sup>208</sup> It is mostly regulated in sec. 8 EEG 2023.

<sup>209</sup> Cf. sec. 8 subs. 1 EEG 2023.

<sup>210</sup> Sec. 8 subs. 4 EEG 2023.

<sup>211</sup> Sec. 8 subs. 1 EEG 2023.

<sup>212</sup> RE installation operators may choose to be connected to another connection point of this grid or another suitable grid with regard to the voltage level unless the resulting additional costs for the grid operator are not insignificant, sec. 8 subs. 2 EEG 2021 (not insignificant means more than 10% additional costs, Higher Regional Court (OLG) of Celle, judgment of 23/02/2017 – 13 U 44/15). However, the grid operator has the final say and may, pursuant to sec. 8 subs. 3 EEG

Moreover, the grid operator is obliged to provide the installation operator without undue delay with a precise timetable for the processing of the grid connection request.<sup>213</sup>

Eight weeks after receiving all necessary information for the grid connection, grid operators must provide feedback to the requesting party.<sup>214</sup> If a grid operator fails to meet the aforementioned deadlines, installation operators may file for a temporary injunction (*einstweilige Verfügung*).<sup>215</sup> Additionally, the Federal Network Agency (*Bundesnetzagentur*) may exercise its monitoring tasks regarding the compliance of the grid operators with the above requirements.<sup>216</sup>

## **b) Exceptions for “small RE installations”**

Small installations are installations of an overall lower capacity. For questions regarding grid connection, the German law differentiates between installations of either 10.8 kW or up to 30 kW. The difference between the two sizes can be explained by the fact that one size, 10.8 kW, was already explicitly mentioned in Art. 17 RED and transformed into national law, and the other one is only mentioned in national law. Among others, the RED provides for a simple-notification procedure for smaller installations with a capacity of 10.8 kW or less. Thus, such installations are to be connected to the grid following a notification to the distribution system operator.

Concerning the grid connection point, smaller installations with a total installed capacity of no more than 30 kW located on a property with an existing grid connection may use this existing connection. If operators of small installations with an installed capacity of up to 10.8 kW do not receive any response from the grid operator within one month, they may have their installation connected to the grid themselves.<sup>217</sup>

A further procedural simplification is planned for smaller installations with an installed capacity of less than 30 kW: Starting on 1 January 2025, grid operators will be required to carry out the grid connection process for such installations in an automated manner using a web portal.<sup>218</sup> It is anticipated that many grid operators would extend a web-based solution to larger RE installations.

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2021, assign a different grid connection point to the RE installation unless the physical offtake of the electricity from the relevant installation would not be ensured at that connection point.

<sup>213</sup> Sec. 8 subs. 5 EEG 2023.

<sup>214</sup> Pursuant to sec. 8 subs. 6 EEG 2023. This includes, *inter alia*, a cost estimate regarding the favoured grid connection route.

<sup>215</sup> Cf. sec. 83 subs. 1 EEG 2023.

<sup>216</sup> Cf. sec. 85 subs. 1 no. 3a EEG 2023.

<sup>217</sup> NB: Transposition of Art. 17(1) RED II into German law.

<sup>218</sup> Cf. sec. 8 subs. 7 EEG 2023.

Unfortunately, no statistics exists as the duration of RE installations, regardless of their installed capacity.

Duration of procedure	
▶ Small installations (e.g., capacities of up to 10.8 kW or 30 kW)	●●
▶ Larger installations (e.g., wind farms)	●●●

(● low → ●●●●● high)

**4) Grid expansion obligation and court proceedings**

If the purchase, transmission, and distribution of the electricity fed into the grid cannot be fully ensured (e.g., capacity shortage, inadmissible voltage increase), the grid operator is, in general, obliged to expand the grid.<sup>219</sup> RE installation operators are entitled to grid expansion. The grid operator is obliged to take measures to optimise, strengthen and expand their grid for the feed-in of renewable energy under German federal law<sup>220</sup> unless these measures are economically unreasonable for the grid operator.<sup>221</sup>

A RE installation project may not be developed in the first place if the installation operator and grid operator cannot agree on the timeframe for connecting the installation to the grid. As a result, only a small number of instances normally require a retroactive court trial to determine whether the most cost-effective grid connection option was chosen. However, since damages may be considerable, both parties have a strong interest to cooperate from the beginning of the grid connection process. From an overall perspective, most problems are generally due to a lack of technical grid expansion.

**General assessment:** Although the German system for connecting RE installations to the grid is complex and may result in considerable costs for installation operators, all parties have adjusted to it and are aware of what to expect.

**Proposals** for accelerating the grid connection process: To further accelerate the grid connection process, the first grid operator receiving an installation operator’s grid connection request should be obliged to establish the connection to the grid.

Procedure	Level of complexity
▶ Grid connection process	●●●●●

(● low → ●●●●● high)

<sup>219</sup> Cf. sec. 12 EEG 2023.

<sup>220</sup> Cf. sec. 12 EEG 2023.

<sup>221</sup> The grid expansion is deemed economically unreasonable if the costs incurred by the grid operator are above 12.5% of the estimated EEG funding: *Clearingstelle EEG/KWKG*, vote 2008/14 of 19/09/2008.

## D. Analysis of the permitting procedures in France

### I. General rules for the permission of renewable energy installations/ energy storages/ grid connection

#### 1) Executive Summary

- The legal framework differs for each renewable energy source.
- Permits required for most large projects are building permits ("*permis de construire*"), environmental permits ("*autorisations environnementales*") and authorisations to operate an electricity generating facility ("*autorisations d'exploiter*").
- Various other authorisations under regulations applicable, for instance, to protected species, heritage, landscapes or public health and safety may be required depending on the nature and location of the project<sup>222</sup>. Where the project is subject to a building permit or an environmental permit, these include some or all of the other required authorisations<sup>223</sup>.
- Some facilities such as geothermal power stations and pumped storage energy transfer stations are subject to very specific authorisations, permits or licenses<sup>224</sup>.

#### 2) Brief description of permit-granting procedure

##### a) Main features of the permit-granting procedure

As for all works carried out on the national territory, those relating to renewable energy production units must comply with the local town planning rules<sup>225</sup> set by the municipality ("*plan local d'urbanisme*") or by a public establishment for inter-municipal cooperation ("*plan local d'urbanisme intercommunal*") when the competence for town planning has been transferred to such an establishment and, in the absence of a local plan, with the national town planning regulations ("*règlement national d'urbanisme*")<sup>226</sup>.

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<sup>222</sup> Art. L. 311-1 and seq. of the Energy Code, Art. L. 341-1 and seq. of the Forestry Code, Art. L. 411-2 of the Environmental Code, Art. L. 621-1 and seq. and L. 631-1 and seq. of the Heritage Code.

<sup>223</sup> Art. L. 181-2 of the Environmental Code, Art. L. 4225-1 and seq. and R. 425-1 and seq. of the Town Planning Code.

<sup>224</sup> Art. L. 115-1 and seq., L. 124-1 and seq. and L. 134-1 and seq. of the Mining Code.

<sup>225</sup> Art. L. 151-11 of the Town Planning Code.

<sup>226</sup> Art. L. 111-4 of the Town Planning Code.



Please note that the permit granting process differs for almost each type of source. This is the reason why it seems more meaningful to describe the relevant substantive law in the respective other parts of this report.

Studies shall be carried out and attached to the permits' application files, notably the Environmental Impact Assessment when required<sup>227</sup>, which often takes more than a year to complete. Moreover, when an Environmental Impact Assessment is required, the permit-granting process shall always include a public inquiry<sup>228</sup>, which necessarily increases the duration of this process for at least three months (cf. section III below).

The permissions from the landowners to file for the required building permits and environmental permits shall be obtained before filing<sup>229</sup>.

As regards "facilities classified for the protection of the environment" ("*installations classées pour la protection de l'environnement*" - ICPE), the opinion of the landowners and the local authorities on the state in which the site should be returned to after definitive closure of the facilities shall be requested and obtained<sup>230</sup>. The cessation of activities of "*facilities classified for the protection of the environment*" (ICPE) is subject to an obligation to restore the site.

In some cases, a prior call for competition is mandatory before the required permits are issued (e.g., exploration permits ("*autorisations de recherches*")<sup>231</sup> and exclusive research licenses ("*permis exclusifs de recherches*")<sup>232</sup> for geothermal boreholes ("*gîtes géothermiques*") or authorisations to occupy public bodies' property<sup>233</sup>.

Where local planning documents do not allow implementation of renewable energy production units for reasons of spatial planning, they must be amended before required permits may be issued. The process for such amendment, which is a political choice, lasts from 6 months to several years.

## **b) Competent bodies/ bodies that have to participate**

The Prefect ("*préfet*"), local representative of the State in the districts (*departments*), is competent for issuing building permits ("*permis de construire*") and decisions on preliminary declarations

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<sup>227</sup> Art. L. 122-1 and seq. and R. 122-1 and seq. of the Environmental Code.

<sup>228</sup> Art. L. 123-2 of the Environmental Code.

<sup>229</sup> Art. R. 423-1 of the Town Planning Code, Art. D.181-5-2 of the Environmental Code, Art. L. 124-1-2 of the Mining Code, Art. L. 411-2 of the Environmental Code.

<sup>230</sup> Art. D.181-5-2 of the Environmental Code.

<sup>231</sup> Art. L. 1214-8 of the Mining Code.

<sup>232</sup> Art. L. 124-3 of the Mining Code.

<sup>233</sup> Art. L. 2122-1 of the General Code of Public Property.

("déclarations préalables") for energy production, transmission, distribution and storage facilities<sup>234</sup>, environmental permits ("autorisations environnementales")<sup>235</sup>, land clearing permits ("autorisations de défrichement")<sup>236</sup>, derogations ("dérogations") to the prohibition of destruction, alteration or degradation of protected animal or plant species<sup>237</sup>, exploration permits "autorisations de recherches") for geothermal boreholes<sup>238</sup>, operating permits ("permis d'exploitation") and decisions on preliminary declaration ("déclarations") for geothermal reservoirs ("gîtes géothermiques")<sup>239</sup>, authorisations to occupy lands or buildings belonging to the State ("autorisations d'occupation du domaine public de l'Etat")<sup>240</sup> and declarations of public utility ("déclaration d'utilité publique" [DUP]) required for the implementation of new electricity transmission and distribution facilities<sup>241</sup>. We will explain how much time each stage takes for every RE source in the respective section.

Municipalities are competent for issuing an opinion on the project when the prefect is competent to issue the required building permit or preliminary declaration, unless town planning competence has been transferred to a public establishment for inter-municipal cooperation ("établissement public de coopération intercommunale"), in which case the president of the said corporation shall issue this opinion<sup>242</sup>. As stated in section IV, these opinions are non-binding for both the project developer and the administration.

Deliberative assemblies of local authorities are competent for issuing authorisations to occupy their property<sup>243</sup>, authorisations to create or modify an access to public roads they manage<sup>244</sup>, issuing an opinion on environmental assessments relating to projects to be implemented on their territory<sup>245</sup>. These interventions take place before the issuance of the permits by the competent authority. If the local authorities refuse to grant an authorisation to occupy their property or regarding the public roads they manage, the project developer will have to change the layout of his project, which could jeopardize it or make it at least more complicated. As stated above, the opinion to be given by local authorities on environmental assessments relating to projects implemented on their territory are non-

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<sup>234</sup> Art. L. 422-2 of the Town Planning Code.

<sup>235</sup> Art. R. 181-2 of the Environmental Code.

<sup>236</sup> Art. R. 341-1 and seq. of the Forestry Code.

<sup>237</sup> Art. R. 411-6 of the Environmental Code.

<sup>238</sup> Art. 7-9 of Decree Nr. 1978-498 of 28 March 1978.

<sup>239</sup> Art. 10-6 of Decree Nr. 1978-498 of 28 March 1978.

<sup>240</sup> Art. R. 2122-14 of the General Code of Public Property.

<sup>241</sup> Art. R. 323-1 and seq. of the Energy Code.

<sup>242</sup> Art. L. 422-2 of the Urban Planning Code.

<sup>243</sup> Art. L. 1311-5 of the General Code for Local Authorities.

<sup>244</sup> Art. R. 431-13 of the Town Planning Code.

<sup>245</sup> Art. L. 122-1 of the Environmental Code.

binding, but if the local planning documents have to be amended in order to allow the implementation of the project, this cannot be achieved without a positive decision of the local authorities.

The Minister in charge of energy is competent for issuing authorisations to operate an electricity generating facility ("*autorisations d'exploiter*")<sup>246</sup>. The Minister in charge of mines for exclusive research licenses ("*permis exclusifs de recherches*") relating to geothermal sources<sup>247</sup>.

Finally, the French Government is in charge of issuing concessions ("*concessions*") to operate geothermal power stations<sup>248</sup>.

### **c) Participation of the public**

In any case, the developers of projects subject to Environmental Impact Assessment may initiate a prior consultation of the public when the latter is not mandatory<sup>249</sup>. During the permit-granting procedure, all projects subject to Environmental Impact Assessment are also subject to public inquiry.

Prior to the submission of permit applications, the National Commission for Public Debate ("*Commission Nationale du débat public*") must be consulted for power lines with a voltage greater than or equal to 400 kV and a length greater than 10 km<sup>250</sup>.

The construction of power lines with a voltage greater than or equal to 200 kV and a length greater than 100 km must be "made public" by their developer<sup>251</sup>.

### **d) Relevance of regional law (compared to national law)/ regional differences in the procedure and substantive law**

In France, regulations on the permits required to build and operate renewable energy facilities are national.

In addition to national permits, local town planning documents ("*plans locaux d'urbanisme*" and "*plans locaux d'urbanisme intercommunaux*") may allow the implementation of renewable energy production facilities in areas they identify as agricultural ("*zones agricoles* ") or natural ("*zones naturelles*") provided that these facilities are not incompatible with the carrying out of an agricultural, pastoral or

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<sup>246</sup> Art. R. 311-5 of the Energy Code.

<sup>247</sup> Art. 6-11 of Decree Nr. 1978-498 of 28 March 1978.

<sup>248</sup> Art. 9-10 of Decree Nr. 1978-498 of 28 March 1978.

<sup>249</sup> Art. L. 121-8 of the Environmental Code.

<sup>250</sup> Art. R. 121-2 of the Environmental Code.

<sup>251</sup> Art. R. 121-2 of the Environmental Code.

forestry activity on the land on which they are located and that they do not affect the preservation of natural areas and landscapes<sup>252</sup>.

**e) Role of the courts in challenging permits**

Regarding building permits, environmental permits and all permits, authorisations and licenses required for exploring and operating geothermal sources, administrative courts may cancel all or part of a permit challenged by a third party who has a legitimate interest to do so, defer its decision to allow a regularisation of the permit-granting procedure or dismiss the claim against the challenged permit<sup>253</sup>.

Regarding environmental permits as well as all permits, authorisations and licenses required for exploring and operating geothermal sources, courts also may issue the requested permit, amend the challenged permit and, in case they cancel the permit, order the cessation of the operation<sup>254</sup>.

Regarding other permits, courts only may cancel the challenged permit or dismiss the claim.

Procedure	Level of complexity
▶ Permit-granting procedure	● to ●●●●●
▶ Planning approval procedure	● to ●●●●●

(● low → ●●●●● high)

**3) Information on the duration of the permit-granting procedure, evaluation**

**a) Detailed information about duration of certain steps; brief indication of the reasons**

A significant number of permits may be required to build and operate a renewable energy generation facility

- Building permits or preliminary declarations under the Town Planning Code,
- environmental permits or preliminary declarations under the Environmental Code,
- derogations to the prohibition of destruction, alteration or degradation of protected animal or plant species under the Environmental Code,
- clearing permits under the Forestry Code,

<sup>252</sup> Art. L. 151-11 of the Town Planning Code.

<sup>253</sup> Art. L. 600-5 and seq. of the Town Planning Code and Art. L. 181-18 of the Environmental Code.

<sup>254</sup> Art. L. 181-18 of the Environmental Code.

- authorisations to occupy public bodies' property either assigned for direct use by the public or assigned to a public service, provided that the said property was especially arranged for this public service,
- authorisations to operate an electricity generating facility,
- permits, authorisations, and licenses required for exploring and operating geothermal reservoirs,
- authorisations required when the project site is located in an area protected because of its heritage or landscape interest or in the vicinity of areas or building protected for heritage or defence reasons under the Heritage Code, the Town Planning Code and/or the Environmental Code.

When the projects are subject to public inquiry, time limits for the competent authorities to issue their decisions on applications for planning permission and environmental authorisation do not begin to run until the investigating commissioner has submitted his report. The duration of the permit-granting process can therefore not really be anticipated. We will specify the durations in the sections regarding the different RE installations.

Regarding building and environmental permits application files, once they are submitted, the authority in charge of their examination may request additional documents, which may imply the realisation of new studies<sup>255</sup>. The examination is thus suspended for a period, which lasts three months for building permits but can last several years for environmental permits.

According to articles L 422-2<sup>256</sup> and R 422-2<sup>257</sup> of the Town Planning Code the Prefect is the competent authority for granting permits for energy-generating facilities.

Concerning environmental permits, the permit-granting procedure consists of three consecutive phases:

- The review phase, which should last four to five months in principle. In practice, as this phase is suspended when the administration requests additional documents or studies, it can last over a year.
- The public inquiry phase, which should last three months in principle. In practice, this three-month period may be extended at the request of the investigating commissioner, if the latter

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<sup>255</sup> Art. R. 423-38 of the Town Planning Code.

<sup>256</sup> Art. L 422-2 of the Town Planning Code.

<sup>257</sup> Art. R 422-2 of the Town Planning Code.

is prevented from carrying out the investigation or if the prefect requires an additional public inquiry.

- The decision-making phase, which lasts two to three months in principle but may be suspended if an amendment of the local town planning documents is necessary or when the prefect request a third-party expert opinion.

<b>Duration of procedure</b>	
▶ Small installations	One month to a few months
▶ Larger installations (e.g., wind park)	One year to up to 6 years

#### **4) Presentation of the relevant obstacles, both from procedural and from substantive law**

##### **a) Procedural issues**

##### **b) Role of the relevant authorities (regional, municipal level)**

Obstacles for the realisation in RE installations may arise from opinions of the municipalities (the deliberative assembly) where the project is to be implemented and, in some cases, of neighbouring municipalities are sought during the permit-granting process<sup>258</sup>. However, these opinions are non-binding for both the project developer and the administration.

##### **c) Participation of the public**

Regarding projects subject to public consultation or public inquiry, citizens and environmental associations may submit their opinions during these phases of the permit-granting process, but such opinions are non-binding for both the project developer and the administration.

##### **d) Role of the courts**

##### **(1) Duration of court procedures**

The average duration of between seven months and two years before administrative courts ("*tribunaux administratifs*"), between one and two and a half years before the administrative courts of appeal ("*cours administratives d'appel*") and one year before the administrative supreme court ("*Conseil d'Etat*")

<sup>258</sup> Art. L. 422-2 of the Town Planning Code and Article L. 122-1 of the Environmental Code.

## **(2) Suspensive effect of court procedures**

Appeals made before all administrative courts have no suspensive effect on the challenged permits. However, after lodging their appeal, applicants may request the suspension of the challenged permit through a separate emergency procedure ("*référé suspension*")<sup>259</sup>.

## **II. Wind**

### **1) Executive Summary**

- Onshore wind farms including at least one wind turbine with a mast and nacelle height above ground level of 50 metres or more and wind farms consisting solely of wind turbines with a mast and nacelle height above ground level of less than 50 metres and at least one wind turbine with a height of mast and nacelle above ground level of at least 12 metres and an installed capacity of at least 20 MW are subject to environmental permit.
- Onshore windfarms subject to environmental permit under the Environmental Code are exempt from building permit or preliminary declaration under the Town Planning Code.
- Onshore windfarms subject to environmental permit under the Environmental Code are subject to mandatory environmental assessment and, therefore, to public inquiry.
- The environmental permit includes all required permits under other regulations that might be required for building and/or operating an onshore wind farm except authorisations to occupy public bodies' property.

### **2) Brief description of permit-granting procedure**

#### **a) Necessary steps for the permission**

Onshore wind farms including at least one wind turbine with a mast and nacelle height above ground level of 50 metres or more and wind farms consisting solely of wind turbines with a mast and nacelle height above ground level of less than 50 metres and at least one wind turbine with a height of mast and nacelle above ground level of at least 12 metres and an installed capacity of at least 20 MW are subject to environmental permit.

Before submitting their environmental permit application file, project developers must have all studies necessary for the drafting of the Environmental Impact Assessment, which must be proportionate

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<sup>259</sup> Art. L. 521-1 of the Code for Administrative Justice.

to the environmental sensitivity of the project site, the size and nature of the works and facilities as well as and their foreseeable impact on the environment or human health<sup>260</sup>.

Once the Environmental Impact Assessment has been drafted and at least one month before filing the application for an environmental permit to the departmental prefect, the project developer must send its non-technical summary to the mayors of the municipalities where the project is to be implemented, as well as to the neighbouring municipalities<sup>261</sup>.

The project developer also must obtain the landowners' and the local authorities' opinions on the state in which the site should be returned to after definitive closure of the wind farm, which must be attached to the environmental permit application file<sup>262</sup>.

Although almost all the authorisations and permits required under the various applicable regulations are included in the environmental permit, where an authorisation to occupy public bodies' property is required for the implementation of the project, it must be applied for separately.

#### **b) Participation of the public**

Onshore wind farms subject to a mandatory Environmental Impact Assessment are also subject to public inquiry<sup>263</sup>. Where changes to the local town planning document are required to enable the implementation of wind farms in "natural" and "agricultural" areas, a public enquiry also may be required depending on the extent of the changes.

#### **c) Relevance of regional law (compared to national law)/ regional differences in the procedure and substantive law**

Local town planning documents may delimit sectors in which the implementation of onshore wind farms is subject to conditions, provided that said wind farms are incompatible with the inhabited neighbourhood or with the use of land located in the vicinity or if they are detrimental to the preservation of natural spaces and landscapes, to the architectural, urban and landscape quality, to the enhancement of the heritage and to the insertion into the surrounding environment<sup>264</sup>.

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<sup>260</sup> Art. R. 122-5 of the Environmental Code.

<sup>261</sup> Art. L. 181-28-2 of the Environmental Code.

<sup>262</sup> Art. D. 181-15-2 of the Environmental Code.

<sup>263</sup> Art. L. 123-2 of the Environmental Code.

<sup>264</sup> Art. L. 151-42-1 of the Town Planning Code.



**d) Special procedures for technology/ de-minimis-rules or simplified procedure for certain installations**

Onshore wind farms consisting of wind turbines with a mast and nacelle height of between 12 and 50 metres and a capacity of less than 20 MW are subject to preliminary declaration under the Environmental Code<sup>265</sup> and they are not subject to environmental assessment. However, they are not exempt from building permit under the Town Planning Code and, where accurate, applications for land clearing permits and/or derogations to the prohibition of destruction, alteration or degradation of protected animal or plant species must be submitted separately.

Onshore wind farms consisting of wind turbines with a mast and nacelle height of less than 12 metres are not subject to any formality under the Environmental Code<sup>266</sup> and, outside protected areas where a preliminary declaration under the Town Planning Code is required, they are not subject to building permit. However, land clearing permits and/or derogations to the prohibition of destruction, alteration or degradation of protected animal or plant species sometimes may be necessary in certain cases.

Procedure	Level of complexity
▶ Permit-granting procedure	●● to ●●●●●●
▶ Planning approval procedure	●● to ●●●●●●

(● low → ●●●●●● high)

**3) Information on the duration of the permit-granting procedure, evaluation**

**a) Statistics about the duration, if available**

The average duration of the permit-granting process for environmental permits relating to onshore wind farms is eighteen months.

**b) Empirical experiences regarding the duration**

In practice, the permit-granting process can last less than a year and up to six years.

Duration of procedure	
▶ Small installations	●
▶ Larger installations	●●●●●●

(● short → ●●●●●● long)

<sup>265</sup> Appendix 2 to Art. R. 511-9 of the Environmental Code.

<sup>266</sup> Appendix 2 to Art. R. 511-9 of the Environmental Code.

#### **4) Presentation of the relevant obstacles, both from procedural and from substantive law**

##### **a) Substantive law**

In practice, the permit-granting process is extended and/or the requested environmental permits are refused or cancelled for reasons relating to nature and landscape protection (particularly because of visual saturation effects), animal and vegetal species protection, non-compliance with local planning documents, air traffic safety (particularly because of proximity to military radars areas used by military aircraft and helicopters for training).

For the requested environmental permit to be issued, the project must establish that its wind farm complies with regulations applying to minimum distances<sup>267</sup> between onshore wind farms and weather radars, dwelling and inhabited areas, nuclear power plants and facilities classified for the protection of the environment likely to cause major incidents.

##### **b) Procedural issues**

Although several measures have been adopted in the last five years to speed up the proceedings for claims against environmental permits relating to onshore wind farms or decisions refusing to issue environmental permits requested for onshore wind farms, the duration of litigation remains very long due to the lack of sufficient financial and human resources.

#### **5) Evaluation of already adopted acceleration proposals**

##### **a) Proposal 1 – Facilitating repowering (Ministerial Order of 10 December 2021)**

###### **aa) Summary of the proposal**

Specific rules on repowering (renewal) of wind farms have been included in the Ministerial Order of 10 December 2021 relating to wind farms subject to authorisation to ease repowering. This Ministerial Order focuses particularly on recycling during the repowering process, for example, with regard to the dismantling of rotors.

###### **bb) Evaluation**

The new regulations clarify the situation but do not significantly ease repowering.

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<sup>267</sup> Ministerial Order of 26 August 2011 relating to wind farms subject to authorisation.

**b) Proposal 2 – Speeding up the public inquiry phase (Decree No. 2021-1000 of 30 July 2021)**

**aa) Summary of the proposal**

Since 1 August 2021, the prefect must request the president of the administrative court of appeal to appoint the investigating commissioner no later than fifteen days after the date of completion of the examination phase.

**bb) Evaluation**

As the project developer is not in a position to influence this deadline, this proposal is ineffective if the prefect does not spontaneously comply with it. Moreover, as the public enquiry phase is not the most time-consuming part of the permit-granting procedure, its usefulness is limited. Indeed, the most time-consuming phase is the review phase, which can be suspended without any time limit if the administration requests additional documents or studies.

Proposals	Complexity	Effectiveness
Proposal 1	●	●●
Proposal 2	●	●

(● low → ●●●●● high)

**III. Solar**

**1) Executive Summary**

- The required permits depend on the nature and location of the project.
- Where a building permit is required, i.e. for a ground-mounted solar plant with a capacity of 1 MWp or more, the latter may include several other permits required among others by the Environmental Code, the Heritage Code, or the Defence Code.
- Where an environmental permit<sup>268</sup> is required under the provisions of the Environmental Code relating to the protection of waters and aquatic environment, the latter includes several other permits required among others by the Environmental Code, the Heritage Code, or the Defence Code with the exception of the preliminary declaration or the building permit which might be required under the Town Planning Code.

<sup>268</sup> Solar plants are only subject to environmental permit when it is required under the provisions of the Environmental Code applying to the protection of waters or aquatic environment.

- Only ground-mounted PV plants with a capacity of more than 1 MWp are subject to mandatory Environmental Impact Assessment and public inquiry.
- Regarding ground-mounted PV plants with a capacity between 300 kWp and 1 MWp, an Environmental Impact Assessment is required only if the competent authority ("*autorité environnementale*") declares so.<sup>269</sup> These plants are not subject to public inquiry.

## 2) Brief description of permit-granting procedure

### a) Necessary steps for the permission

For ground-mounted PV plants with a capacity between 300 kWp and 1 MWp, the project developer must request the opinion of the competent authority ("*autorité environnementale*"<sup>270</sup>) to determine if an Environmental Impact Assessment is required and, if so carry out the said Environmental Impact Assessment before submitting the building permit application file<sup>271</sup>.

When the facility constitutes an accessory to the main building the required building permit or decision on the preliminary declaration is issued by the mayor. The accessory premises depend on or constitute an integral part of the main building. Generally speaking, they have a complementary and indissociable function. Their nature is very varied. Article R. 151-29 of the Town Planning Code states that they are deemed to have the same use as the main building to which they are attached.

Concerning shading systems, the urban procedures differ depending on the surface area. No formalities are required for footprints below 5 m<sup>2</sup> (existing buildings: R. 421-13 of the Town Planning Code) or a height of less than 12m for new buildings (R. 421-2 of the Town Planning Code).

Depending on the project's footprint (plus or minus 20 m<sup>2</sup>) and height (plus or minus 12 metres), a request for a building permit or a prior declaration must be submitted to the municipality in which the project is located.

In addition, under article R.421-17 of the Town Planning Code, any installation that results in a change of external appearance of the building must be priorly declared.

For existing buildings, a simple prior declaration to the mayor is required.

Since decree no. 2022-970 of 1 July 2022, installations on roofs and on car park shading systems are no longer subject to environmental assessment.

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<sup>269</sup> Please note that we do not know the statistics on this matter.

<sup>270</sup> The *autorité environnementale* can comprise various persons but would in this case be the Prefect.

<sup>271</sup> Art. R. 122-3-1 and Appendix to Art. R. 122-2 of the Environmental Code.

When the electricity produced by the facility is intended for self-consumption, the required building permit or decision on the preliminary declaration is issued by the mayor.

## **b) Participation of the public**

Only ground-mounted PV plants with a capacity of more than 1 MWp are subject to mandatory environmental assessment and, therefore, to public inquiry.

Where changes to the local town planning document are required to enable the implementation of ground-mounted solar plants in “natural” and “agricultural” areas, a public enquiry may be required depending on the extent of the changes. Generally speaking, an amendment is only necessary where the local town planning document in force does not allow the implementation of ground-mounted solar plants. The modifications concern the zoning of the local town planning document, which will be revised to change the use of natural spaces and allow the installation of a solar power plant.

- Special procedures for technology/ de-minimis-rules or simplified procedure for certain installations (if relevant)

Unless located in areas protected for heritage or environmental reasons, ground-mounted solar plants with a capacity of less than 3 kWp and a maximum height above ground of 1.8 metres are subject neither to preliminary declaration nor to building permit under the Town Planning Code<sup>272</sup>.

Unless located in areas protected for heritage or environmental reasons, ground-mounted solar plants with a capacity of less than 3 kWp and a maximum height above ground of less than 1.8 metres as well as ground-mounted solar plants with a capacity between 3 kWp and 1 MWp and a maximum height above ground of 1.8 metres are only subject to preliminary declaration under the Town Planning Code<sup>273</sup>.

Finally, solar panels installed on pre-existing buildings are only subject to preliminary declaration under the Town Planning Code<sup>274</sup>.

As of 31 December 2022, the power of the photovoltaic solar park reached 16,333 MW, including 15,851 MW in mainland France. The newly connected power was 2,385 MW during the year 2022, compared to 2,835 MW during the year 2021. 54% of the new connected power corresponds to installations of more than 250 kWp, which only represent 0.3% of the number of new connections. Smaller installations, less than 9 kWp, represent 90% of the number of newly connected units and 14% of new

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<sup>272</sup> Art. R. 421-2 of the Town Planning Code.

<sup>273</sup> Art. R. 421-9 of the Town Planning Code.

<sup>274</sup> Article R. 421-17 of the Town Planning Code.

power. The capacity of projects in the queue has increased by 46% since the beginning of the year to 16.9 GW, including 3.9 GW with a signed connection agreement.

### Breakdown of the connected photovoltaic installations by power segment<sup>275</sup>

Power range	Solar farms on 31 December 2022			New 2022 installations		
	Numbers of installations	Power (MW)	<i>Including me-tropo-lis</i>	Numbers of installations	Power (MW)	<i>Includ-ing me-tropo-lis</i>
≤ 3 kWp	423 072	1 102	1 094	48 652	109	109
> 3 et ≤ 9 kWp	172 870	1 022	1 017	42 695	233	233
> 9 et ≤ 36 kWp	28 210	685	643	2 995	71	71
> 36 et ≤ 100 kWp	32 524	2 796	2 736	5 462	493	486
> 100 et ≤ 250 kWp	9 192	1 707	1 658	889	183	182
> 250 kWp	2 671	9 020	8 702	292	1 296	1 289
<b>Total</b>	<b>668 539</b>	<b>16 333</b>	<b>15 851</b>	<b>100 985</b>	<b>2 385</b>	<b>2 369</b>

<sup>275</sup> <https://www.statistiques.developpement-durable.gouv.fr/publicationweb/527>



Procedure	Level of complexity
▶ Permit-granting procedure	●● to ●●●●●
▶ Planning approval procedure	

(● low → ●●●●● high)

### 3) Information on the duration of the permit-granting procedure, evaluation

Duration of procedure	
▶ Small installations	0 to 1 month
▶ Larger installations	Up to more than 24 months

(● short → ●●●●● long)

### 4) Presentation of the relevant obstacles, both from procedural and from substantive law

In practice, the permit-granting process is extended and/or the requested building permits are refused or cancelled for reasons relating to nature and landscape protection, animal and vegetal species protection, non-compliance with local planning documents or public safety reasons (fire hazards).

### 5) Evaluation of already adopted acceleration proposals

#### a) Proposal 1 – Increasing the threshold for a mandatory environmental assessment (Decree No. 2022-970 of 1 July 2022)

##### aa) Summary of the proposal

The threshold for the submission of ground-mounted solar plants to a mandatory environmental assessment and, consequently, to a public enquiry has been raised from 250 kWp to 1 MWp.

##### bb) Evaluation

This reform led to a simplification of building permit application files for the projects concerned and an acceleration of their permit-granting procedure.



**b) Proposal 2 – Increasing of the peak capacity above which projects are subject to building permit (Decree No. 2022-1688 of 26 December 2022)**

**aa) Summary of the proposals**

The threshold for the submission of ground-mounted solar plants to building permit has been raised from 250 kWp to 1 MWp. The principle is that any new construction is subject to building permit<sup>276</sup>.

**bb) Evaluation**

This reform led to a simplification of the procedure applying to ground-mounted solar plants with a capacity of less than 1MWp.

**c) Proposal 3 – Acceleration of judicial review for solar plants with a capacity of 5 MW or more (Decree No. 2022-1379 of 29 October 2022)**

**aa) Summary of the proposals**

For permits relating to solar plants with a capacity of 5 MW or more issued between 1 November 2022 and 31 December 2026:

- All appeal periods will be limited to two months and prior informal appeals (“*recours gracieux*”) will not extend this period.
- Administrative courts will be required to give their decision within ten months. If they fail to do so, the case will automatically be transferred to the administrative court of appeal.
- Administrative courts of appeal will be required to give their decision within 10 months. If they fail to do so, the case will automatically be transferred to the administrative supreme court (“*Conseil d’Etat*”)

**bb) Evaluation**

Given the average time taken by administrative courts and administrative courts of appeal to process appeals, the ten-month time limit seems unrealistic unless these courts are very quickly provided with the human resources to enable them to meet it. Moreover, to date, this measure is only temporary.

Proposals	Complexity	Effectiveness
Proposal 1	●	●●●●
Proposal 2	●	●●●●

<sup>276</sup> Under Art. R. 421-1 of the Town Planning Code (unless this Code provides otherwise).

#### IV. Geothermal

##### 1) Executive Summary

The general geothermal regime is based on a set of authorisations for, first, the exploration of deposits (research authorisation or exclusive research license) and, second, their exploitation. As regards the exploration phase, the authorisation regime provided by the Law applies basically to projects for which drilling work is necessary. The legislator has also provided for a procedural regime for exploration work that does not involve drilling work.

For the exploitation of geothermal deposits, the authorisations will be partly different and the constraints more or less important depending on the primary capacity of the deposit (less than 20 MW / 20 MW and more). The primary power of the deposit corresponds to the maximum thermal power that can be extracted from the subsoil.

However, administrative procedures are simplified for "minor" geothermal installations.

##### 2) Brief description of permit-granting procedure

As stated above, the petitioner can choose the authorisation that corresponds to the rights he or she wishes to enjoy in the context of its research work.

##### a) Explorations of geothermal reservoirs

In the case of boreholes, the procedure is subject to environmental impact assessment in accordance with Article R. 122-2 of the Environmental Code.

The petitioner is free to choose the type of authorisation that corresponds to the rights he wishes to have: the research authorisation or the exclusive research license (Article L. 124-1-1 of the Mining Code). The exclusive research license confers more rights than a "simple" authorisation.

This choice left to the petitioner stems from the reform carried out by the order of 24 July 2019 amending the provisions of the Mining Code relating to the granting and extension of exploration and exploitation permits for geothermal deposits.

In addition to the research authorisation or exclusive research permit, the applicant must obtain an authorisation to start research works (c).

**aa) Research authorisation ("*autorisation de recherches*")**

The research permit granted does not confer a property right to the petitioner.

After a competitive bidding process provided for by Decree n°78-498 of 28 March 1978 relating to geothermal research and exploitation permits, the research authorisation, granted by prefectural decree, determines, under the terms of Article L. 124-3 of the Mining Code, either:

- The location of the borehole(s) which the holder of the authorisation is solely authorised to undertake;
- The delineation of a perimeter within which drilling may be carried out;

According to the above-mentioned article, the period of validity of the research permit is 3 years.

The procedure for obtaining a research permit lasts approximately two years. It requires an application file, which may be the same as the works permit application. The application must then be admissible, followed by a competitive bidding process, a public enquiry (article 124-6 of the mining code) and consultation with the relevant authorities. Once the application has been accepted, a CODERST<sup>277</sup> is required. Finally, the prefectural decree can be issued. The research authorisation allows mining work to be undertaken, in particular drilling, but does not allow exploitation. An exploitation permit or a concession is required for this operation.

**bb) Exclusive research licence ("*permis exclusif de recherches*")**

The exclusive research licence confers on its holder the exclusive right to carry out all exploration work within a defined perimeter and to freely dispose of the substances extracted during the research and testing, which is not the case with a research authorisation<sup>278</sup>. It is issued by order of the Minister responsible for mines, after a competitive bidding process, for a period that cannot exceed 5 years<sup>279</sup>.

There are two conditions for obtaining an exclusive research licence:

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<sup>277</sup> Departmental Committee for the Environment and Health and Technological Risks ("*conseil départemental de l'environnement et des risques sanitaires et technologiques*"): Its main role is to advise prefectural authorities on environmental, health, and technological issues. It reviews projects and files related to the environment, public health, and technological risks, and provides recommendations in this regard. The CODERST contributes to the evaluation and consideration of environmental and health issues in public decisions and policies at the departmental level.

<sup>278</sup> Art. L. 124-2-1 of the Mining Code.

<sup>279</sup> Art. L. 124-2-3 of the Mining Code.

1. The petitioner must have the technical and financial capacity to obtain the license<sup>280</sup>.
2. It must participate in a competitive bidding process.

A public enquiry is not required, but an electronic public consultation procedure must be organised<sup>281</sup>. The application file for an exclusive research license contains, in particular, the elements necessary to identify the applicant, a technical brief and a financial commitment<sup>282</sup>. An impact notice ("*étude d'incidence environnementale*") is also required, indicating the impact that the project could have on the environment and the way in which environmental concerns are considered by the project. In practice, it is similar to an environmental impact study.

The exclusive research license granted may be renewed twice, each time by up to five years. In this case, a new bidding process is not required<sup>283</sup>. In addition, the area of the license is reduced to half of the area at the time of the first renewal and to a quarter of the remaining area at the time of the second renewal<sup>284</sup>.

### **cc) Authorisation to start exploration works**

In addition to a research licence or exclusive research permit, geothermal reservoirs exploration works require an authorisation to start exploration works<sup>285</sup>. The application for authorisation must include an impact study and a report detailing the measures taken to understand the geology of the subsoil affected by the works and the natural phenomena, particularly seismic phenomena, likely to be activated by the works. A public enquiry must be organised. The authorisation is granted by the Prefect. Applications for an exploration permit and for the start of the exploration works may be submitted simultaneously. Since 1 July 2023, the authorisation to start exploration works is granted in the form of an environmental authorisation<sup>286</sup>.

### **b) Exploitation of the geothermal deposit**

The holder of a research authorisation or an exclusive research license may be granted rights on exploitable deposits discovered within the perimeter of the mining title he holds<sup>287</sup>. Depending on the primary power of the deposit, the authorisations will be partly different and the constraints more or

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<sup>280</sup> Art. L. 124-2-2 of the Mining Code.

<sup>281</sup> Art. L. 123-19-2 of the Environment Code.

<sup>282</sup> Art. 17 of Decree No. 2006-648 of 2 June 2006 on mining titles and underground storage titles.

<sup>283</sup> Art. L. 142-1 of the Mining Code.

<sup>284</sup> Art. L. 124-2-6 of the Mining Code.

<sup>285</sup> Art. L. 162-1 of the Mining Code, and Article 3 of Decree no. 2016-649 of 2 June 2006.

<sup>286</sup> Amended Art. L. 162-3 of the Mining Code and article L 181-1 of the Environmental Code.

<sup>287</sup> Cf. Art. L. 134-2 of the Mining Code.

less important. Below a primary power of 20 MW, an exploitation permit is granted (aa), above this power mark, a concession shall be applied for (bb).

In addition to the operating license or concession, the applicant must obtain an authorisation to start exploration work (cc).

#### **aa) Exploitation permit (primary power below 20 MW)**

The holder of a research authorisation has priority in obtaining an exploitation permit if, within the framework of its research authorisation, its work has demonstrated that a deposit is exploitable<sup>288</sup>. If an exclusive research permit has been granted, no research authorisation may be given to another entity. The exploitation permit is granted by prefectural order ("*arrêté préfectoral*").

The duration of the operating license is determined considering the costs of exploration and exploitation and the economic equilibrium of the project. It may not exceed thirty years<sup>289</sup>. The exploitation permit covers either the locations of the authorised boreholes or is located in whole or in part within the perimeter of the authorisation.

#### **bb) Concession (primary power above 20 MW)**

In the case of an exclusive research license, Article L 132-6 of the Mining Code states that, during the period of validity of the permit granted, only the holder of the permit may apply for a concession within the perimeter of the exclusive research license for the substances mentioned in the permit, without a bidding process.

#### **cc) Authorisation to start exploration work**

For geothermal reservoirs to be exploited (in addition to the exploitation permit or concession), an authorisation to start exploitation work is required<sup>290</sup>. The application for an authorisation must include an impact study and a report detailing the measures implemented and those planned to understand the geology of the subsoil affected by the work and the natural phenomena, particularly seismic phenomena, likely to be activated by the work. A public enquiry must be organised. The authorisation is granted by the Prefect. Applications for an operating licence and to start work may be submitted together. From 1 July 2023, authorisation to start mining operations is granted in the form of an environmental authorisation<sup>291</sup>.

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<sup>288</sup> Art. L. 134-3 of the Mining Code.

<sup>289</sup> Art. L. 134-4 of the Mining Code.

<sup>290</sup> Art. L. 162-1 of the Mining Code, and article 3 of decree no. 2016-649 of 2 June 2006.

<sup>291</sup> Amended Art. L. 162-3 of the Mining Code and Art. L 181-1 of the Environment Code.

### 3) Minor geothermal installations

Certain geothermal systems benefit from an exemption regime: these are geothermal "reservoirs of minimal importance" (RMI - "*gîtes géothermiques de minime importance*" or "GMI"), which comply with the conditions set out in article L. 112-3 of the French Mining Code.

For example, RMI facilities include closed-loop geothermal exchangers with a borehole depth of less than 200 m and a maximum thermal output of less than 500 kW. Minimal geothermal deposits are exempt from research and operating permits. The operation of a RMI is subject to a simplified, paperless declaration system (remote declaration)<sup>292</sup>. However, RMI installations located in identified risk zones ("red zones") are excluded from the exemption system.

#### a) No drilling procedure

Apart from drilling, Article L. 124-1-2 of the Mining Code provides for the possibility of undertaking exploration work for geothermal deposits by the owner of the surface or with the owner's consent after a declaration to the competent administrative authority and with its authorisation, after the owner has been invited to present his observations and under conditions laid down by decree in Council of State ("*Conseil d'Etat*"), if the owner of the surface has not consented, and lastly, by the holder of an exclusive research permit.

#### b) Hydraulic socket ("*connexion hydraulique*")

In order to resolve potential conflicts in the case of an application for a geothermal exploration title covering an area covered by an existing mining title and for which the title holder has not given its consent, the administrative authority may require the title holder to establish the existence of a direct hydraulic socket between the deposit covered by its title and the one which is the subject of the application. This notion of hydraulic socket was introduced by Order No. 2019-784 of 24 July 2019 in Article L. 124-1-3 of the Mining Code.

If the existence of a direct hydraulic socket between the two is demonstrated, the competent administrative authority may establish a protection perimeter within which work likely to be detrimental to the activity covered by the pre-existing geothermal title may be prohibited or subject to regulations<sup>293</sup>.

Procedure	Level of complexity
▶ Permit-granting procedure	●●●

(● low → ●●●●● high)

<sup>292</sup> Art. 22-1 et seq. of decree no. 2006-649.

<sup>293</sup> Art. L. 124-1-4 of the Mining Code.

#### 4) Information on the duration of the procedure, evaluation

To our knowledge, there are no official statistics on the average length of time it takes to obtain authorisations for the exploration and exploitation of geothermal deposits in France. In our experience, the time to obtain an exclusive research permit is, at a minimum, 3 years, and it takes at least 2 years to obtain an exploitation permit. It should also be taken into account that the time between obtaining a research authorisation or an exclusive research permit and an application for an exploitation permit can be long, as it takes time to carry out the drilling and exploration work. It can take up to ten years from the granting of an exclusive research permit to the application for an exploitation permit.

The number of projects involving large geothermal deposits (20 MW or so) is currently quite low in France. Given the recent difficulties experienced by a major developer of this type of project, it is very likely that future projects will come up against strong opposition from local populations, who will not hesitate to challenge, including before the courts, any authorisations, including research authorisations, that may have been issued.

Duration of procedure	
▶ Small installations	●●●
▶ Larger installations	●●●●

(● short → ●●●●● long)

#### 5) Presentation of the relevant obstacles, both from procedural and from substantive law

##### a) Substantive law

The search for and exploitation of geothermal deposits can be restricted by various considerations.

For example, the Environmental Code provides that certain sites, the conservation or preservation of which is of public interest, may not be subject to works other than maintenance or routine operations<sup>294</sup>. In addition, exploration or mining operations must respect the constraints and obligations relating, in particular, to safety, public health and sanitation, the solidity of public and private buildings, the essential characteristics of the surrounding environment<sup>295</sup>. This specific constraint was particularly relevant for a “deep” geothermal project developer in 2021: the Prefect (“*Préfet*”) of the Bas-Rhin region issued two orders dated 2 February and 11 October 2021 suspending the work of a major project developer, since its geothermal deposit exploitation work had caused earthquakes of a magnitude of 3.5 on the Richter scale in Strasbourg. This measure meets the objectives of preserving public health and safety stated above.

<sup>294</sup> Art. L. 341-1 of the Environmental Code.

<sup>295</sup> Cf. Art. L. 161-1 of the Mining Code.

Besides, one of the main characteristics of the legal regime for geothermal energy creates uncertainties that are detrimental to the development of this type of project: the holder of an exploration permit does not automatically obtain an exploitation permit if its research has proven to be successful, as a competition must be organised beforehand at a local or national/European level. This particularity may dissuade project developers from engaging in such projects.

**6) Evaluation of already adopted acceleration proposals**

Law No. 2018-727 of 10 August 2018 *"for a State at the service of a trustworthy society"* empowered the government to reform the provisions of the "Mining Code" relating to the exploration and exploitation of geothermal energy, in order to establish a simplified regime adapted to projects in a known geological situation and requiring only a limited exploration phase and, on the other hand, a more comprehensive regime for other projects, without the distinction between these two regimes being based on the temperature of the deposit, which had been the case until then.

**a) Proposal 1 – Focus on power capacity of the geothermal deposit, not on the circulation medium temperature**

**aa) Summary of the proposals**

The Government abandoned the classification of geothermal deposits into three categories according to the circulation medium temperature, which governed the authorisation regime applicable to geothermal projects, and replaced it with the distinction regarding the primary power of the deposit (less than 20 MW, 20 MW or more).

**bb) Evaluation**

It is rather difficult to say whether this reform really simplifies the applicable regime, as the applicable procedures and the different permits available have remained the same.

Proposals	Complexity	Effectiveness
New classification of geothermal deposits	●	●●

(● low → ●●●●● high)



**b) Proposal 2 – Reform of the mining code**

**aa) Summary of the proposals**

Recently, the Mining Code has been reformed on two occasions by Order no. 2022-534 of 13 April 2022 on the environmental authorisation for mining operations<sup>296</sup> and Decree no. 2023-13 of 11 January 2023. They concern the environmental authorisation for mining works.

These two texts amend the Environmental Code, the Mining Code and its implementing decrees<sup>297</sup>. The main contribution of this reform is to make the start of exploration and exploitation works on geothermal reservoirs subject to environmental authorisation (provided for in the Environmental Code), whereas until now such works were subject to authorisation under the Mining Code.

This change means that all the administrative authorisations (except for town planning authorisations) required to carry out geothermal exploration or exploitation works can be incorporated into a single authorisation *i.e.*, the environmental authorisation. For example, the environmental authorisation may, if necessary, be used as authorisation for land clearance, exemptions for protected species, etc.

Compared with the authorisation to start exploration works previously provided for in the Mining Code, all stages of the procedure are modified (with the exception of the public enquiry phase), and the duration of the procedure is reduced from 12 to 9 months, with specific deadlines for each stage. The implementation of the project, including modifications and the transfer of the authorisation, has also been modified. Several applicants may be involved in obtaining this authorisation, but only one representative will be mentioned in the file.

**bb) Evaluation**

Proposals	Complexity	Effectiveness
Reform of the Mining Code	●	●●●●●

(● low to ●●●●● high)

**V. Energy storage**

The development of energy storage capacity has not been seen as a priority by the French Government until recently. For this reason, France is less advanced than its neighbours in terms of storage capacity. In order to catch up with neighbouring countries, a specific provision of the Energy Code

<sup>296</sup> Amended by Order no. 2022-1423 of 10 November 2022.

<sup>297</sup> Decree no. 2006-649, decree no. 78-498 (geothermal energy), decree no. 2016-1303 (drilling/wells) and decree no. 2010-1389 (financial guarantees).

allows the minister in charge of this sector, if the storage means and capacities seem insufficient, to organise calls for tender leading to the conclusion of a fixed-term, fixed-price contract with the operator of the storage capacity<sup>298</sup><sup>299</sup>.

Beside this, the French legislative and regulatory framework for energy storage can be examined by considering the three main storage vectors identified by the French government, among other in the “multi annual program for energy” (“*programmation pluriannuelle de l’énergie*”):

- pumped storage energy transfer stations (“STEP”);
- stationary storage systems (batteries);
- hydrogen storage (power-to-gas), which will be examined under sect. F (“Electrolysers”) here-under.

However, this legislative and regulatory framework is still under construction and remains rather undeveloped.

## 1) Executive Summary

- The permitting process for storage capacity under French Law is very much dependent on the storage technology being considered.
- Pumped storage power stations are subject to an original and specific legal regime, which brings them closer to large hydroelectric works, and which partly depends on the power of the installation.
- As for electric batteries, the legal regime relating to their installation combines town planning rules common to other types of construction as well as specific rules linked to the legislation on classified installations for environmental protection and on water usage.<sup>300</sup>

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<sup>298</sup> Energy storage was introduced into the Energy Code in 2021 by the ordinance transposing the bioenergy sustainability strand of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources. Art. 39 of Act No. 2019-1147 of 8 November 2019 on energy and climate empowered the Government to adopt the legislative provisions necessary for this transposition by ordinance.

<sup>299</sup> Art. L. 352-1-1 of the French Energy Code.

<sup>300</sup> It seems that all chemistries are taken into account: (<https://www.fiches-auto.fr/articles-auto/batterie-et-recharge-ve/s-2511-les-differents-types-et-chimies-de-batteries-lithium-ion.php>).

## 2) Brief description of permit-granting procedure

The permit granting procedures applying to the energy storage solutions mentioned here above are very different from one solution to another and we will therefore only give an overview of the different procedural rules, where they exist.

### a) Pumped storage energy transfer stations ("STEP")

The construction and operation of a "STEP" is subject to:

- The delivery of a building permit;
- Depending on the nominal capacity output of the "STEP" (up to 4,500 kW/more than 4,500 kW<sup>301</sup>), the delivery of an "authorisation" to operate a STEP pursuant to the provisions of the French Environment Code regarding the "Environmental permit" ("*autorisation environnementale*") or an "hydraulic concession permit" ("*concession hydraulique*") pursuant to the regulations of the Energy Code. Subject to criteria set out in the provisions of the Environmental Code regarding water usage policy ("*Loi sur l'eau*"), the granting of an "Environmental permit" instead of "only" an "authorisation" to operate a STEP may be required;
- Depending on the impounded or stored water volume or the height of the installation above ground level, the carrying out of an exhaustive environmental impact assessment ("*évaluation environnementale*") for the construction and operation of the "STEP" subject to "authorisation", and of a "lighter" assessment study ("*étude d'incidence*") for renovation/modification work. For "STEPS" subject to the granting of an "hydraulic concession permit", an environmental impact assessment is compulsory.
- The establishment of a specific "water regulation" ("*règlement d'eau*") for STEPs subject to an "hydraulic concession permit": The water regulation is a document that specifies the technical conditions of exploitation of the water resource specific to the installation. This document describes, in particular, the location and consistency of the work, the technical characteristics of the pumping station and, above all, the safeguards taken for the use and restitution of water downstream, so as to guarantee the elements mentioned in article L. 211-1 of the Environmental Code, and which are intended to guarantee balanced and sustainable management of the water resource (prevention of flooding, preservation of ecosystems, protection of water against pollution, in particular).

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<sup>301</sup> Art. L. 511-5 of the Energy Code.

- As for “hydraulic concession”, the conclusion with the locally competent *Préfet* of a “concession agreement” (“*contrat de concession*”) is required.

The “Environmental permit” or the “hydraulic concession permit” required to operate a STEP is delivered by the *Préfet* of the administrative unit (district) “*Département*” or by the Energy Ministry for the most powerful installations (more than 100 MW). As for the granting of an “hydraulic concession permit”, a highly regulated competitive bidding process must be organised by the *Préfet*.<sup>302</sup>

As mentioned above, the granting process of an authorisation to operate a STEP is subject either to the provisions for the granting of an Environmental permit<sup>303</sup> or to those of the Energy Code<sup>304</sup>. The provisions of the French Environmental code for water usage policy<sup>305</sup> contain the criteria for determining the applicable granting procedure. Participation of the public is compulsory for the granting of an “authorisation” as well as for an “hydraulic concession permit” and follow the rules of the “public inquiry” (“*enquête publique*”) of the Environmental Code (see above).

Involved competent bodies are:

- For the granting of an “hydraulic concession permit”:
  - The competent bodies for the management of the public property land (“hydraulic concession”);
  - The “monitoring committee for the concession and management of water uses” (“*comité de suivi de l’exécution de la concession et de la gestion des usages de l’eau*”), if any,
  - The locally competent “departmental councils for the environment and health and technological risks” (“*conseils départementaux de l’environnement et des risques sanitaires et technologiques*”),
  - The “Environmental Authority” (“*Autorité Environnementale*”),
  - Local municipalities, councils of “*Départements*” and “*Régions*” concerned by the project,
  - The “departmental commission(s) for nature, landscapes and sites” (“*commission départementale de la nature, des paysages et des sites*”),

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<sup>302</sup> The relevant substantive Law is contained in the Art. L. 521-1 *et seq.* and R. 521-1 *et seq.* of the Environmental Code.

<sup>303</sup> Cf. Art. L. 181-1 *et seq.* and R. 181-1 *et seq.* of the French Environmental Code.

<sup>304</sup> Cf. Art. L. 311-5 *et seq.*

<sup>305</sup> Cf. Art. L. 214-1 *et seq.*

- The local water usage commission (“*commission locale de l'eau*”),
  - The chambers of commerce and industry, the chambers of agriculture,
  - The departmental land development commission (“*commission départementale de l'aménagement foncier*”),
- For the granting of an “authorisation”, involved competent bodies are the same as for the granting of an “Environmental permit” (see the wind energy section above).

Procedure	Level of complexity
▶ Permit-granting procedure	●●●

## b) Stationary batteries

At the date of writing, stationary batteries are not subject to specific rules regarding their installation and operation.

One should thus apply to such project’s general rules about land planning and granting of construction and operation permits.

For example, a building permit (“*permis de construire*”) may be necessary under the general conditions of the Town-Planning Code: Pursuant to article R. 421-9 of the Town-Planning Code, a “preliminary declaration” (“*déclaration préalable*”) shall be required for the buildings with either a footprint or floor area greater than five square metres and meeting the following cumulative criteria:

- a height above ground less than or equal to twelve metres,
- a footprint less than or equal to twenty square metres,
- a floor area less than or equal to twenty square metres,

Subject to the filing of a “preliminary declaration” are also the “buildings” that met the following criteria:

- a height above ground level greater than twelve metres
- a footprint less than or equal to five square metres;

If the characteristics of the premises housing the battery system exceed one of the values set by the above provision, a building permit must be applied for.

Like for other works pertaining to the production, the supply or the transport of electricity, the building permit shall be applied for and delivered by the Prefect of the *Département*, unless the energy

stored is mainly used by the producer, in which case the local municipality may be competent. The procedural rules for the delivery of the building permit are very similar to those applicable to, for example, solar projects.

If the stationary batteries are part of a larger installation including e.g., a solar park, the procedural rules for the delivery of the building permit regarding the solar park will be applied for the storage system as well.

Stationary batteries used as storage capacity are subject to the submission to the Prefectural authority of a "declaration" with regard to the "classified facility (for the protection of the Environment)" legislation (category no. 2925, "workshops for charging accumulators") if the "maximum usable power" (i.e. "the cumulative deliverable charging power of all workshop infrastructure") is greater than 600 kW. The declaration shall be filed prior to the commissioning of the battery system and the operator shall comply with the technical specifications of the category no. 2925 contained in the Ministerial Order of 29 May 2000 "relating to the general requirements applicable to installations classified for the protection of the environment subject to declaration under heading no. 2925 "accumulators (battery charging workshops)"".

If the stationary batteries are not part of an installation that is subject to the carrying out of an environmental impact assessment and to public inquiry, it does not seem that these procedural constraints shall apply, unless otherwise decided by the Prefect following a case-by-case analysis.

Procedure	Level of complexity
▶ Permit-granting procedure	●●
▶ Environmental authorisation procedure ("Classified facility for the Protection of the Environment", "Installation classée pour la Protection de l'Environnement", "ICPE")	●

(● low → ●●●●● high)

**3) Information on the duration of the procedure, evaluation**

**a) "STEPS"**

Given the circumstance that no such infrastructure was built or planned recently in France, it is rather difficult to provide statistics about the duration of a granting process. According to the "multiannual program for energy" ("*Programmation Pluriannuelle de l'Energie*", **PPE**), an official policy paper defining the general strategy for the energy sector in France, the overall duration for the granting of the authorisations and the performance of works would be approx. 10 years.

The circumstance that the construction of a "STEP" requires either an authorisation pursuant to the provisions applicable to the "Environmental permit" or a "hydraulic concession permit" following a tender procedure, the maximum duration of which is not regulated, is clearly a "lengthening" factor.

**b) Stationary batteries**

To our knowledge, no information is yet available regarding the duration of the granting process regarding stationary batteries.

Where stationary batteries form the storage part of a renewable energy project, the time taken to issue the necessary permits for the construction of the batteries will be the same as for the whole project. If the installation of stationary batteries is the project in itself, then the duration of the granting procedure shall, in principle, be limited to two to three months, provided that no recourse has been filed against the building permit (if any).

Duration of procedure	
▶ Small installations (stationary batteries)	● ●
▶ Larger installations (STEP)	● ● ● ●

(● short → ●●●●● long)

**4) Presentation of the relevant obstacles, both from procedural and from substantive law**

**a) Substantive law**

**aa) "STEPS"**

The main obstacles to the rapid implementation of "STEPS" projects as regards administrative authorisations are the following:

- Water quality and management: The rather stringent content of the Law on water usage and the constraints often imposed by the prefectural authority to such installations can make water quality management quite complex and costly;
- Grid connection: "STEPS" are usually located in off-grid sites. Connection work, the cost and time of which can be uncertain, is required.

**bb) Stationary batteries**

- Operators of stationary batteries are seen as producers and consumers of electricity at the same time, which makes them subject to a double grid connection procedure and obliges them to pay the tax for the use of the public electricity network ("*Tarif d'Utilisation du Réseau Public d'Electricité*", **TURPE**) and the tax on the final consumption of energy twice.

- The transmission and distribution network operators seldom take into account battery storage capacities when they design their connection works. So-called "hybrid" installations (e.g., a solar park with stationary batteries) are addressed in the TSO/DSO's technical regulations, but not storage installations alone.
- For stationary batteries installed as part of a renewable energy project, the need to comply with local planification documents regarding grid connection works ("*Schéma régional de raccordement au réseau des énergies renouvelables*", **S3REnR**) may cause delays in the implementation of the projects.
- Lack of technical specifications for the design and operation of stationary batteries connected to the distribution or transport system.
- Safety standards are sometimes unclear or missing.

## **b) Procedural issues**

### **aa) "STEPS"**

As mentioned above, to our knowledge, no project of construction of a "STEP" has been envisaged over the recent years. Yet, given the characteristics of a project of this type, it can be assumed that the constraints on its acceptability will be close to another infrastructure project for the production of renewable energy.

### **bb) Stationary batteries**

In case stationary batteries are included in a project for the production of renewable energy, the issues and constraints of such would encompass the storage system. It can thus be referred to the developments on this subject that relate to renewable energy infrastructure projects.

## **5) Evaluation of already adopted acceleration proposals**

In recent years, there have been no measures to simplify or speed up the procedures for obtaining the permits required for the establishment of storage facilities. The subject is nevertheless frequently raised by the Minister in charge of energy and by the Energy Regulation Commission and developments are expected in the coming months.

## **VI. Electrolysers**

### **1) Executive Summary**

The French government has not, for the time being, put in place a scheme specifically designed to encourage the establishment of electrolysers on national territory.



The legal framework for electrolysers is mainly of two kinds, like other industrial facilities: on the one hand, the regulations of the Town Planning Code apply with, like other renewable energy sources, "local" planning (e.g., local town planning map) and on the other hand, the regulations regarding the building permit or prior declaration regime. Finally, the regulations of the Environmental Code apply with specific categories.

## 2) Brief description of permit-granting procedure

### a) Procedural rules in public administration/ regulation

Electrolysers used to produce hydrogen are considered under French Law as "installations classified for the protection of the Environment" in two different categories:

- The "*production on an industrial scale of inorganic chemicals by chemical or biological transformation*" (category nr 3420). According to an explanatory note from the Ministry of Ecological Transition, taking up the position expressed by the European Commission, DG Environment, there is no quantitative capacity threshold of the "*industrial scale*": "*Various criteria should be taken into account to decide whether production is "on an industrial scale", including such factors as the nature of the product, the industrial character of the plant and machinery used, production volume, commercial purpose, production solely for own use, environmental impact*". Still according to the DG Environment, "*the fact that the activity is carried out for "commercial purposes" may be a strong indicator of "industrial scale", even if the material is an intermediate product and therefore not itself traded*". However, the European Commission emphasizes that the main criterion should be the significant or non-significant impact of the installation on the Environment.
- As a consequence of the above mentioned "classification", these installations are subject to the delivery of an "authorisation to operate" to be delivered by the locally competent *Préfet*. The procedural rules for the delivery of this authorisation are those of the "Environmental permit"<sup>306</sup>. The publicity measures regarding the "notice of a public inquiry" shall be carried out within a radius of 3 kilometres from the installation.
- Beside this, electrolysers are classified in the category no. 4715 ("hydrogen"). If the quantity of hydrogen likely to be present in the installation is greater than or equal to 100 kg but less than 1 ton, the operator of the electrolyser shall submit a "declaration" towards the locally competent *Préfet*. Above this threshold, an "authorisation" shall be necessary. As for other

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<sup>306</sup> As contained under the Art. L. 181-1 et seq. and R. 181-1 et seq.

“classified installations for the protection of the Environment”, technical constraints set out in specific Ministerial Orders shall be complied with by the operator.

- As for other new buildings/construction, the rules of the Town-Planning Code also apply to determine whether or not the installation of electrolyzers is subject to the requirement of a building permit (see above).

Also in application of the general rules of the town planning code, the building permit will be issued by the *Préfet* of the *Département*, unless the energy produced by the electrolyser is mainly intended to be used by the producer himself. In the latter case, the mayor should be competent to issue the building permit.

For details of the procedure to be followed, the parties involved, the average durations and the applicable substantive law, reference can be made to the developments under part A above. Participation of the public, throughout the organization of a “public inquiry”, is required as well as the submission of an environmental impact assessment if the production of hydrogen (H<sub>2</sub>) and synthesis gas by reforming or partial oxidation with a production capacity of over 25 tons per day.

Procedure	Level of complexity
▶ Permit-granting procedure	●●●

(● low → ●●●●● high)

### 3) Information on the duration of the procedure, evaluation

To our knowledge, no statistics are yet available on the average length of time it may take to obtain the necessary authorisations for the installation of an electrolyser. This is partly due to the fact that the experience on the coupling between electrolyzers and renewable energy production means is still not very significant in France, while electrolyzers are very often projects of industrial companies, particularly in the chemical or pharmaceutical sector, and do not necessarily include a "green" component. Despite this, and if the electrolyser is not part of a bigger industrial or renewable energy project, it can be estimated that the time required to obtain the necessary permits for the installation of an electrolyser will be between three to six months (if the electrolyser is not subject to authorisation under the regime of classified facilities) or two to three years (if an authorisation under the regime of classified facilities is required). As with the procedures applicable to certain renewable energy projects, the duration of the procedure may vary significantly depending on the number of bodies consulted and the time they are given or that these bodies take to give their opinion.

Duration of procedure	
▶ Small installations	●●
▶ Larger installations	●●●

(● short → ●●●●● long)

#### **4) Presentation of the relevant obstacles, both from procedural and from substantive law**

##### **a) Substantive law**

The main obstacles to the massive installation of electrolysers on French territory are common to other industrial installations of this type, i.e. the relative length of the authorisation procedures as well as the limited means of the Prefecture's investigating services to deal with the various application files. The idea would be to lower the applicable thresholds for determining the level of authorisation required.

The protection of nature and biodiversity can have an impact on the massive deployment of electrolysers on the territory, provided that these, through their technical constraints, have a significant impact on the protection of protected species. This requires, however, a case-by-case analysis, and we are not aware of any electrolyser operator who has requested authorisation to destroy protected species. Nevertheless, once again, this risk does not appear to be major at this stage but could become so as the size of the electrolysers increases.

Similarly, at this stage, we are not aware of any legal action taken by environmental activists against the proposed installation of an electrolyser.

##### **b) Procedural issues**

We refer here to the explanations given in part A of this report.

#### **5) Evaluation of already adopted acceleration proposals**

Up to now, measures to accelerate the deployment of electrolysers have not been taken by the French government, as far as authorisations are concerned. Only "calls for projects" have been launched to help the implementation of these projects, but without any particular legislative or regulatory measures.

### **VII. Grid connection**

#### **1) Executive Summary**

- There is a complex planning and permit-granting procedure for the reinforcement or expansion works of the transmission system to be carried out by the TSO, RTE.
- No permit is required under the Town Planning Code for buried electrical cables nor for overhead powerlines approved in accordance with the procedure provided for in Article L. 323-11 of the Energy Code.

- There is a well-defined process for grid connection, and there are sometimes long waiting periods in the queue due to insufficient grid capacity.
- There have not been many lawsuits regarding the planning and permit-granting procedure for the reinforcement or expansion works of the electricity system, with the exception of some lawsuits regarding the expropriation of landowners and more generally the public utility of the works. Recently, there have been some lawsuits filed by opponents of wind farms, who for instance filed recourses against environmental permits granted by the Prefect to RTE for the connection works for offshore wind farms.
- It is urgent to reduce the timelines for the planning and the execution of the electricity system works and simplify the grid connection procedures.

## 2) **Brief description of permit-granting procedure for the reinforcement or expansion works of the grid**

There is no permit needed for grid connection under French law.

The French electricity system consists of the public distribution system, operated mainly by ENEDIS (95%) and a few local distribution companies (ELDs ("*entreprises locales de distribution*"), and the public transmission system, operated by RTE. For the grid connection of renewable power-generating facilities, the distribution system plays a particularly central role, as this is where most facilities are connected. The connection of a power-generating facility to the grid is subject to the compatibility of the power delivered with the voltage level(s) of the corresponding system. The reference connection voltage for a power-generating facility is determined according to its installed power by the Ministerial order of 9 June 2020 on the technical design and operating requirements for grid connection. The connection is made either to the public transmission system (high voltage and very high voltage [HTB]) or to the public distribution system (medium voltage / high voltage A (HTA) and low voltage (BT)) of the service area where the power-generating facility is located.

The Ministerial order of 9 June 2020 provides that, in principle, power-generating facilities with an installed capacity of up to 12 MW must be connected to the distribution network. However, there is a possibility for the producer to request, by way of derogation, a HTA connection if the installed capacity is between 12 MW and 17 MW. If the installed capacity is higher, the facility must in principle be connected to the HTB transmission system.

The connection of new power-generating facilities often requires the grid to be adapted. For each connection request, the grid operator must therefore check whether works to strengthen or expand the local grid are required to continue to guarantee its stability. The financing of these works is another important aspect of the grid connection that affects the practicability of the project. In France, part of these costs is to be borne by the plant operators within the framework of the "regional grid

connection schemes for renewable energies" ("*Schémas régionaux de raccordement au réseau des énergies renouvelables*" [S3REnR]).

Every two years, RTE has to draw up a ten-year grid development scheme ("*Schéma Décennal de Développement du Réseau – SDDR*") taking into account the existing supply and demand as well as medium-term evolution expectations for the production, consumption and of the cross-border electricity networks<sup>307</sup>. The S3REnR are also relevant for grid planning in France<sup>308</sup>. They are established by RTE at regional level in accordance with the DSOs<sup>309</sup> and should provide for long-term planning of renewable energies and their injection into the grid. This should allow for an optimal adaptation of the grid. In addition, they avoid that the first projects developed at a given location must bear the full costs of grid connection. The S3REnRs contain, among other things, information on the investment measures necessary to achieve the development objectives of renewable energies at local level and an overview of the forecast costs of the installations to be set up.

The planning is preceded by a needs assessment, considering the required interconnections, as well as the reinforcement measures and the necessary grid expansion measures. This is followed by a consultation phase ("*consultation Fontaine*")<sup>310</sup> under the aegis of the Prefect, which aims at working out the project in collaboration with elected representatives and associations representing the population concerned (e.g., landowners' associations). The question of whether citizen participation is required is examined in relation to the scale of the project. Where this is the case, the national commission for public debate ("*Commission nationale du débat public*" [CNDP]) may be convened for this purpose.

In addition, for most of the projects, an environmental impact assessment ("*étude d'impact*") is required. The corridor alignment is either proposed to the Ministry by the Prefect and then adopted, or directly adopted by the Prefect. The corridor alignment is the route of power lines that is planned by the competent planning authority. It is subject to certain procedures such as the declaration of public utility. The route is binding and is included in the town planning documents. The aim is to choose the route that will have the least impact on the environment in each area. Finally, these routes are part of the European environmental objectives. The estimated timeline for this preliminary phase is from 6 months to 2 years. However, for 400 kV and sometimes 225 kV aerial projects, the duration can be longer because consultation with the locals can be difficult.

Before definitively determining the alignment, a declaration of public utility ("*déclaration d'utilité publique*" [DUP]) must be obtained<sup>311</sup>. This declaration is the basis for any expropriations that may be

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<sup>307</sup> Art. L. 321-6 of the Energy Code.

<sup>308</sup> Art. L. 321-7 of the Energy code, Art. D.321-11 et seqq. of the Energy Code.

<sup>309</sup> Art. L. 321-7 of the Energy Code.

<sup>310</sup> Instruction of 9 September 2002.

<sup>311</sup> Art. L.323-3 et seqq. of the Energy Code.

necessary or the establishment of easements. In addition, it ensures that the project plans are compatible with local town planning documents, which eventually must be modified to comply with the project requirements. The DUP is not equivalent to the granting of an authorisation. It is issued either by the Prefect of the concerned department, or by a joined order of the relevant Prefects where several departments are concerned by the project<sup>312</sup>. It can take between 12 and 36 months to be issued.

Once the DUP has been obtained, the exact alignment is defined and applications for the required authorisations are submitted by the system operator who is the project holder. The competent authority for granting these authorisations is the prefect or the ministry, depending on the size of the project. These are, on the one hand, applications for technical authorisations such as the "approval of the project of work" ("*approbation du projet d'ouvrage*" [**APO**])<sup>313</sup>, and on the other hand, environmental authorisation.

In the final stage of planning, rights such as easements must be obtained, and the necessary expropriations carried out, if necessary.

Underground pipelines, power lines or cables are exempted from any formality under the Town Planning Code<sup>314</sup>. Overhead powerlines subject to the approval process referred to in Article L. 323-11 of the Energy Code are exempted from any formality<sup>315</sup>.

As mentioned in the first part of this report, various other authorisations might be required under regulations applicable, for instance, to protected species, heritage, landscapes or public health and safety depending on the nature and location of the project.

### 3) **Grid connection procedure *stricto sensu***

Defined by the energy regulation commission ("*Commission de regulation de l'énergie*" [CRE])<sup>316</sup>, the conditions for the connection of renewable power-generating facilities are specified in the technical reference documentation ("*documentation technique de reference*" [DTR]) of RTE, ENEDIS or the alternative grid system operators (ELD). In addition to the rules on queuing ("*file d'attente*") and financing, this documentation specifies the technical requirements and timelines for the various stages of the connection. The connection procedure described in the DTR guarantees non-discriminatory and transparent access to the grid in a context of scarce capacity. The connection procedure commits the system operators.

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<sup>312</sup> Art. R. 121-1 I. of the Expropriation for Public Purposes Code.

<sup>313</sup> Art. R.323-26 and seq. of the Energy Code.

<sup>314</sup> Cf. Art. R.421-4 of the Town Planning Code.

<sup>315</sup> According to Art. R. 425-29-1 of the Town Planning Code.

<sup>316</sup> According to Art. L. 134-1 of the Energy Code.

For the connection procedure to the distribution system, in a first step, the plant operator submits a connection request to ENEDIS (or an alternative grid system operator). Among the important documents to be attached to the application is a copy of the administrative decisions required to build the renewable energy production plant (building permit, environmental permit, decision on preliminary declaration made under the Town Planning Code, others as the case may be, depending on the type of renewable power-generating facility). The file is considered complete and can be processed by the grid operator only when all the documents are received. This date is important insofar as it determines the order of entry of the application in the queue from which ENEDIS processes the connection applications received and reserves the capacity requested on its system.

The queue represents an important part of the process of connecting renewable power-generating facilities to the French grid. For each voltage level, RTE, ENEDIS and the other grid operators maintain a list of all facilities to be connected as soon as the volume of these requests is significantly higher than the existing grid capacity. As the grid operators process connection requests in chronological order according to their date of receipt, it is important for the achievement of the project to submit the request as soon as possible. Not all facilities can be connected to the grid without an extension or a reinforcement of said grid. As long as these works have not been completed, and as long as there is sufficient capacity for electricity from other facilities, the project remains in the grid operator's queue.

After receiving the connection request for a facility submitted by its operator, ENEDIS draws up a grid connection proposal within three months, including the technical specifications and financial conditions of the connection. The grid connection proposal is valid for three months. If the applicant does not accept it within this period or fails to make the relevant down payment, his project is automatically removed from the queue and ENEDIS stamps out the processing of his request.

As soon as the applicant agrees to the grid connection proposal, ENEDIS begins drawing up the connection agreement. This agreement specifies in a detailed and compelling manner all the provisions relating to the connection of the facility. It includes, in particular, the deadlines for carrying out the connection works to the grid as well as the technical, legal, and financial terms and conditions.

ENEDIS has five months to draw up the agreement for a low-voltage connection and nine months for a medium-voltage connection. Exceptions are possible in certain cases (changes in legal provisions, delays in the authorisation procedure, etc.). The finalised agreement is allowable for three months from the date it is sent to the applicant. The connection works for which the plant operator is responsible must be completed within one year of acceptance of the connection agreement. The final step in the connection procedure is the conclusion of an operating agreement ("*convention d'exploitation*") between ENEDIS and the plant operator.

The procedure for connection to the transmission system operated by RTE follows similar rules. There are some differences though. One of the main differences is that in order for the project to enter the queue and to be able to stay in the queue, the applicant may justify the development status of his

project by submitting regularly some documents listed in Annex 1 of the DTR in its version approved by the CRE decision No. 2021-326 dated 21 October 2021. It is thus not necessary to submit the permit required to build the renewable energy production plant to enter the queue.

Procedure	Level of complexity
<ul style="list-style-type: none"> <li>▶ Planning and permit-granting procedure for expansion and reinforcement works of the transmission system</li> </ul>	●●●●

(● low → ●●●●● high)

**4) Information on the duration of the procedure, evaluation**

- According to the information given by RTE in the 10 years scheme for the development of the grid published in 2019 (“Schéma décennal de développement du réseau”), the whole planning and permit-granting procedure for the expansion and reinforcement works of the transmission system, including the works, may last between 46 and 70 months i.e. between 4 and 6 years). This duration can be much longer if some of the authorisations are challenged, for instance, by opponents to wind farms, as this seems to be the case lately.
- The average duration of the grid connection procedure is 3 years, but according to project developers, sometimes it can last up to 8-10 years. This duration estimates takes into account the waiting time in the queue.

**5) Presentation of the relevant obstacles, both from procedural and from substantive law**

**a) Substantive law**

The main obstacle for the grid connection of renewable power-generating facilities is the complexity of the planning and permit-granting procedure for the expansion and reinforcement of the grid. Due to the duration of these procedures, the queues for the grid connection, be it to the distribution system or to the transmission system, are sometimes very long, depending on the available capacity. The number of projects that are blocked in the queue has increased by 25% over the last 4 years.

According to ENEDIS, about 13 GW are currently waiting for connection to the distribution system (6 GW of wind projects and 7 GW of PV projects).

There are several reasons to this delay:

- Whereas the S3REnR allow the mutualisation and the flat rating of part of the grid connection costs, their long elaboration and revision timelines (between 3 and 5 years) are not compatible with the acceleration of the production of renewable energies. These procedures would need to be simplified in order to allow more regular revisions (every 2 years).



- The long permit-granting procedures for the infrastructure works of the electricity system (5 to 10 years) is also not compatible with the dynamic of development of renewable energies, in particular solar projects, whose construction timelines are reduced. A clarification and simplification of these procedures, in particular the different consultations that are required, is therefore necessary.

## b) Procedural issues

We refer here to the explanations given in part A of this report. As there is no permit needed for the grid connection, the litigation that may arise falls under private law.

## 6) Evaluation of already adopted acceleration proposals

**Proposal 1 – Acceleration of judicial review regarding the approval process provided for in the Energy Code regarding structures of public electricity transmission and distribution networks required for the connection of some renewable power-generating facilities (decree No. 2022-1379 dated 29 October 2022)**

### a) Summary of the proposal

For all structures of public electricity transmission and distribution networks required for the connection of:

- solar plants with a capacity of 5 MW or more,
- geothermal activities, with the exception of those considered to be “of minimal importance” within the meaning of Article L. 112-2 of the Mining Code,
- hydroelectricity plants with a capacity of 3 MW or more.

approved between 1 November 2022 and 31 December 2026:

- All appeal periods will be limited to two months and prior informal appeals “*recours gracieux*” will not extend this period.
- Administrative courts will be required to give their decision within ten months. If they fail to do so, the case will automatically be transferred to the administrative court of appeal.
- Administrative courts of appeal will be required to give their decision within 10 months. If they fail to do so, the case will automatically be transferred to *Conseil d’Etat* (in its capacity as French administrative supreme court).

**b) Evaluation**

Given the average time taken by administrative courts and administrative courts of appeal to process appeals, the ten-month time limit seems unrealistic unless these courts are very quickly provided with the human resources to enable them to meet it.

Moreover, to date, this measure is only temporary.

Proposals	Complexity	Effectiveness
Proposal 1	●●●●	●●

(● low → ●●●●● high)

**VIII. The Bill on the acceleration of renewable energy production**

Unlike other European countries, France is lagging behind in the deployment of renewable energies on its territory. Thus, aware of the climate emergency and in order to meet the national and European renewable energy targets, the Government has proposed a bill to accelerate the deployment of renewable energies<sup>327</sup>, having identified the following major obstacles to the deployment of renewable energies. According to the latest figures published by the Ministry of Energy Transition, renewable energies represent 20.7% of gross final energy consumption in France in 2022, up 1.4 points compared to 2021. However, the share of renewable energies remains below the target set for 2020 (23 %).

- the complexity of the permit-granting and court procedures in comparison with other European countries,
- the lack of land that is readily available and compatible with the environmental issues,
- the lack of visibility regarding the planification procedure for offshore wind,
- the lack of acceptability and attractiveness of renewable energy projects,
- the lack of local ownership of the projects<sup>328</sup>.

The Government bill on the acceleration of renewable energy production (hereinafter “**the Bill**”) has been discussed since 26 September 2022. On 7 February 2023, following the examination of the conclusions of the joint committee on the Bill, it was adopted by the Senate. But, on 9 February 2023, the Bill was referred to the Constitutional Council. The Constitutional Council rendered its decision on 9 March 2023. Some of the provisions that were challenged were deemed by the Constitutional

<sup>327</sup> Projet de loi relatif à l'accélération de la production d'énergies renouvelables, bill tabled by the French Ministerial Council (« Conseil des ministres ») on 22 September 2022.

<sup>328</sup> “Statement of reasons” of the bill on the acceleration of renewable energy production.

Council to be unconstitutional. We will detail the decision in the second part of Part 3. The Bill was published on 11 March 2023.

The Bill revolves around four axes:

- Simplify and accelerate permit-granting procedures for renewable energy projects,
- Plan with local elected officials the deployment of renewable energies in the territories,
- Release land potential suitable for renewable energy projects,
- Share the value of renewable energy projects with the territories that host them.

The Bill contains various provisions aimed at enabling the achievement of these objectives but also some provisions creating new restrictions for the development of renewable energy. Indeed, this Bill seeks to reconcile the acceleration of the deployment of renewable energies with the improvement of local acceptability while guaranteeing the protection of biodiversity and minimizing the artificialization of soils.

In parallel, as part of the Fit for 55 package and RePowerEU, the European Commission proposed a revision of the Renewable Energy Directive RED II: RED III and RED IV proposal. We refer here to the detailed analysis in Part 2. As stated in the Commission's Communication on the REPowerEU Plan, renewable energy is in the overriding public interest. Thus, the importance of transposing the European provisions into national law to streamline procedures at national level and to simplify the procedures for granting permits is noted.

The Bill has, in a way, anticipated European law and adopted certain provisions of the RED III and IV proposals, while not being totally in line with the proposed European provisions. We will highlight hereinafter the main provision of the Bill, compare them, where accurate, with the provisions of the European Commission's proposals for RED III and RED IV and point out the remaining or new obstacles following these provisions.

## **1) Relevant contents of the Bill**

### **a) The creation of a new criterion for granting an environmental permit**

Article 2 of the Bill provides for the amendment of Article L. 515-44 of the French Environmental Code so that it states that environmental permits relating to wind farms must also take into account the number of existing wind farms in the area involved in order to prevent visual saturation effects.

The implementation of this criterion of visual saturation effects as a limit to the deployment of wind farms may raise difficulties because there is no threshold to indicate when visual saturation occurs or not. Thus, there is a risk that it will become an obstacle to the deployment of wind energy.

**b) The creation of a prefectural referent for the examination of renewable energy projects and industrial projects necessary for the energy transition**

The Bill provides for the nomination by each Prefect of a referent for the appraisal of renewable energy development projects and industrial projects necessary for the energy transition<sup>319</sup> among the sub-prefects. This referent's mission is, among others, to facilitate the administrative procedures of the petitioner, to coordinate the work of the services in charge of the permit-granting process and to issue an annual report on the examination of renewable energy projects in its territory.

This provision is in accordance with the draft RED IV directive, which requires the Member States to set up one or more contact points to guide the applicant through the permit-granting procedures for the production and storage of energy from renewable sources<sup>320</sup>. However, contrary to what is foreseen in the European RED IV draft, the prefectural referent is not responsible for ensuring that the deadlines for the permit-granting procedures set out in the Directive or in the French law are met.

**c) The implementation of common monitoring indicators<sup>321</sup>**

These common monitoring indicators, broken down at the level of each department of the region concerned, are defined by order of the Minister responsible for energy and include in particular the number of projects under examination, the number of permits refused, the reasons of refusal and the average processing times. These monitoring indicators are made public.

**d) The simplification of the permit-granting procedure for the repowering of renewable energy plants<sup>322</sup>**

In the event of re-equipment of a renewable energy production facility, the impacts that the project is likely to have on the environment are assessed regarding the potential significant impacts resulting from the modification or extension in relation to the initial project.

The aforementioned provisions apply for a period of eighteen months from the promulgation of the Bill.

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<sup>319</sup> Art. 6 of the Bill.

<sup>320</sup> Art. 16 (3)(4) of Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency.

<sup>321</sup> Art. 6 of the Bill.

<sup>322</sup> Art. 9 of the Bill.

#### e) **The creation of onshore renewable energy acceleration areas<sup>323</sup>**

The Bill provides for the creation of onshore renewable energy acceleration areas.

These acceleration areas are defined for each category of sources and types of renewable energy production facility, taking into account the necessary diversification of renewable energies according to the potential of the concerned territory and the renewable energy capacity already installed. These areas must have the potential to accelerate the production of renewable energies, contribute to solidarity between territories and to the security of supply<sup>324</sup>. The existing capacities of the public electricity and natural gas networks on the territory must also be considered<sup>325</sup>.

It is important to note that it's up to the municipalities to identify the acceleration zones, after consultation with the public, according to terms that they freely determine. After a consultation process involving the concerned public institution for inter-municipal cooperation<sup>326</sup> and the regional energy committee<sup>327</sup>. The prefectural referents establish the mapping of the acceleration zones identified at the level of each department. This occurs after having collected the assent of the concerned municipalities, expressed by deliberation of the municipal council, each for with regard to the acceleration zones located on its territory.

The development of the acceleration areas therefore involves significant exchanges and coordination efforts between the various local authorities, the municipalities having been given a crucial role to encourage them to designate enough space for renewable energy projects, as the acceleration areas cannot be identified nor established without their approval.

It has also to be noticed that the prefectural referent has an important role in helping the municipalities to identify the acceleration zones, as he coordinates with others local authorities concerned, provides support and information to municipalities, and makes up for their lack if necessary.

If the acceleration areas are deemed sufficient to achieve the regional objectives set out in the multi-annual energy program, then the municipalities will also have the possibility of defining areas where the implantation of renewable energy generating facilities will be excluded<sup>328</sup>. This was a way for the

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<sup>323</sup> Art. 15 of the Bill: "*zones d'accélération pour l'implantation d'installations terrestres de production renouvelables ainsi que leurs ouvrages connexes*".

<sup>324</sup> Art. 15 of the Government bill.

<sup>325</sup> Art. 15 of the Government bill.

<sup>326</sup> "établissement public de coopération intercommunale – EPCI".

<sup>327</sup> "comité régional de l'énergie".

<sup>328</sup> Art. 17 of the Bill.

Government of responding to the "right of veto" demanded by deputies of the center-right party "Les Républicains", while trying to distribute renewable energies throughout the territory.

On the European level, the proposal for RED IV defines two types of areas. In the first instance, the mapping refers to the land and sea areas identified by the Member States that are "*necessary for the installation of plants for the production of energy from renewable sources that are required in order to meet their national contributions towards the 2030 renewable energy target*"<sup>329</sup>. The draft of RED IV states that must be considered:

- "the availability of the renewable energy resources and the potential for renewable energy production of the different technologies in the land and sea areas;
- the projected energy demand;
- the availability of relevant grid infrastructure, storage and other flexibility tools or the potential to create such grid infrastructure and storage"<sup>330</sup>.

In a second phase, Member States shall adopt, within the areas referred to in article 15b(1) of the draft of RED IV, renewables go-to areas<sup>331</sup> : "*specific land or sea areas which a Member State has designated as priorities because they are particularly suitable for the accelerated installation of renewable energy production*". For those go-to areas<sup>332</sup>, the draft of RED IV states that Member States must:

1. Identify sufficiently homogeneous land and sea areas where the deployment of one or more renewable energy sources would not have a significant impact on the environment, considering the particularities of the chosen territory ;(...)
2. Develop appropriate rules for areas designated as renewables go-to areas, including mitigation measures for the installation of renewable energy generation plants, co-located energy storage facilities and the assets needed to connect them to the grid, in order to significantly reduce the possible environmental negative impacts that may arise. (...)

As stated in the proposal for RED IV, before designating the go-to areas, the plans of these areas are subject to an environmental assessment. Therefore, "*Member States shall explain in the plan the assessment made to identify appropriate mitigation measures*"<sup>333</sup>.

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<sup>329</sup> Art. 15b of Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency.

<sup>330</sup> Art. 15b of the above-mentioned proposal.

<sup>331</sup> Art. 15c of the above-mentioned proposal.

<sup>332</sup> The European Parliament suggests calling the « go-to-areas » *acceleration areas* (cf. footnote 36 of Part 2).

<sup>333</sup> Art. 15c of the above-mentioned proposal.

The acceleration areas provided for in French law seem to correspond to the go-to areas mentioned above. However, the Bill does not contain any provisions regarding the implementation of an environmental assessment carried out in accordance with the conditions set out in Directive 2001/42/EC to assess the impacts of each renewable technology on the relevant areas designated in a plan or a program prior to identifying the acceleration areas.

In view of the role devolved to the municipalities in the creation of acceleration areas, the transposition of the Directive would require the allocation of the necessary State funds to the municipalities.

**f) The shortening of certain timelines within the permit-granting procedure**

- For the projects located within onshore renewable acceleration areas, the investigating commissioner or the investigating commission shall submit its report and its reasoned conclusions within fifteen days of the end of the inquiry. If this deadline cannot be respected, the additional deadline may not exceed fifteen days<sup>334</sup>.
- Article L. 181-9 of the environmental code is completed by a paragraph stating that for the projects located within onshore renewable acceleration areas, the maximum duration of the examination phase for the granting of the environmental permit is three months from the date of acknowledgment of receipt of the file. It may be extended to four months by reasoned decision of the competent authority. The examination phase is one of the three phases of the instruction of the application for environmental permit, alongside the public consultation phase and the decision phase<sup>335</sup>.

With the exception of these provisions, the Bill does not really provide for a shortening of deadlines of the permit-granting procedures.

Thus, the shorter deadlines provided for in the draft of RED IV shall still be transposed into French law:

- Deadline for the validation of the application by the competent authority of 14 days for plants located in go-to areas and of one month for plants located outside of go-to areas<sup>336</sup> ;
- Maximum one year for the permit-granting process for projects in renewable go-to areas<sup>337</sup> ;
- Deadline of 3 months for the granting of a permit for solar energy equipment<sup>338</sup> ;

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<sup>334</sup> Art. 7 of the Act.

<sup>335</sup> Art. L. 181 -9 of the environmental code.

<sup>336</sup> Art. 16 of the above-mentioned RED IV proposal.

<sup>337</sup> Art. 16a of the above-mentioned proposal.

<sup>338</sup> Art. 16c of the above-mentioned proposal.

- Deadline of 6 months for the repowering of plants<sup>339</sup> ;
- A global deadline: “*the permit-granting process [...] shall not exceed two years, for projects outside renewables go-to areas, and shall not exceed three years for offshore renewable projects*”<sup>340</sup>.

So far, if as a result of the Bill, the land available for renewable energy projects should increase. However, the impact on the permit-granting procedures seems limited. On the contrary, the transposition and implementation of the aforementioned shorter deadlines defined in Articles 16, 16a, 16b and 16c of the RED IV draft should have a considerable impact on the duration of the permit-granting procedures but require that the Member States allocate the necessary financial means to the prefectural services in charge of the instruction of the permits.

#### **g) Acknowledgement of the imperative reason of overriding public interest**

Where necessary, the environmental permit includes the derogation to the prohibition of destruction, alteration or degradation of protected animal or plant species.

According to Article L. 411-2, 4° of the French Environmental Code, the derogation may only be granted if:

- there is no other satisfactory solution,
- the derogation does not adversely affect the maintenance in a favourable state of conservation of the populations of species concerned in their natural area of distribution,
- the exemption is justified by one of the five grounds restrictively listed in Article L. 411-2, I, 4° of the Environmental Code, among which the existence of an “*imperative reason of overriding public interest*” is the only one applicable to renewable energy projects.

Article 19 of the Bill provides that projects for renewable energy production or energy storage in the electricity system, including their connection works to the energy transport and distribution systems, are deemed to meet an imperative reason of overriding public interest, within the meaning of Article L. 411-2, I, 4°c) of the Environmental Code, when they meet the conditions defined by a decree issued after consultation of the State Council<sup>341</sup>.

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<sup>339</sup> Art. 16a of the above-mentioned proposal.

<sup>340</sup> Art. 16b of the above-mentioned proposal.

<sup>341</sup> *Décret en Conseil d’Etat* ; Art. 19 of the Bill.



The provisions of Article 19 specify that the existence of an acceleration area does not as such constitute a satisfactory alternative within the meaning of Article L. 411-2 of the Environmental Code.

The provisions of Article 19 were challenged before the Constitutional Council as being contrary to the Constitution<sup>342</sup>.

#### **h) The creation of a seafront strategic document**

The Bill also creates a planning mechanism for offshore wind energy with the establishment of a seafront strategic document<sup>343</sup>. This document must map the priority maritime and land areas for the installation, over a period of ten years from its publication, of offshore wind farms and their connection works to the public electricity transmission system<sup>344</sup>.

The provisions of Article 56 were challenged before the Constitutional Council as being contrary to the Constitution<sup>345</sup>.

#### **i) The creation of a renewable energy observatory**

The Bill also provides for a "renewable energy observatory"<sup>346</sup>. The task of this observatory is to carry out an inventory of the impact of renewable energy on biodiversity, soil and landscapes, the means of assessing this impact and the means of improving this knowledge. Indeed, the principle is advocated that the deployment of renewable energies must not, of course, be to the detriment of the environment. The possible impacts of projects on the environment must therefore be assessed so that they can be considered and existing infrastructures can be improved.

#### **j) The creation of an obligation for the author of an appeal against an environmental permit to notify his appeal<sup>347</sup>**

Article 23 of the Bill provides that the author of an appeal against an environmental permit is required to notify his appeal to the author and recipient of the decision, at the risk of being inadmissible. The conditions of application of these provisions are to be specified by decree in State Council.

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<sup>342</sup> Cf. analysis under II.

<sup>343</sup> "*document stratégique de façade*".

<sup>344</sup> Art. 56 of the Bill.

<sup>345</sup> Cf. analysis under II.

<sup>346</sup> "*observatoire des énergies renouvelables*"; Art. 20 of the Bill.

<sup>347</sup> Art. 23 of the Bill.

The provisions of Article 23 were challenged before the Constitutional Council as being contrary to the Constitution<sup>348</sup>.

#### **k) The creation of an optional insurance fund**

The operator of a renewable energy production facility selected following a call for tenders mentioned in Article L. 311-10 of the Energy Code or benefiting from a contract for difference mentioned in Article L. 314-18 of the Energy Code may join an insurance fund intended to compensate for part of the financial losses that would result from the cancellation by the administrative judge of an environmental permit issued pursuant to Title VIII of Book I of the Environmental Code, a single authorisation issued pursuant to Article 20 of Ordinance No. 2016-1687 of 8 December 2016 relating to maritime areas under the sovereignty or jurisdiction of the French Republic or, for photovoltaic or thermal solar energy production facilities, a building permit. This subscription takes place before the start of the construction works and after the issuance of the environmental permit, the single authorisation or the building permit by the competent authority.

The provisions of Article 24 were challenged before the Constitutional Council as being contrary to the Constitution<sup>349</sup>.

#### **l) The deployment of solar energy on outdoor car parks and certain buildings**

Outdoor car parks with a surface area of more than 1,500 square metres shall be equipped, for at least half of this surface area, with shading systems integrating a renewable energy production process over the entire upper part of the car park providing shade<sup>350</sup>.

This obligation does not apply to outdoor car parks where the manager implements, on such car parks, renewable energy production processes that do not require setting up shading systems, provided that these processes allow for an equivalent production of renewable energy to that which would result from the application of the previous paragraph. When several car parks are adjacent, the managers may, by mutual agreement of which they can provide proof, share the obligation mentioned in the first paragraph, provided that the surface area of the shaded systems created corresponds to the total of shaded systems to be installed in each of the concerned car parks.

Article 43 of the Bill creates a new Article L. 171-5 of the construction and Housing Code: Buildings or parts of buildings used for commercial, industrial, craft or administrative purposes, buildings or parts of buildings used for offices or warehouses, storage buildings not open to the public and used for commercial purposes, hospitals, sports, recreational and leisure facilities, buildings or parts of school and

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<sup>348</sup> Cf. analysis under II.

<sup>349</sup> Cf. analysis under II.

<sup>350</sup> Art. 40 of the Bill.

university buildings and covered car parks accessible to the public with a floor area of at least 500 square metres must incorporate either a renewable energy production process, or a vegetation system based on a method of cultivation which uses drinking water only as a supplement to reclaimed water, which guarantees a high degree of thermal efficiency and insulation and which promotes the preservation and recovery of biodiversity, or any other system which achieves the same result.

**m) The simplification of the planning procedures for the grid connection of offshore wind farms**

After the publication of the cartography of the maritime and terrestrial zones mentioned in article L. 219-5-1 of the environment code<sup>351</sup>, the Minister in charge of energy may ask the public electricity transmission system operator to initiate in advance studies and works for the connection of offshore power-generating facilities. The Energy Regulation Commission<sup>352</sup> monitors the technical and economic relevance of the investments planned by the manager of the public transmission network.

**n) A legal framework for agrivoltaics<sup>353</sup>**

One of the challenges of the Bill is to reconcile energy sovereignty and sovereignty of food. The Bill therefore specifically frames the development of solar panels on agricultural land, distinguishing between:

- so-called agrivoltaic installations which allow to maintain agricultural activity and to provide the farmer with any additional income, but above all an additional service to its agricultural activity: the improvement of the agronomic potential, the adaptation to climate change, the protection against hazards, the improvement of animal well-being;
- installations on agricultural land or forests that cannot lead to clearing operations of more than 25 hectares and will only be authorized on land that is not cultivated or that has not been cultivated for some time.

The development of these two types of installations can only be done under the condition that it is reversible and does not affect the agronomic functions of the soils.

Article 54 of the Bill thus provides some specific provisions to produce electricity from agrivoltaic installations.

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<sup>351</sup> Cf. Art. 56 of the Bill.

<sup>352</sup> « *Commission de régulation de l'énergie* » – CRE.

<sup>353</sup> Art. 54 of the Bill.

## 2) Analysis of the main provisions of the decision of the Constitutional Council

As previously stated, in its decision No. 2023-848 DC of 9 March, 2023, the Constitutional Council ruled on the provisions of the Bill, which had been referred by two appeals from more than sixty deputies<sup>354</sup>, showing a strong opposition to the deployment of renewable energies from part of the political forces in France. The following provisions were challenged: the modulation of the feed-in tariff for renewable energies linked to the conditions of implantation within acceleration areas<sup>355</sup>, automatic recognition of the overriding public interest for renewable energy projects<sup>356</sup>, the obligation to install solar power energy installations on exterior car parks<sup>357</sup> or car parks within certain buildings<sup>358</sup>, the mapping of offshore wind power development areas<sup>359</sup>.

Moreover, the "*Rassemblement National*" deputies called for a censure of the Bill as a whole, as its provisions would violate the French Charter of the environment ("*Charte de l'environnement*")<sup>360</sup>.

### a) On article 19

As stated above, Article 19 of the Bill was challenged, which provides that projects for renewable energy production or energy storage in the electricity system, including their connection works to the energy transport and distribution systems, are, under certain conditions to be determined by decree, deemed to meet an imperative reason of overriding public interest, such as to justify that a derogation from the prohibitions on harming protected species be granted. The petitioning deputies criticized such provisions, in particular for establishing a conclusive presumption that certain projects meet an imperative reason of major public interest, which would systematically favour their implementation. In their view, this resulted in a breach of the right to a fair trial, a breach of the right to an effective remedy and a breach of the constitutional objective of environmental protection and the requirements of Articles 1, 2, 5 and 6 of the Charter of the environment, given the harmful effects that these installations could have on the health of local residents and on protected species and their habitats. It is interesting to note that, for the deputies authors of the referrals to the Constitutional Council, this Article 19 contravenes, in particular, the objective of constitutional value of environmental protection.

In its decision of March 9, 2023, the Constitutional Council reminds that, under the terms of Article 1 of the Charter of the environment, "*Everyone has the right to live in a balanced environment that*

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<sup>354</sup> Members of the "*Rassemblement National*" party and the "*Les Républicains*" party.

<sup>355</sup> Art. 17 of the Government bill.

<sup>356</sup> Art. 19 of the Government bill.

<sup>357</sup> Art. 40 of the Government bill.

<sup>358</sup> Art. 41 and 43 of the Bill.

<sup>359</sup> Art. 56 of Government bill.

<sup>360</sup> A text with constitutional value, the 2005 charter of the environment promotes respect for the environment and the rights and duties that flow from it.

*respects health". The limitations placed by the legislator on the exercise of this right must be linked to requirements or justified on grounds of public interest and proportionate to the objective followed. In this respect, the Constitutional Council notes in particular that, on the one hand according to preparatory works, these provisions aim to promote the production of renewable energy and the development of energy storage capacities. In so doing, the legislator followed the constitutional objective of environmental protection. On the other hand, this provision concerns only one of the three conditions to be met in order for a derogation to the prohibition of destruction, alteration or degradation of protected animal or plant species to be issued: "the presumption established by the contested provisions does not exempt the installation projects covered from compliance with the other conditions required to grant a derogation from the prohibitions provided for in Article L. 411-1 of the Environmental Code. In this respect, the competent administrative authority ensures, under the control of the judge, that there is no other satisfactory solution and that the derogation does not harm the upkeep of the species population concerned in their natural range, in a favourable conservation status".*

The Constitutional Council also noted that while the legislator had left it to a decree of the State Council to define the conditions to be met by renewable energy production or energy storage facility projects, it had provided that they must be set taking into account:

- the type of renewable energy source,
- the total projected power of the planned facility and
- the expected overall contribution of similar power facilities,

to achieve the objectives mentioned in Article L. 141-2 of the Energy Code under the multiannual energy program.

From all these reasons, the Constitutional Council deduced that the contested provisions do not breach Article 1 of the Charter of the environment and that they are not vitiated by negative incompetence.

## **b) On Article 23**

Certain provisions of Article 23 of the Bill were also challenged, which amended Article L. 181-17 of the Environmental Code in order to provide that the author of an appeal against an environmental permit is required to notify his appeal to the author and recipient of the decision, at the risk of being inadmissible.

The members of Parliament who submitted the first referral criticised these provisions for persuading the applicants not to act. The members of Parliament who submitted the second referral argued that these provisions were vitiated by negative incompetence on the grounds that their conditions of application were established by reference to a decree of the State Council.

The Constitutional Council reminds, firstly, that, according to Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789: *"Any society in which the guarantee of rights is not ensured, nor the separation of powers determined, has no Constitution"*. It follows from this provision that the right of persons concerned to an effective remedy before a court must not be substantially impaired. With regard to the constitutional framework thus recalled, the Constitutional Council notes that the contested provisions only require the applicant to carry out a simple formality aimed at ensuring, in accordance with an objective of legal certainty, that the recipient of environmental permits are rapidly informed of the challenges directed at the permits granted. Consequently, such provisions do not disregard the right to an effective judicial remedy. Secondly, the Constitutional Council reminds that it follows from Articles 34 and 37 of the Constitution that the provisions of the procedure to be followed before the administrative courts fall within the regulatory competence as long as they do not call into question the rules or fundamental principles placed by the Constitution in the domain of the law.

Without disregarding the scope of its competence, the legislator was thus able to refer to the regulatory power for the determination of the conditions of application of the rule of admissibility of the appeals lodged before the administrative courts that it introduced.

For all these reasons, the Constitutional Council ruled that the second paragraph of Article L. 181-17 of the Environment Code was in line with the Constitution.

**c) On Article 24**

Article 24 inserts a new Article L. 311-10-4 into the Energy Code establishing an optional insurance fund to which certain operators of renewable energy production facilities may subscribe. It also completes Article L. 121-7 of the same code to include the amounts related to the initial grant of this fund in the expenses attributable to public service missions in the field of electricity production which are compensated by the State.

The members of Parliament who submitted the first referral considered that these provisions, which constitute a burden on the State budget, could only be included in a finance law and were therefore adopted at the end of a procedure that disregarded the organic requirements relating to such laws. Joined by the members of Parliament who had submitted the second referral, they also argued that such provisions disregarded the principle of equality, on the grounds that the fund only benefited renewable energy producers. Secondly, the purpose of the contested provisions is to provide renewable energy production installations operators with a financial guarantee to encourage them to undertake construction work without waiting for a final decision on appeals, to speed up setting up such installations. The difference in treatment established by these provisions, which is based on the difference in situation between these operators and producers using non-renewable energy sources, is in

keeping with the purpose of the law. Consequently, the complaint alleging a breach of the principle of equality before the law must be dismissed.

Consequently, Articles L. 121-7 and L. 311-10-4 of the Energy Code, which do not disregard any other constitutional requirement, are in compliance with the Constitution.

**d) On Articles 40, 41 and 43**

Articles 40, 41 and 43 relate to the obligation to equip certain buildings or car parks with renewable energy production processes.

The Constitutional Council ruled that although the members of Parliament who submitted the second referral considered that the provisions of these articles were vitiated by a "manifest error of assessment", they did not make any specific complaint against them.

**e) On Article 56 regarding the creation of a seafront strategic document**

The members of Parliament who submitted the second referral to the Constitutional Council argued that the provisions of article 56 would disregard the precautionary principle on the grounds that the impact of wind turbines on marine biodiversity is poorly documented. The Constitutional Council, in its decision dated 9 March 2023, ruled:

*“According to Article 5 of the Charter of the Environment: ‘When the occurrence of damage, although uncertain in the light of scientific knowledge, could seriously and irreversibly affect the environment, the public authorities shall ensure, by application of the precautionary principle and within their areas of competence, the implementation of risk « assessment procedures and the adoption of provisional and proportionate measures in order to prevent the occurrence of damage’.*

The contested provisions have neither the object nor the effect of determining the rules for setting up wind turbines or authorising their establishment. The complaint based on the disregard of the precautionary principle can therefore only be rejected.” It thus decided that the referred provisions were compliant with the Constitution.

**f) On the complaints against the Bill as a whole**

The members of Parliament who submitted the first referral criticised the Bill for generalising the use of offshore and onshore wind power without taking into consideration the risk that this would pose to the health of local residents, birdlife, and marine biodiversity. This would result in a disregard for the requirements of Articles 1 and 5 of the Charter of the Environment and its preamble. According to the Constitutional Council, however, the complaint which stated that the legislator has disregarded these constitutional requirements can only be usefully submitted to the Constitutional Council against specific provisions and on the condition that the mechanism they introduce is challenged, in accordance

with the procedure laid down in Article 61 of the Constitution. In this case, the members of Parliament who submitted the first referral developed a general criticism of the choices made by the legislator and did not challenge any specific provision of the law referred to.

The Constitutional Council therefore ruled that their complaints could only be dismissed.

### **g) Ex officio censorship of some provisions by the Constitutional Council**

The Constitutional Council automatically censored ex officio as "riders", i.e., as adopted according to a procedure contrary to the requirements of Article 45 of the Constitution, Articles 46, 48, 49, 55, 79, 94, 97, 111, 113 and 115 of the Bill referred to.

The censorship of such articles does not prejudge the conformity of their content with other constitutional requirements.

Finally, Article 65 of the law is censored as lacking normative scope.

It is important that the Constitutional Council declared that most of the criticized articles of Bill were in conformity with the Constitution and in particular, that he dismissed the criticisms directed at article 19 regarding the imperative reason of overriding public interest, stating that these provisions did not contravene, in particular, the objective of constitutional value of environmental protection.

### **3) Further legislative steps**

It has been pointed out that an energy and climate programming bill<sup>361</sup> is planned for the second half of 2023. This bill will set the major energy transition objectives and should also transpose the objectives of European law into French law, namely the directive proposals RED III and RED IV.

A bill on "green industry" was adopted in the summer of 2023 and came into effect in October 2023<sup>362</sup>. The Green Industry Bill includes several measures aimed at supporting industrial sectors that contribute to carbon neutrality objectives. A tax credit for companies investing in green industries was to be introduced in the Finance Act for 2024.

In addition, the implementation of the Bill will require more than 60 decrees/prefectural orders defining the modalities. At this level, it is therefore complex to project the implementation of the Bill and the future bills to be adopted in 2023 and their joined effects on the acceleration of the deployment of renewables energies.

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<sup>361</sup> "Loi de programmation énergie-climat", LPEC. It has not been adopted as of April 2024.

<sup>362</sup> [LOI n° 2023-973 du 23 octobre 2023 relative à l'industrie verte \(1\) - Légifrance \(legifrance.gouv.fr\)](#)



## E. Analysis of the permitting procedures in Spain

### I. General introductory remarks

The Spanish authorisation and permit granting procedures for the execution of electricity production installations from renewable energy sources ("RES installations"), energy storages and electricity transmission and distribution network infrastructure is conditioned, by a) its **territorial planning** regime – **State** (National Administration), **Autonomous Communities**<sup>363</sup> (AACC – Regional Administration) and **Municipalities** (Local Administration) –, and b) by the allocation of competences within the mentioned Administrations.

Although the fundamental guidelines for the general planning of the economic activity, mining and energy regimes are the exclusive competence of the State, the **Spanish territorial organisation implies greater heterogeneity at regional and local level** in the administrative procedures for permit granting of authorisations and permits, since the applicable criteria, particularly in the environmental and urban planning fields, are regulated in an unequal manner. On the other hand, there is a **single and homogeneous procedure for administrative authorisation and granting of access and connection permits for RES installations for all types of RES installations, with no specificities regulated by technologies.**<sup>364</sup>

In Spain, the renewable technologies experiencing the greatest boom are solar photovoltaic - both ground PV and roof-top solar - and wind power installations. Other technologies, such as storage and renewable hydrogen, are still lacking a completed regulatory framework that is still being developed. However specific roadmaps have been published both for storage "*Estrategia de Almacenamiento energético*" approved on 9 February 2021 and on hydrogen "*Hoja de ruta del hidrógeno: una apuesta por el hidrógeno renovable*". published on 6 October 2020. Geothermal energy is still marginal. On their side, grid access and connection permits are an essential critical element in the entire procedure for RES installations' permit granting. These permits must be obtained by the project developer, prior to the approval of the corresponding administrative authorisation, and are one of the main stumbling blocks in the process of accelerating and implementing RES installations.

Both the State Government and many AACCs have adopted legislation aimed at promoting renewable energies and simplifying the permitting procedures, in response to the increased number of applications and investment interest in the framework of the energy transition, accelerated by Europe's need to reduce its energy dependence from third countries.<sup>365</sup> However, these new measures introduced are not providing the expected acceleration effects in the daily practice of the procedures by

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<sup>363</sup> Spain has seventeen Autonomous Communities and two Autonomous Cities. Hereinafter referred to collectively as "AACC" or regional administration.

<sup>364</sup> For details on the distribution of competencies see Part 6 B.I.1.cc.

<sup>365</sup> For details on the dates and the content of the recent changes see Part 2E.II.5).

the Administration, while they have raised the social protest against renewable energy projects, especially due to their environmental impact. This protest has been very relevant, up to the point that some regions have reversed the support, even by issuing moratoriums on permit granting until a planning and zoning plan regulating the massive development of RES installations is available, thus pacifying the society.<sup>366</sup>

## II. General rules for the authorisation of renewable energy installations / storage installations

### 1) Executive summary

RES installations, as well as electric power transmission and distribution network installations<sup>367</sup>, are subject to prior **authorisation regime**.

The national electricity legislation provides for an authorisation procedure applicable only to installations for which the General State Administration (GEA) is responsible for granting authorisation. At the same time, it is reserved to the AACC to regulate the administrative procedures for the authorisation of installations under their competence. Eventually, the national procedure is applied by the AACC which have not regulated a specific regional procedure or which, having regulated it, decide to apply the national legislation in a complementary manner.

In this sense, the basic authorisation regime is established by the basic state regulations (requirement to obtain prior administrative authorisation, administrative authorisation for construction and administrative authorisation for operation). However, the particularities of the administrative procedure are reserved to the AACCs. Therefore, the AACCs can introduce particularities in the administrative procedure. For instance, in the time frames for processing, in the required documentation and in the meaning of administrative silence, among other matters.

The national authorisation procedure is **unique and homogeneous** for RES installations, with no specificities by type of installation or technologies.

The administrative authorisation procedure integrates, in addition to the energy aspect, the **assessment of environmental and urban planning** considerations. These include minor specificities

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<sup>366</sup> Unfortunately, information as to the total RES capacity that has been stopped/paused is unavailable.

<sup>367</sup> In Spain, the grid actions included in the framework of the execution projects of the RES installations are included in the authorisation procedure of the generation facility itself, and basically and broadly speaking, they usually include the evacuation line and the electrical substation, if any. The reference to the fact that transmission and distribution installations are subject to the same prior authorisation regime is relevant if, in addition to the network installations to be executed as part of the generation project, it is necessary for the transmission or distribution company to carry out other actions to extend its network in order to integrate the renewable generation. Therefore, although the references in this part of the study are made exclusively to RES generation installations they should also be understood as being made for electricity transmission and distribution installations.

depending on the type of installation/technology (mainly related to the scope of the required sectoral documentation and reports), **although the procedure is equally homogeneous for all types of RES installations. The environmental and urban planning aspects are more heterogeneous**, as their development and definition are reserved to the regional and municipal administrations.

## 2) Brief description of the permit-granting Authorisation procedure

### a) General procedural rules

#### aa) Authorisation of RES installations

The general procedure for the authorisation of RES installations is regulated in the Electricity Act (Law 24/2013, of 26 December 2013), and its regulatory development in Royal Decree 1955/2000<sup>368</sup>. It has undergone several recent modifications to optimize and speed up the authorisation procedures for RES installations. Specifically, for RES construction and start-up, as well as for their modification and expansion, the following **administrative authorisations** will be required: **(i) previous authorisation, (ii) construction authorisation and (iii) operational authorisation**. These administrative authorisations are granted by the substantive authority. Additional authorisations or concessions might be necessary in accordance with applicable provisions, especially those relating to land use planning and environment.

#### (1) Basic characteristics of the required administrative authorisations

##### (a) Previous Administrative Authorisation (PAA):

Its processing requires the presentation of a **preliminary project** of the installation as a technical document and, if applicable, the **environmental impact assessment** as well.<sup>369</sup> To start the procedure, the holder does not need to have the permits for access and connection to the grid (transmission or distribution grid). This allows to move forward in the administrative processing, while such permits are being processed and granted. However, this authorisation cannot be granted if the holder has not previously obtained the referred access and connection permits.

##### (b) Construction Administrative Authorisation (CAA):

It requires the presentation of an **execution project** together with a responsible statement proving compliance with the applicable regulations. For its resolution, only the exclusively technical conditions by the affected Public Administrations and entities must be analysed.

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<sup>368</sup> Royal Decree 1955/2000, of December 1, 2000, regulating the activities of transmission, distribution, supply and procedures for the authorisation of electric power installation.

<sup>369</sup> On the applicability of EIA, see under B.II.1)c).

(c) **Operational Authorisation (OA):**

This allows, once the project has been executed, to connect the installations to the grid and proceed with their operation. Additionally, the promoter must provide sufficient evidence of the technical and safety conditions of the installations and associated equipment, as well as its legal, technical, and economic-financial capacity to carry out the project.

(2) **Procedural milestones**

The most important milestones of the procedure are summarised below.

(a) **Previous Administrative Authorisation (PAA)**

It begins with the developer's request, together with the required documentation, which is submitted for **public information** for a period of thirty (30) days. If the administrative authorisation and the declaration of public utility are requested simultaneously, a joint public information is carried out for both. The **developer must respond to the claims and reports** within fifteen (15) days. Likewise, the request is submitted for **information to other public administrations**,<sup>370</sup> so that within thirty (30) days they may give their consent or opposition to the requested authorisation (the absence of a reply is considered as consent). **This is one of the milestones with the largest delays.** In fact, in accordance with the provisions of the regulations, once this period has elapsed without a response from the different Administrations, bodies or public service or general interest service companies affected in their assets and rights, it will be understood that said Administration agrees with the authorization of the installation. Even so, and notwithstanding the existence of affirmative silence, the usual practice is to wait for the issuance of these, beyond the established time limit. However, each CCAAs may incorporate specifications in this respect.

Subsequently, the **project developer is requested to express** its conformity or formulate objections within fifteen (15) days. Its **reply is, again, sent back to the Administration for its evaluation** (the objections of the project developer are transferred to the Administration or the organisation that formulated the opposition for fifteen (15) days, to show its conformity or objections; if no new objection is submitted within the given timeframe, it will be considered as conformity).

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<sup>370</sup> The provision of the regulation regarding the process of information to other public administrations does not specify which authorities must be informed, indicating that the different administrations, agencies or, as the case may be, public service or general interest service companies must be informed in the part that the installation may affect their assets and rights. Thus, the definition is open, and depending on the type of project and its location, the aforementioned information procedure will be addressed to one or other subjects. As mentioned above, it is each administrative procedure established by the AACC, which determines the bodies and public utilities from which a report must be requested and, furthermore, the complete list of bodies to be informed is determined by the characteristics of each project.

Finally, the **file is forwarded to the competent authority to resolve**. In the case of new installations, a **report from the NRA (CNMC) is required within** fifteen (15) days, assessing the legal, technical, and economic capacity of the applicant. Regarding the issuance of this report, the Government has recently adopted **two acceleration measures**<sup>371</sup>:

1. In the event the competent Administration does not issue the report within the fifteen (15) days' timeframe, the report is considered approved.
2. Establish an exception for certain RES projects that meet certain conditions of the previous requirement, by allowing the NRA to issue the report without the need to carry out a detailed analysis (it is basically an exception for promoters holding RES projects approved recently).<sup>372</sup>

The **resolution of the authorisation request must be approved within a maximum period of three (3) months from the date of submission (rejection is considered in case of non-issuance)**. This authorisation allows the project developer to start the appropriate preparatory works for the installations site.

#### **(b) Construction Administrative Authorisation (CAA)**

It begins with the project developer's **request** and the **project offprints** are **sent to the (regional and local) Administrations and entities involved** to establish the appropriate technical conditions within thirty (30) days (in absence of reply within the given timeframe, agreement is considered with the technical specifications proposed in the project). In order to speed up the procedure,<sup>373</sup> an exception has recently been introduced reducing the terms by half to fifteen (15) days when the installation has a PAA, and the processing of the CAA does not require any of the procedures foreseen for a modification of the PAA and the joint declaration of public utility has not been requested.<sup>374</sup>

Then, the **conditions are sent to the project developer** to give its conformity or formulate objections within another fifteen (15) days. In this period of 15 days the project developer may give its conformity

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<sup>371</sup> Royal Decree-Law 17/2022, of 22 September 2022, which adopts urgent measures in the field of energy, in the application of the remuneration system to cogeneration installations and temporarily reduces the Value Added Tax rate applicable to deliveries, imports and intra-Community acquisitions of certain fuels. The measures do apply without a temporary limit but for an indefinite period of time.

<sup>372</sup> In this exceptional cases the NRA may issue a favourable report on the assessment of the legal, technical and economic capacity of the company without going into a detailed analysis, as a way of speeding up the process. The conditions concerned are as follows: (i) The project belongs entirely to a developer company that has obtained a favourable report from said commission for the authorization of other generation projects of the same technology within a period of no more than two years for a size of no less than fifty percent. (ii) Provided that the power of its authorized projects has not increased by more than three hundred percent during said period. (iii) It has not changed its status in terms of legal capacity.

<sup>373</sup> By Royal Decree-Law 17/2022, of 20 September 2022.

<sup>374</sup> Please note that aspects related to the Public Utility Declaration are developed in Section 3. "Operational Authorisation (OA)" section b) "Public Utility Declaration".

or formulate objections to the technical conditions that, if any, may have been introduced by the administrations and entities concerned. If objections are formulated, they are sent to the corresponding Administration to give its conformity or formulate objections to the project developer's reply within fifteen (15) days (in absence of reply within the timeframe, agreement is considered).

**The project execution report is then submitted for approval** by the competent authority.<sup>375</sup> A field reconnaissance may be required beforehand. It is foreseen that the substantive authority may either resolve by including the technical conditions already established in the condition's terms or, in case of disagreement, by sending a resolution proposal to the Ministry. A three (3) months' timeframe is foreseen for issuing a **resolution**. Thus, the maximum duration for obtaining the CAA may last for up to four months.

In this respect, the applications for prior administrative authorisation and for construction under this paragraph may be made consecutively, simultaneously, or jointly.

#### **(c) Operational Authorisation (OA)**

Following the application request, the commissioning certificate must be issued within one month.

#### **(3) Competent bodies**

The General Directorate of Energy Policy and Mines (Ministry for Ecological Transition and Demographic Challenge) is responsible for the authorisation of electric generation installations with an installed power capacity of more than 50 MW and those located in the territorial waters; production, secondary transmission and distribution installations exceeding the territorial scope of an Autonomous Community; and all primary transmission installations, with the exception of the specificities established for the insular and extra-peninsular territories.

The **AACC** are responsible for the authorisation of the installations that, not corresponding to the GSA, are located exclusively in their territory. Several Autonomous Communities have regulated their own specific procedure for the granting of authorizations, while others have chosen to apply the State procedure. Thus, depending on the Autonomous Community in question, the procedure will be different.

#### **(4) Simplification of RES installations modification procedures**

Modifications of RES installations also require the processing of the administrative authorisations. However, there are specific provisions for certain installations that allow to shorten the procedure.

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<sup>375</sup> In the case of state procedures, it is the Directorate General for Energy Policy and Mines, while for the AACC procedures, it is the corresponding regional Directorate General for Energy.

In the case of **modifications to installations with a PAA**, they may obtain a CAA without requiring a new PAA, provided to comply with certain conditions. The threshold of installed capacity for modification – previously set at 10%– has recently<sup>376</sup> been raised to a maximum of 15% of the capacity fixed in the original project, to accommodate a greater number of modifications through this procedure<sup>377</sup>. On the other hand, for certain **non-substantial modifications of projects already authorised**, neither the PAA nor the CAA need to be obtained again, being only necessary to obtain a new OA<sup>378</sup>. Likewise, the threshold for power modification has recently<sup>379</sup> been raised up to 10% of the installation power capacity (previously 5%).

## (5) Administrative procedure particularities

A new provision was introduced by Royal Decree 1183/2020 from 29<sup>th</sup> of December 2020 in the national regulation<sup>380</sup> regarding the **shared ownership of evacuation transmission lines**. This measure has been initially considered not only to maximise the use of power lines to feed electric generation to the grid and avoid the execution of redundant installations, but also to facilitate the use of these lines by third parties; however, **in practice, however, it has been deemed as a hurdle and a cause of delay in many of the procedures**. The reason for the delays is that the agreement on shared ownership is a precondition for the administrative processing of the authorisation and requires the agreement of private parties, which is a complex matter in practice.

In the case of lines performing feeding in electricity functions of RES installations, the PAA of the RES feed-in infrastructures may not be granted without the prior submission of a document, signed by all the installations holders with access and connection permits granted at the position of the power line arriving at the substation of the transmission or distribution network, proving evidence of the existence of a binding agreement between the parties for the shared use of the feed-in infrastructures.

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<sup>376</sup> Royal Decree-Law 17/2022, of 20 September 2022.

<sup>377</sup> The other conditions to be met are that the modifications: (i) are not subject to an ordinary EA; (ii) the land affected by the production facility after the modifications do not exceed the one defined in the authorised project or, if exceeded, do not require compulsory expropriation and have urban development compatibility; (iii) do not involve a change in generation technology; and (iv) do not require a declaration of public utility for the implementation of the planned modifications.

<sup>378</sup> The following conditions must be met: (i) they are not within the scope of application of Law 21/2013, of 9 December 2013, on EA; (ii) they do not involve an alteration of the basic technical conditions greater than 10% of the installation power capacity; (iii) they do not involve safety alterations; (iv) no declaration of public utility is required for the implementation of the planned modifications; (v) the modifications of lines that do not cause changes of easement on the route, or in case of causing them, an agreement has been reached with the affected parties; (vi) in case of modification of the configuration of a substation, if there is no variation in the number of lanes or in the number of positions.

<sup>379</sup> Royal Decree-Law 17/2022, of 20 September 2022.

<sup>380</sup> Introduced by Royal Decree 1183/2020.

**Storage** installations that are directly or indirectly connected to the transmission and distribution networks, either alone or hybridised, are submitted to the same regulatory framework as electricity generation installations in relation to the need and processing of administrative authorisations.

## **bb) Declaration of Public Utility**

### **(1) Introductory remarks**

Another critical aspect in the authorisation procedure of RES installations is the disposition of the land on which they are located and, if applicable, their Declaration of Public Utility (DPU).

The Electricity Act (Article 54) declares power generation installations to be of public utility for the purposes of compulsory expropriation of the assets and rights necessary for their establishment and the imposition and exercise of the right-of-way easement. However, it has been considered that such declaration of public utility is not directly applicable to the generation installations themselves - e.g., the area of deployment of wind turbines or PV-, but only to power evacuation lines and substations, for the purposes of the imposition and exercise of the corresponding easements.

In Spain, it is a common practice to have lease or ownership contracts for the land on which the project installations are located. And, if necessary, to request the DPU of the project for the evacuation lines and substations.

### **(2) Public declaration procedure**

There is a procedure in place to obtain the project's DPU; it begins with the **request submission**, which must include the installation execution project and a specific, individualised list of the assets or rights considered necessary to be expropriated. The request must be submitted for **public information** and a **report is required by the affected entities**. It is up to the GSA to agree on the recognition of the public utility, if the authorisation of the installation corresponds to the State (if the capacity is over 50 MW), or to the competent body of the AACC, in all other cases.

Once the declaration is obtained, which must be issued within six months from the date on which the application was entered in the registry, the corresponding **resolution for the occupation of the assets or acquisition of the affected rights** must be processed and issued. If the affected parties do not agree with the terms and conditions of such occupation or acquisition, the corresponding **compulsory expropriation procedure** is initiated. Considering the implications (individualised notification, public hearing, notification of the administrations concerned), it is usually a lengthy procedure.

**Considering the delay that this may entail – as this is a long and complex procedure – it is a common practice to negotiate a prior economic agreement with the affected parties to avoid initiating an expropriation procedure.**



### cc) Environmental procedure of RES installations: Environmental Impact Assessment (EIA)

Projects related to electric power production, transmission and distribution installations are subject to an EIA when required by the applicable legislation. For this purpose, the necessary public information in accordance with the above-described regulations will be carried out during the administrative authorisation stage. Legislative competence in environmental matters is vested in the regional Administration (AACC), holding the State minimum legislative competences; almost all executive competences in this field are vested in the regional and local administration.

The environmental processing of RES installations depends on the installed power capacity of the project, according to its administrative processing. Thus, projects with a capacity above 50 MW are approved by the State Government while projects with a capacity below 50 MW are approved by the regional Administration (AACC).

#### (1) Types of Environmental Impact Assessment

Depending on its significant impact on the environment, the project must undergo an **Environmental Impact Assessment**. At the State level, the EIA is governed by Law 21/2013, of 9 December 2013, on Environmental Assessment, which is also basic legislation for the AACC. The law establishes **two types of procedures**, again, according to their impact on the environment: the **ordinary (art. 7)** or **simplified** procedure (art. 8). In Annexes I and II, the projects that are subject to EIA are listed.

Within the scope of this study, the following projects are subject to an **ordinary EIA procedure**<sup>381</sup>:

- Construction of electric power transmission lines with a voltage equal to or greater than 220 kV and a length greater than 15 km, unless they are entirely underground through urbanised land, as well as their associated substations.
- Wind farms that have 50 or more wind turbines, or a capacity of more than 30 MW or are located less than 2 km from another wind farm in operation, under construction, with administrative authorisation or holding an EIA.
- PV production installations, which are not located on roofs of existing buildings, and which occupy more than 100 ha of surface area.<sup>382</sup>

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<sup>381</sup> In addition to the above, they will be subject to ordinary EIA: (i) The projects that, being presented in fractions, jointly reach the thresholds of Annex I (Law 21/2013) through the accumulation of the magnitudes or dimensions of each of the projects considered; (ii) Those which, being subject to simplified EIA, are decided by the environmental body in accordance with the criteria indicated in Annex III Law 21/2013, as well as when decided by the developer. (iii) Any modification of a project subject to ordinary EIA and simplified EIA, when it complies with the thresholds of Annex I Law 21/2013.

<sup>382</sup> In general terms, in general terms, on 100 ha about 50 MW of installed capacity may be realised, but this depends on each project. It is important to note that the criteria here is set taking into account Ha, no matter the total installed capacity of the project.

- Projects consisting of drilling for exploration, research or exploitation of hydrocarbons, CO<sub>2</sub> storage, gas storage and medium and high enthalpy geothermal energy, which require the use of hydraulic fracturing techniques.
- Stand-alone energy storage installations with non-electrochemical technology

On the other hand, the following projects are subject to **simplified EIA**<sup>383</sup> :

- Construction of power transmission lines (projects not included in Annex I) with a voltage equal to or greater than 15 kV, with a length greater than 3 km, unless they run entirely underground through urbanised land, as well as their associated substations.
- Installations that use wind power for the production of energy and are not included in Annex I.
- Installations for energy production offshore.
- Installations to produce electricity from solar energy, intended for sale to the grid, within an area of less than 100 ha not installed on roofs of buildings or on urban land and occupying an area greater than 5 ha.
- Stand-alone energy storage by means of electrochemical batteries or any other technology hybridised with electrical energy installations.
- Projects that could significantly affect, directly or indirectly Protected Areas of the “Natura 2000 Network”.

Therefore, projects that, in accordance with the above, are subject to ordinary EIA or simplified EIA, depending on the project power capacity (above or below 50 MW), will be processed either by the State Government or by the competent body of the CA where the project is located.

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<sup>383</sup> In addition to the above, will be subject to simplified EIA:

- (i) Any modification to the characteristics of a project already authorised, executed or in the process of execution, which may have significant adverse effects on the environment. It shall be understood that this modification may have significant adverse effects on the environment when it involves: 1. A significant increase in emissions into the atmosphere. 2. A significant increase in discharges into public watercourses or onto the coastline. 3. Significant increase in the generation of waste. 4. A significant increase in the use of natural resources. 5. An effect on Natura 2000 Network Protected Spaces. 6. A significant impact on cultural heritage. (ii) The projects that, being presented in fractions, reach the thresholds of Annex II through the accumulation of the magnitudes or dimensions of each of the projects considered. (iii) Projects subject to EIA that serve exclusively or mainly to develop or test new methods or products, provided that the duration of the project does not exceed two years.

## (2) Procedure by the State

### (a) Ordinary EIA:

The ordinary EIA is carried out in three phases: initiation, technical analysis, and environmental impact statement.

Prior to the start of the procedure, the project developer may request the environmental agency to prepare an EIA **scope document** (this request is common practice). For its preparation, the environmental body shall consult the public administrations and the affected persons, who must give their opinion within twenty (20) working days. The document shall be prepared within a maximum period of two (2) months and is valid for two years.

The project developer shall then submit to the substantive body the project to be implemented together with an environmental impact study, which must identify the potential impact of the project on "Natura 2000 network" areas, alternatives and/or justification for the absence of alternatives, and, if applicable, possible alterations in the hydro morphological state of the waters. The project and the study are then submitted for **public information and consultation of the affected Administrations and citizens**, so that they can issue the corresponding mandatory reports and submit objections (within a minimum term of thirty (30) days)<sup>384</sup>. This process is jointly carried out with the hearing process of the PAA.

Within a maximum period of thirty (30) days from the end of the public information and consultation procedures, the substantive body shall send the reports and objections received to the project developer for consideration in the drafting, if applicable, of a new version of the project and in the environmental impact study. **This is one of the formalities generating the longest delays, since the affected Public Administrations do not submit their reports on time. The delay is also generated by the need to publish an announcement in the official journal prior to making it available to the public. There is no timeframe set in the legislation for this formality.**

Once the objections and mandatory reports are received, they must be incorporated into the EIA. The project developer must then submit an ordinary environmental impact request to the substantive

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<sup>384</sup> The following reports shall be requested as mandatory: a) Report from the environmental authority of the C in which the project is located. b) Report on cultural heritage, when applicable. c) Report from the bodies responsible for hydrological planning and the public water domain, and for water quality, when appropriate. d) Report on maritime-terrestrial public domain, and marine strategies. e) Preliminary report from the body responsible for radiological impact, when appropriate. f) Report from the bodies responsible for the prevention and management of risks derived from serious accidents or catastrophes, if applicable. g) Report on the compatibility of the project with the hydrological or marine demarcation planning, when applicable. h) Report from the Ministry of Defence in the event that the project affects areas declared of interest for National Defence and land, buildings and installations, including their protection zones, affected by National Defence.

body, which shall also include: (i) the project's technical document; (ii) the environmental impact study; and (iii) objections regarding the mandatory reports.

The environmental agency shall perform a formal **technical analysis** of the EIA file and verify it is completed (additional documentation might be requested). Once the technical analysis is completed, the environmental agency formulates the **EIA**. Both milestones must be completed within four months.

**The total duration of the procedure is 6 months. Reality shows that EIAs are not being issued in less than one year.**<sup>385</sup>

#### **(b) Simplified EIA**

Those projects that must be submitted to Simplified EIA, start by applying to the substantive body for the initiation of the EIA, including the requested documentation. Once the compliance with legislation has been verified, the request is forwarded to the environmental body to adopt, if considered appropriate, the procedure admission resolution.

The environmental body must then **consult** the affected Administrations and interested parties, making the environmental document of the project available for a maximum of twenty (20) days. Once this period has elapsed without any comment or objection being received, the procedure continues if the environmental body has sufficient elements to formulate the environmental impact report. **This is the formality that entails the longest delay in this procedural step. In practice, the reports of the public administrations are not issued on time.**

The environmental body shall formulate the **environmental impact report** within three (3) months from the receipt of the request for initiation, and it is submitted to the substantive body, which shall decide on the granting of the administrative authorisation. When the decision is positive, it shall be published in the Official State Journal (BOE).

#### **dd) Urbanistic aspect**

In urban and territorial planning matters, the competences are exclusive to the AACC, although the execution of urban planning is a local competence. However, the AACC competence in territorial

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<sup>385</sup> The reality of the processing of each project is very heterogeneous, and this does not make it possible to specify in which parts of the procedure this delay usually occurs (some delays are due to the lack of diligence of the administration, or due to the delays and defects of the concerned party).

planning has its limits in the State Sectorial Plans on areas for which it maintains its competence<sup>386</sup>; and, from the environmental point of view, its limits are found in the natural resources plans of the AACC.

The processing of administrative authorisations implicitly involves their evaluation from an urban planning perspective. Neither the Electricity Act nor RD 1955/2000 establish any provisions in this respect. The urban planning provisions for the implementation of these installations is established in the urban planning regulations issued by each AACC and, especially, in municipal planning.

In general, in cases where the implementation of RES installations is expressly foreseen in the corresponding municipal planning, it may be sufficient to obtain a positive report from the corresponding body, which is requested during the hearing phase of the authorisation procedure. In some AACC, regardless of whether the affected land allows the implementation of these installations, the processing and approval by the AACC competent body of a specific project or plan for the project is also required from an urban planning point of view for its approval.

## b) Conclusions

As described the authorisation procedures for RES installations are unique and homogeneous, for all types of technologies. However, practice has shown a greater complexity in the permitting procedure for **wind power installations**, which require a major number of sectoral reports and for which stricter environmental criteria are applied including more preventive and compensatory measures. On the other hand, rooftop solar installations requiring authorisation benefit from greater simplicity in their procedures.

Procedure	Level of complexity
▶ Permit-granting procedure for solar in rooftop	●●●
▶ Permit-granting procedure for solar FV	●●●●
▶ Permit-granting procedure for wind	●●●●●

(● low → ●●●●● high)

## 3) Information on the duration of the procedure, evaluation

In the previous chapters have been described the procedural milestones and their deadlines for processing and obtaining the project corresponding administrative authorisations and EIA, which, objectively, are considered as reasonable. We have also analysed the environmental assessment

<sup>386</sup> The Constitutional Court, on the various occasions confronted with the problem of collision of interests, has appealed to the need to establish formulas of cooperation to avoid collisions between adopted decisions, in the use of their own competences, by different Administrations when they affect the use of physical space. However, in the absence of such coordination, the decisions of the State, adopted within the scope of its specific competence, prevail.

procedure, which includes certain milestones which must be fulfilled in a minimum and objective period of six months. The Electricity Act states that, for installations whose authorisation is under the responsibility of the National Government, the maximum term for issuing and notifying the authorisation resolution is **one year** (absence of resolution within the given timeframe is considered as rejection).

However, in practice the deadlines referred to are **never** met by the Administration<sup>387</sup> ; on the contrary, **the procedures are extended and delayed in time, in an alarming manner. The most delayed procedures are those corresponding to the issuance of reports by the affected public administrations and agencies, and the processing of projects EIA.**

**As mentioned above, the authorisation processes for wind power installations are the ones that take the longest time and face the greatest obstacles from the Administration -especially environmental and urban planning, as well as the greatest social opposition; this is linked to their greater complexity and environmental and visual impact- especially the impact on protected birds.**

**Another aspect that influences the duration of the procedures, lengthening them in time, is whether the processing of the project's DPU is required and, especially, if this leads to a compulsory expropriation file.**

To conclude, practice shows a **greater agility in the procedures handled by the State**. A greater delay occurs in the procedures processed by the regional Administration, where proximity of the society, the reticence (lack of will) of the Administration that processes and decides, as well as the social opposition become more present. This has even led to the situation that, for projects that due to their size should be processed by the regional Administration, the project developers decide, once the processing has begun, to increase the project installed power capacity, overcoming the 50 MW barrier – and thus avoiding the processing being in hands of the AC redirecting its processing to the GSA.

Duration of procedure	
▶ Permit-granting procedure for solar in rooftop	● ● ●
▶ Permit-granting procedure for solar FV	● ● ● ●
▶ Permit-granting procedure for wind	● ● ● ● ●

(● short → ● ● ● ● ● long)

<sup>387</sup> The deadlines must be strictly fulfilled by the promoters, under penalty of the proceedings being declared null and void.

#### 4) **Presentation of the relevant obstacles, both from procedural and from substantive law.**

##### a) **Substantive law**

There are several obstacles at the substantive law level, especially relevant in the evaluations of the environmental and urban planning aspects.

- Requirement of multiple sectoral reports and authorisations that with a vast heterogeneity

The processing of administrative authorisations requires multiple sectoral reports. The fact that most of these reports are regional generates a complex heterogeneity throughout the territory.<sup>388</sup> The most common permits are those corresponding to heritage, archaeology, roads, and aeronautical easements. However, additional studies are required adding complexity (soil studies, visual and noise impact studies, etc.); also some AC apply criteria that are difficult to comply with (for example it has even been required to raise PV panels more than 2 metres above the ground, when no manufacturers can comply with it, or requirements by the regional administration for lighting and signalling of wind turbines, measures prohibited by the State Aviation Safety Agency as competent authority).

- Regional administration excessive zeal in the flora and fauna protection

This is especially the case for bird protection; beyond European and national regulations on bird protection, the regional administration usually establishes more restrictive criteria for their assessment and demands greater preventive and compensatory measures (especially for steppe bird species).<sup>389</sup>

- Lack of coordination between energy planning, land use planning and sectoral plans.

It is quite common for the regional administration processing and authorising projects, to appeal to the lack of sectorial planning for RES installations, allowing adequate planning and zoning for the implementation of these projects. In addition, on many occasions there is a lack of coordination between the criteria and zoning in sectorial plans, land use planning and energy planning.

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<sup>388</sup> Taking into account the heterogeneity of these requirements, we have not detected issues that are recurrent in all the procedures and that are particularly complex to circumvent.

<sup>389</sup> There has been no unified relaxation of environmental standards. Even in the new procedures adopted by the regulation (such as those indicated in section A.II.V).1.2 of this report) of simplified environmental impact assessment, which imply a certain flexibility in these criteria, the regional administrations are maintaining their stricter criteria with regard to the protection of the flora and fauna.

b) **Procedural issues**

aa) **Obstacles arising from the authorisation procedures configuration**

- The land management configuration system and its own procedures, which involve the participation of multiple and very different public administrations and affected entities.
- **The rigidity of excessively guarantee-based procedures:** multiple sectorial reports are required, and several replies and counter-replies are foreseen within the framework of the procedure, to allow the participation and hearing right of the affected parties. Although this participation is considered necessary, **the successive steps of reply and counter-reply by the interested parties and reports issued by the affected Administrations and organizations, on both sides** (project developer and Administration), **clearly delay the files processing.**
- The procedure configuration requiring the **granting of a PAA and CAA.**
- The regulations establish that both procedures can be carried out **consecutively, simultaneously, or jointly.** Up to now it is a common practice for project developers to opt for processing both authorisations consecutively, as this allows them to prepare the execution of the project – required to process the CAA – once the positions of the affected Administrations and entities are known –, and, therefore, adapt and specify the necessary project aspects to meet the required conditions.
- However, in a context of needed acceleration of such procedures, the joint processing and resolution of both authorisations begins to be a chosen option. Notwithstanding, practice shows this does not end up shortening the resolution period. In most cases it is necessary to modify the project initially submitted - in order to adapt it to the requirements and criteria required by the Administrations and affected parties, as well as to the criteria arising from the public consultation process; this requires, in practice, processing a modification of the initial request and resubmitting the project to the public information process and requesting reports from the Administrations and entities affected.
- Lack of a specific procedure for the repowering of installations

Many of the installations that were commissioned in the first place are now reaching the end of their useful life (especially wind farms). However, the regulations do not foresee any specific simplified procedure for the repowering of those, so, for their renewal, it is necessary to request the corresponding administrative authorisation, which generally entails the application of the same authorisation procedure, as if they were new installations.



## bb) The role of the competent authorities

- **Excessive zeal by** the Administrations, especially regional and environmental Administrations.
- **Many municipalities** are exercising their **veto rights by** modifying their urban plans to prevent the execution of RES projects in their territory, as well as suspending the granting of construction licenses.
- **Lack of human and technical resources** to cover a massive request and massive processing of renewable projects.
- Lack of standardisation and digitalisation of the procedures.
- **Lack of coordination between the administrations involved**, even between different agencies and departments of the same Administration.

## cc) Participation of the general public: social protest against the massive implementation of RES installations.

The necessary and urgent energy transition towards RES, and the lack of RES development for some years in Spain, have greatly increased the interest in developing RES, especially wind and photovoltaic, on a scale and at a speed that has caused social alarm. Likewise, the need to occupy agricultural land for the installation of large solar farms has made the regional environmental administration more cautious about these projects.

To overcome this opposition, some AACC (e.g., Balearic Islands and Catalonia) adopted measures, requiring these projects to be open to **local participation**, forcing the project developer to offer the citizens the possibility of participating in the project ownership/shares of the project or in its financing. However, this measure is proving to be ineffective, as the local citizens continue to mistrust and view these projects and their project developers with suspicion. In this sense, an increase in opposition from environmental groups and neighbourhood associations is noticed, which are closely monitoring the processing of projects and openly expressing their opposition, both during the administrative process and by challenging the authorisations and licenses granted in court.

## dd) The role of the courts

To date, the role of the courts has been residual, also due to the lower activity in the execution of RES projects in Spain in recent times. However, as the execution of such projects has increased, so has judicial intervention. From the project developer's perspective whose request for authorisation has been denied, it is usually less likely to recourse to the courts. In these cases, the fact that precautionary measures in favour of the project developer are not viable, and the length of the judicial proceedings until a final decision is reached (between two and three years), are reasons that discourage

challenging of permit denials in court. On the contrary, challenges against the granting of permits by third affected parties do have relevance in court. As the number of projects being processed increases, this may become a significant obstacle. However, the effective judicial protection of the interested parties is a fundamental principle of the rule of law, and the room for action to deal with this aspect is really limited. In this sense, and with the aim of preventing these challenges from being successful, developers must ensure that the procedure at the formal level is flawless, following strictly the established procedure.

In these cases, it is usually feasible to grant precautionary measures (basically, suspension of the project construction). In this sense, some appeals have recently been settled that are overturning projects that have already been implemented and are in operation.

## **5) Evaluation of already adopted acceleration proposals**

### **a) Authorisation regime**

Several measures have recently been adopted to speed up the processing of RES projects, to accelerate decarbonisation and reduce energy dependence, according to European legislative proposals and goals.

#### **aa) Exemption from the obligation to process PAA and CAA for production installations up to 500 kW<sup>390</sup>**

This measure helps to simplify authorisation procedures, although it only applies to small capacity installations. In practice this will only have effects in solar PV production installations, most of them linked to self-consumption.

#### **bb) Procedure for determining the environmental impact of RES projects**

This is a clear example of the measures which are adopted in Spain to accelerate the processing of RES projects. On 29 March 2022<sup>391</sup>, a temporary procedure to assess the EIA of certain RES projects was adopted but limited to a certain power capacity.<sup>392</sup>

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<sup>390</sup> Introduced by Royal Decree-Law 18/2022 of 18 October 2022, which amends the Electricity Act (Art. 53) and Royal Decree 1955/2000 (Article 115).

<sup>391</sup> By Royal Decree-Law 6/2022, of 29 March 2022.

<sup>392</sup> Projects, not located in the marine environment, with evacuation lines not exceeding 15 km (unless they run entirely through urbanized land and are undergrounded, as well as their associated substations) and voltage of less than 220 kV and size equal to or less than 75 MW in the case of wind power and 150 MW in solar PV that are located in areas of low and moderate sensitivity according to the environmental zoning published by MITERD (Government).

Only a few months later, on 27 December 2022, the Government approved<sup>393</sup> a new procedure - exceptional and transitory - for determining EIA, automatically applicable to all RES projects, unless their location is proposed in areas that are part of the "Natura 2000 network", in protected natural areas or in the marine environment, without any kind of limit with respect to their installed power capacity.

The essential element is that these projects will not be subject to an EIA as regulated in Law 21/2013, of 9 December, provided confirmation after the finalisation of the corresponding "*determination of environmental affection*" report, carried out by the environmental body within a **maximum period of two months** from the receipt of the documentation. It will be determined whether the project can continue with the corresponding authorisation procedure due to the absence of significant adverse effects on the environment or whether, on the contrary, the project shall be submitted to the corresponding EIA procedure.

This procedure is only applicable by the GSA. However, the AACC within their scope of competence, might apply this procedure (which requires the adaptation of their own regulations). This procedure is, as said, temporary and will only be applicable to projects that submit an application for administrative authorisation from 27 December 2022 until 31 December 2024.

#### cc) **Simplified approval procedures for RES projects**<sup>394</sup>

The authorisation procedures for RES projects under the State competence, which have been granted with a positive EIA report are declared urgent for reasons of public interest, provided that their project developers request the use of this simplified procedure before 31 December 2024 – for applications submitted after the entry into force of the measure on 29 December 2022.

These procedures will be processed in accordance with the general procedure (regulated in RD 1955/2000), applying a reduction of the deadlines, and with the following particularities:

- **Joint processing and resolution of the PAA and CAA:** The procedures regarding the hearing of the affected Administrations and entities, as well as those necessary for the approval of the execution project, are unified. In addition, the deadlines set forth in these provisions will be reduced by half. The public information procedure is carried out simultaneously with the application and its terms are reduced by half. During this process, the appropriate observations of an environmental nature may be made. Once these procedures have been completed, the competent body for the processing must submit, within fifteen (15) days, the complete file accompanied by its report, for its resolution.

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<sup>393</sup> By Royal Decree-Law 20/2022, of 27 December 2022.

<sup>394</sup> This simplified procedure was first introduced by Royal Decree-Law 6/2022, of 29 March 2022, and has been regulated again by Royal Decree-Law 20/2022, of 27 December 2022, and the wording established in the latter is currently in force.

- If the **DPU** is requested, it is submitted together with the PAA and CAA applications. The procedures for public information and consultations to other Administrations are unified with those foreseen for the processing of authorisations and are carried out within the same deadlines.

## b) One-stop shop

The MITERD<sup>395</sup> has just created the "Electric Energy Projects Division", with the aim of building under the competence of the Secretary of State for Energy a specific administrative unit, served by civil servant staff, to speed up the processing of renewable energy projects.

This action is in line with Article 15(3) of the revised Renewable Energy Directive.

## b) Environmental Impact Assessment

It has been recently foreseen<sup>396</sup> in the Environmental Assessment Law that the processing of the EIA for RES projects **will prioritize the dispatch of files corresponding to projects located in areas of low and moderate sensitivity**, according to the "*Environmental zoning for the implementation of renewable energies*", prepared by the Ministry (MITERD).

Proposals	Complexity	Effectiveness
Exemption from the obligation to process the PAA and CAA for production installations up to 500 kW	●	●●●●●
Procedure for determining the impact on RES projects	●●	●●●
Simplified RES project approval procedures	●●	●●●
Prioritization of environmental processing of RES projects	●●	●●●●●

(● low → ●●●●● high)

## III. Grid connection

### 1) Executive summary

Grid access and connection permits are an essential critical element in the entire procedure for RES installations' permit granting. These permits must be obtained by the project developer, prior to the

<sup>395</sup> Order TED/189/2023, of 21 February 2023, creating the Division of Electrical Energy Projects.

<sup>396</sup> Royal Decree-Law 6/2022.

approval of the corresponding administrative authorisation, and are one of the main stumbling blocks in the process of accelerating and implementing RES installations.

The right to access the grid by third parties constitutes the cornerstone of the liberalization of the Electricity Sector in Spain. The Electricity Act (Article 26.2 in fine) recognises RES producers **priority access and connection to the grid**, based on objective, transparent and non-discriminatory criteria. However, at the date of issuance of this report, such priority access has not been further developed by regulation;<sup>397</sup> therefore, the current regulations only provide for equal access to the grid to all actors.

In Spain, the competence to regulate the access and connection conditions and the granting of the corresponding permits, is exclusively national, and is shared between the Government and the NRA (CNMC).

The lack of network capacity and the new regulation established on capacity tenders, as well as the process of granting network access and connection permits itself, have emerged as one of the major obstacles in the procedures for the implementation of RES projects.

## 2) **Brief description of the permit-granting procedure**

In the following sections, we will describe the most important aspects of the permit-granting procedure.

### a) **Procedural rules regulation**

#### aa) **Introductory remark: network capacity and network planning**

The purpose of electricity planning is to foresee the needs of the electricity system to guarantee long-term energy supply, as well as to define the investment needs in new electricity transmission facilities, all under the principles of transparency and minimum cost for the system as a whole; and is carried out by the GSA, with the essential participation of the Spanish system operator - *Red Eléctrica de España, SA*, "REE".

The transmission grid development plans cover periods of six years and include flexibility criteria and mechanisms regarding their temporary implementation, in order to adapt to the real evolution of electricity demand. They allow periodic reviews in the event of variations in the parameters taken into account for their preparation.

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<sup>397</sup> Currently, there is no information available on the status of this regulatory development, and the entry into force is uncertain.

Given its relevance, a long, tedious procedure of preparation and approval of the development plans of the transmission grid is foreseen, with different procedural milestones, with the participation of the NRA, the system operator -REE-, the AACC, as well as the relevant stakeholders. It also includes a consultation and information process in which the society has a say. Its strategic environmental assessment is also the responsibility of the Government<sup>398</sup>; although it follows a different procedure to that of electricity planning (Law 21/2013 of 9 December 2013, on environmental assessment).

The distribution network is planned through annual and multi-annual plans (three-year horizon), which DSOs shall submit annually and are approved by the State, following prior positive reports by the NRA and the AACC (without the involvement or hearing of interested third parties). As it is an annual planning, the distribution network has greater flexibility in its configuration.

In Spain most of the RES projects are connected directly to the transmission grid, especially the larger ones. This is an exemption in comparison to the EU average of 70% of RES connected to the distribution grid.<sup>399</sup> Distributed generation projects and smaller projects are connected to the distribution grid<sup>400</sup>.

#### **bb) Granting network access and connection permits regulation. Competent bodies**

The main principles of access and connection regulation are established in the Electricity Act, which reinforces the principles of objectivity, transparency, and non-discrimination in its granting, and establishes the regime of granting and denial under exclusively technical criteria. Its regulatory development is shared between the Government and the NRA. The Government is responsible for establishing the criteria and procedures that the concession of access and connection must meet to comply with the objectives of energy policy and the incorporation of renewables. This mandate was executed with the approval of Royal Decree 1183/2020, of 29 December 2020, on access and connection to the electricity transmission and distribution networks ("RD 1183/2020").

The NRA – CNMC – is responsible for approving the methodology and conditions for access and connection, including: the content of applications and permits, economic criteria, criteria for capacity assessment, reasons for refusal, minimum content of contracts and the obligation of publicity and transparency of relevant information for access and connection. The CNMC adopted Circular 1/2021, of 20

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<sup>398</sup> Proof of this tedious process is the fact that the current Plan for the Development of the Electric Energy Transmission Network 2021-2026 was approved by the Council of Ministers on March 22, 2022 (which is later than the beginning of its temporary scope of application).

<sup>399</sup> One of the reasons is that the distribution network is generally more saturated than the transmission network. It should also be noted that the % is a percentage of total installed capacity, not of the number of total projects. In this respect, projects with higher installed capacity are connected to the transmission grids.

<sup>400</sup> Lines, transformers and other electrical elements with rated voltages equal to or higher than 200 kV are considered transmission grids, while lines, transformers and other electrical elements with rated voltages lower than 200 kV are considered distribution grids.

January 2021, on access and connection<sup>401</sup>, and the Resolution of 20 May 2021, establishing the detailed specifications for the determination of generation access capacity to the transmission and distribution grid.

The NRA-CNMC is in the process to be restructured and the energy brand – the CNE (*Comisión Nacional de Energía*) will be separated back to its former structure as a single body. A draft bill has been published on 1<sup>st</sup> March 2024 and submitted to public consultation. However, the competences on energy to the future CNE are expected to remain the same according to the draft bill.

These regulations, in force since 1 July 2021, have clearly and objectively established the criteria for the granting of grid access and connection permits, a key and critical element in the installations' authorisation procedure. Although the publication of these new regulations has accelerated the processing of permit granting procedures, their practical application continues to be complex and excessively bureaucratic - some aspects are not sufficiently regulated or are open to interpretation -, and the lack of grid access capacity is particularly critical.

#### cc) **Criteria for the granting of access and connection permits**

According to the Electricity Act, the granting of an **access permit** shall be based on compliance with the technical criteria of safety, regularity, quality of supply and sustainability and economic efficiency of the electricity system established by regulation. The access permit is granted by the TSO when the grid connection point is in the transmission grid or by the DSO when the grid connection point is in the distribution grid. The permit details the specific conditions of network use. In any case, the access permit may only be denied for lack of access capacity.

The **permit for connection** to a specific network point defines the technical, economic, safety and commissioning conditions of the installations that need to be built, extended, and reformed in the transmission and distribution network to make the connection. The connection permit will be granted by the TSO or DSO owning the network in which the point for the connection requested permit is located. The connection permit may only be denied due to technical impossibility, for safety reasons, the non-existence of the network installation where the connection point is requested and since the installation is not included in the current transmission grid planning or in the investment plans of the distribution companies.

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<sup>401</sup> Circular 1/2021, dated January 20, of the National Commission for Markets and Competition, which establishes the methodology and conditions for access and connection to the transmission and distribution networks of electricity production installations.

dd) **Procedure for requesting and granting access and connection permits**

(1) **Introductory remarks: single procedure, web platforms, financial guarantee, and priority criteria.**

The general criteria, that characterise the process of obtaining access and connection permits, in accordance with recent regulatory developments (RD 1183/2020 and Circular 1/2021), are highlighted below as follows:

- **Joint** processing of access and connection permits **in a single procedure.**
- Management and processing of requests by the TSO and DSOs through **web platforms.** All requesting generators are obliged to use the web platforms for the management of their requests, and to communicate with the system operators by electronic means, except for project developers being natural persons, for whom such use is optional.
- Obligation to **publish monthly on the web platforms the existing access capacity in each network node,** facilitating planning and decision making by the project developers.
- **Financial guarantee:** prior to the application submission for access and connection permits, and before the competent body grants the installation authorisation, a copy of the receipt proving the deposit of a **financial guarantee for an amount equivalent to 40 €/kW installed capacity** shall be submitted. **The constitution and deposit process of the guarantee demands certain requirements that lengthen the time of its constitution and, therefore, the time to be able to apply for the permits, slowing down the procedures.** For example, the deposit of the guarantee must be made together with a request to the competent body legitimated to grant the permit, to make an expressed decision on whether the guarantee is adequately constituted. This confirmation shall be submitted to the system operator before the application can be accepted. This guarantee is required for access and connection permits for immature or non-existing projects, avoiding the analysis of applications for purely speculative projects.
- **The principle of temporal access priority** applies for permits prioritization, except in cases in which an access capacity tender is foreseen for a specific node of the transmission grid, or in case of electricity generation installations hybridization with access and connection permits already granted.

(2) **Milestones in the granting procedure for access and connection permits**

The most relevant milestones in the procedure for requesting and granting access and connection permits are as follows:



**(a) Request**

By fulfilling the application forms regulated and published by the TSO or DSOs. The network operators may require corrections on the requests (within twenty (20) days<sup>402</sup>).

**(b) Analysis and evaluation of the request by the network operator**

Once the application has been accepted for processing, the network operator must assess the existence or not of access capacity in accordance with the established technical criteria. When it is considered that an installation may have an effect on the upstream grid to which it is connected, it is essential to **request an acceptability report from the upstream grid operator, which adds time to the processing of applications** (as a general rule, this happens with requests above 5 MW of installed power capacity). At the same time, the owner of the grid (to which the connection permit is requested) must evaluate the feasibility of the connection.

If the acceptability report is required, the network operator must request the report from the grid operator upstream within a maximum period of ten (10) days after the request has been admitted for processing. The maximum term for the upstream system operator to send the acceptability report to the requesting operator shall be the same as the one that would apply for sending the previous proposal (identified in point 3). This consultation may be extended to successive upstream system operators, if the access could have an influence on them, applying in this case to these operators the same deadlines for requesting the acceptability report to the upstream system operator and for sending the corresponding report to the requesting operator. In practice, **such successive requests for upstream acceptability reports delay for months the assessment and issuance of the corresponding access and connection permits**, and its modification is one of the main important requests by project developers.

**(c) Assessment outcome. Referral of draft proposal: technical and economic specifications.**

The grid operator must communicate to the generator the outcome of the request assessment, its acceptance or refusal; the refusal may be total or partial. If the existence of access capacity is concluded and the connection is viable, the grid operator shall prepare a draft proposal that includes the **connection technical specifications**, as well as an **economic budget** for compliance with the technical conditions and the performance of any action necessary to make the physical connection effective. The deadlines for the network operator to submit this communication vary according to the installation connection type.<sup>403</sup> If the issuance of an acceptability report from the upstream grid

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<sup>402</sup> It should be noted that the periods indicated in days are understood to be working days, excluding Saturdays, Sundays and those declared holidays throughout the national territory.

<sup>403</sup> a) Installations with a connection point to the distribution network:

operator is required, these maximum deadlines will be increased by the deadline established for the remission of the corresponding acceptability report.

**(d) Acceptance of the proposal**

The applicant (the project developer) has thirty (30) days to communicate to the network operator whether it accepts the connection point proposal and the economic and technical conditions.

**(e) Request for the proposal revision**

In case of disagreement with the technical and/or economic conditions, the project developer may request the system operator to review specific aspects within thirty (30) days. The system operator shall reply to the review request within fifteen (15) days. After receiving the network operator's response, the applicant has a further thirty (30) days period for acceptance. The revision of a draft proposal implies the deadlines suspension of procedures related to other access and connection requests when such procedures might be affected by the revision outcome.

Additionally, in the case of generation installations at voltage points equal to, or below, 36 kV, the proposal will not be considered accepted until the applicant previously signs a payment agreement for the infrastructures to be developed by the grid owner. Only the works of reinforcement, adaptation, renovation or reform of existing transmission or distribution network installations in service, provided that they are necessary to incorporate the new installation, must be carried out by the distributor or transporter, as it is the owner of these networks and for reasons of security, reliability and quality of supply. In addition, the works required for the connection of the generating installation up to the point of connection to the distribution network may, at the request of the applicant, be carried out by any legally authorised installation company or by the transport or distribution company.

It is important to outline that, in practice, for installations up to 5 MW of installed power capacity, some grid operators, are directly requesting the payment of the infrastructure to be executed by the grid operator be accredited within the same thirty (30) days' timeframe referred to for the acceptance of the draft proposal.

**a. Issuance of access and connection permits**

After applicant's acceptance of the connection point, the technical conditions of access and connection, and the economic conditions of connection, the network operator shall issue the corresponding access and connection permits and has a maximum period of twenty (20) days to make the

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a) If voltage lower than 1 kV: fifteen (15) days. b. If voltage equal or higher than 1 kV and lower than 36 kV: thirty (30) days. b). If voltage equal or higher than 36 kV: forty (40) days.

c) Installations with a connection point to the transmission network: sixty (60) days.

notification (starting with the applicant's acceptance or, by the signature of the aforementioned payment agreement).

#### **b. Shortened procedure:**

A shortened procedure has been designed for obtaining access and connection permits, but limited to installations below 15 kW, which are not exempt from obtaining such permits (as it is the case of self-consumption installations without surpluses and with surpluses below 15 kW in urbanized land accounting all necessary facilities). Therefore, its impact is reduced. This shortened procedure is governed by the same principles as the general procedure, although the deadlines are reduced by half.

#### **ee) Access and connection conflicts**

The substantive regulation determines the corresponding conflicts that may be filed, in the event of discrepancy with the evaluating and granting procedure for access and connection permits. Although the procedure for granting access and connection permits is the same - as they are processed and granted in a single procedure - the conflicts are divided into access or connection conflict accordingly.

**Access conflict:** The NRA is responsible for the resolution of possible conflicts that may arise in relation to the access permit, as well as to the denials issued by the network operator. The deadline for filing a dispute is one month from the applicant awareness of the fact motivating its request for dispute resolution (in most of the cases when the permit denial is notified). The **resolution timeframe is two months, enlargeable to two additional months if further information to the request is required.**

**Connection conflict:** The processing and resolution of connection conflicts may be referred to the NRA or to the AACC. The disagreements that arise in relation to the granting or denial of the connection permit to transmission or distribution grid under the competence of the GSA are decided by the NRA. However, they are decided by the competent body of the AACC for grid facilities under the competence of the AC, with prior report by the NRA (setting certain binding economic aspects). In both cases, the conflicts must be submitted by the project developer within a maximum period of one month from its awareness of the fact that motivates the conflict resolution request.

The resolution of the access and connection conflicts may be challenged in court, by filing a judicial administrative appeal, although it is not common practice to escalate to the courts for the resolution of such conflicts.

#### **ff) Particularities**

Requests for access and connection to the transmission or distribution grid of **storage installations** that may discharge energy into the transmission and distribution grids are considered and treated as the requests for access to electricity generation installations and must comply with the same established procedure. However, the provisions in RD 1183/2020 on access and connection, do not apply to

storage installations in the electricity systems of non-peninsular territories owned by the transmission system operator.<sup>404</sup> The mentioned provisions do not apply to storage installations when they are fully integrated components of the transmission grid<sup>405</sup>, or when they never inject energy into the grids.

### gg) **Network infrastructure to be built by distribution companies**

In Spain, there are more than 330 DSOs managing the distribution network in their corresponding distribution areas. Among them, the five largest DSOs operate on a large part of the territory.

This is remarkable because many of the smaller DSOs are interconnected with the upstream DSO. This means that, in order to accommodate the integration of RES projects in their distribution areas, network operators need to expand their network, being forced to process the corresponding expansion requests up to their upstream interconnections. In these situations, **the implementation of RES is delayed until these upstream interconnections are solved.**

The criteria for determining these procedures and their concession process by the upstream DSO have not yet been developed.<sup>406</sup> For these DSOs, the general provisions of RD 1183/2020 on the procedure for granting access and connection permits are applicable. However, the technical criteria for the evaluation of network capacity set by the CNMC - in Circular 1/2021 and Resolution of 20 May 2021 - are only applicable to producers, and not to DSOs for their requests.

### 3) **Information on the duration of the procedure, evaluation**

As mentioned, the process for obtaining grid access and connection permits is extensively regulated and excessively bureaucratic, although measures aimed at simplifying it have been introduced (such as the possibility for joint processing of both permits and the digitalization of procedures).

The procedure duration for permits granting varies on a case by case basis depending on the size of the projects and whether or not an upstream acceptability report is required. Generally, the projects that are more agile are those below 5 MW, which generally do not require an acceptability report. For those, permits may be granted within 3-5 months. For larger projects, where upstream grid operator acceptability or greater complexity in determining technical and economic conditions is required, the process may take 6-12 months.

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<sup>404</sup> In accordance with the provisions of Law 17/2013, of October 29, for the security of supply and increase of competition in the island and non-mainland electricity systems.

<sup>405</sup> As provided for in Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 concerning common rules for the internal market in electricity and amending Directive 2012/27/EU.

<sup>406</sup> The NRA – C NMC – agenda for 2023 foresees the preparation and approval of the corresponding Circular regulating the operating procedures for distributors. These procedures are already regulated for interconnection with the TSO.

**These time periods become substantially longer in the event of discrepancies and access and connection conflicts, in which case the time required to process and resolve these conflicts must be added.**

In case the DSO must expand its network and execute actions that require an extension of the inter-connection with the upstream DSO, this procedure remains lengthy, in the absence of concrete rules on technical conditions and operating procedures between DSOs.

Duration of permit-granting procedure	Level of complexity
▶ Small RES installations (under 5 MW)	●●
▶ Larger RES installations (up to 5 MW)	●●●●
▶ Distribution grid expansion	●●●●

(● low → ●●●●● high)

**4) Presentation of the relevant obstacles, both procedural and from substantive law.**

**a) Substantive law**

Two key elements stand out as the main obstacles in the procedures for granting network access and connection permits: the lack of network capacity and the regulatory framework of the permit granting procedure itself.

**aa) Network capacity and planning**

The electricity network planning is a long and laborious procedure. The transmission grid development plans have long-term horizons of six years, even if regulation allows for certain flexibility mechanisms. Exceptionally, specific aspects of the transmission grid development plans may be modified, among other reasons, when the construction of certain transmission grid infrastructure is critical for the energy transition and the economy electrification, and it was not considered in the current planning instrument. In addition to the lack of network capacity, there is the blocking of certain points of the network and the existing speculation, since in many cases access and connection permits have been requested and granted for "ghost" projects (never intended to be executed), request with the only purpose of reselling, creating a highly speculative market.

**bb) Permitting process**

Another critical aspect is the process of granting network access and connection permits. Regulation is very recent, and includes measures aimed at simplifying the procedure. However, since entering into force – on 1 July 2021 – the permit granting processes shows to be complex and excessively lengthy, especially in the case of installations above 5 MW of installed power capacity, which require an acceptability report from the upstream grid operator. This process slows down even more when successive requests for upstream acceptability are imposed.

Practice has also shown that, although the new regulatory framework was intended to regulate most of the cases, there are still grey areas in the procedure that leave room for interpretation by the different network operators, and their treatment is not homogeneous throughout the national territory.

However, the Regulator, during the conflict's resolution being filed, has been establishing interpretative criteria in the grey or unregulated aspects, which is currently allowing more speed in the decision-making process by the project developers, as well as in the evaluation and issuance, if applicable, of the access and connection permits by the network operators.

#### **cc) Updating access and connection permissions**

**Another aspect that often slows down the start-up of the installations are the provisions on the need, in certain cases, to update the access and concession permits previously granted.**

When the main conditions of the RES installation or of the grid connection have been modified during the processing of the permits or until its commissioning, it is obliged to previously inform the grid operator, by means of a request for updating the access and connection permits, providing certain information according to the scope of the update. In the event of an increase in the installations power capacity or modification of their location, a new receipt for the deposit of the economic guarantee and a new communication from the competent administration of the adequate constitution of the guarantee are required.

#### **dd) Special consideration on capacity tenders**

One of the most relevant novelties introduced by the new regulation (RD 1183/2020) is the reservation of certain nodes of the transmission grid for capacity tenders, setting specific criteria for renewable generation and storage installations. Currently, the Ministry (MITERD) has reserved for tender almost 290 nodes of the transmission grid (industry sources estimate a capacity of 100,000 MW). The first reservation took place in June 2021; however, at the date of issuance of this report, no tenders have yet been launched; therefore, today, all reserved capacity is blocked, creating a major obstacle in the implementation of RES projects.

The lack of calls for the tenders has stopped the granting of access capacity to the transmission nodes. It has also blocked the issuance of access and connection permits for projects that, although connected to the distribution network, have an influence on the transmission network and therefore require an acceptability report from the upstream network operator. To the extent that the influence is on a node of the transmission grid reserved for bidding, it has also been ruled that such requests - from the distribution grid - are suspended, since the acceptability report cannot be issued by the grid operator, as the affected node is reserved for bidding.

The fact that one of the determining criteria in such tenders is time, with a higher score awarded to those projects that put the installations into service in the shortest possible time (the general priority criteria does not apply), has meant that in those nodes presumed to be put out to tender before -since

the draft Order regulating the call for tenders has already been submitted to the hearing procedures to obtain the PAA and CAA have started, as well as requests for environmental assessments. The Government has detected "speculative movements" by certain actors who are initiating the first steps in the procedures without giving continuity to them, in order to block sites to other actors with a true interest in developing RES.

This, together with the fact that such requests also affect the Administrations - they have to allocate many human resources they are already lacking, to the management of such requests for an authorisation and environmental procedures - led the Government on 28 December 2022 to adopt a moratorium<sup>407</sup> of 18 months to suspend the processing of those projects that, intending to feed into nodes reserved for capacity tenders, do not yet have access and connection permits. This suspension affects thousands of RES projects; although the extent of the total impact is unknown, according to data from November 2022 published by the TSO, a total of 173,900 MW of wind and photovoltaic power have been accounted for lacking access and connection permits or they have been denied it. Of these, 34,100 MW have applied for permits (10,800 MW wind and 23,300 MW PV). Another 139,800 MW (25,900 MW wind and 113,900 MW PV) applied for them, but were denied, and it is unknown what will happen - whether the project developers will apply again or not.

Due to the lack of grid capacity and with the aim of promoting self-consumption associated with new renewable energy generation in large consumers, on 27 December 2023 a new Royal Decree-Law<sup>408</sup> was published in which 10% of the capacity reserved in the fair transition nodes was released for the development of these projects.<sup>409</sup>

The release of this capacity is extended to those nodes of the distribution grid that require an acceptability report from the TSO.

## **b) Procedural issues**

The processing of access and connection permits is carried out exclusively with the intervention of the transmission or distribution network operators, as appropriate, without any public consultation or hearing of the general public or other possible interested parties. Only in the event of disagreements with access and connection refusals, or with the conditions thereof, the intervention of the NRA or the competent body of the AC may be required.

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<sup>407</sup> Royal Decree-Law 20/2022, of 27 December 2022, on measures to reply to the economic and social consequences of the war in Ukraine and to support the reconstruction of the island of La Palma and other situations of vulnerability.

<sup>408</sup> Royal Decree-Law 8/2023 of 27 December adopting measures to deal with the economic and social consequences of the conflicts in Ukraine and the Middle East and to alleviate the effects of the drought.

<sup>409</sup> In this sense, although there is no maximum power requirement for self-consumption projects, it is required that the quotient between the contracted power in a period and the installed generation power is at least 0.5.

A critical element of these conflicts, which can take between four and twelve months to resolve, is their effect on subsequent requests at the same node or point of connection to the network. Regulation does not provide rules on the suspension of the access and connection permits granting for subsequent requests when a conflict over a previous request is pending resolution. This has led in practice to diverse solutions.

In some cases, the network operator, being aware of the existence of the conflict, has chosen to suspend the processing and resolution of subsequent access and connection requests until the conflict is resolved. At other times, such suspension has not been agreed. This has led to situations where when an access conflict has been resolved in favour of a project developer, recognizing the right of access (previously denied by the network operator), the installation could not be executed due to lack of network capacity at the time of resolution of the conflict. In such cases, the NRA resolution called for an agreement to be reached with the third parties that had obtained capacity; or, where appropriate, the matter ended with a liability claim against the network operator, in court, especially if bad faith in the network operator actions had been proven.

**The intervention of the Court in this field is marginal.** In the event of disagreements with the denials of access and connection permits, access disputes - the most common ones - end with the intervention of the NRA investigating and resolving such disputes. It is not common for such decisions to escalate to the Court.

## **5) Evaluation of already adopted acceleration proposals**

### **a) Proposals**

#### **aa) Proposals on access and connection permit granting dure**

Regulation on the processing of granting network access and connection permits procedures is fairly recent (in force since July 2021).

As of the date of issuance of this report, no additional measures have been adopted by the Government or the NRA to accelerate such permitting processes. The TSO (REE) and the NRA (CNMC) have launched a working group with the DSOs and producers to modify the detailed specifications, especially on those aspects identified as most problematic in their application to determine access capacity leading to permit denials.

#### **bb) Publication of available grid access capacities**

With the approval of Royal Decree 1183/2020, of December 29, on access and connection to the electricity transmission and distribution grids ("RD 1183/2020"), TSO and DSO were required to publish information on the existing access capacities at each node, with the aim of providing this information to the developers in order to enable them to make the corresponding project development decisions in certain locations.



**cc) Accreditation of project progress: accreditation of procedural milestones to maintain the access and connection permits granted**

The Government, by means of Royal Decree-Law 23/2020, of 23 June 2020<sup>410</sup>, has set certain procedural milestones that must be proven by RES projects, as a condition to maintain access and connection to the transmission and distribution networks. The maximum deadlines established for compliance with the different milestones take into account the seniority of the permit and the nature of the administrative procedure in question. Failure to meet these milestones entails the automatic expiration of the access and connection permits and the immediate execution of the submitted economic guarantees.

Both the enactment of these measures -which involved the voluntary resignation of many project developers- and the expiration of the milestones, have had or will have as a consequence the release of capacity in the network.

**dd) Hybridisation**

By means of the Royal Decree-Law 23/2020, the Government adopted urgent measures to **maximise the use of existing grids and minimize environmental impacts**. Therefore, “**hybridisation**” was introduced, meaning access to the same point of the grid by installations using different generation technologies, with access and connection permits already granted.

With this same aim, the wording of the Electricity Act was modified to allow the authorisation of installations with an installed power capacity greater than the access and connection power granted, provided that these evacuation limits are respected in the operation of the plant. In this way, it is allowed to install more power capacity than can be evacuated at any given time whether it is done by hybridizing technologies or with the same generation technology. Since the resource does not have to match in time, it is possible to optimize energy evacuation, thus achieving greater use of the existing grid, better utilization of the RES and greater environmental synergies.

**ee) Obligation of the DSOs to include in their annual investment plans actions for increasing the capacity of access to new RES and self-consumption.**

Considering the existing limitation of grid capacity, another measure recently adopted by the Government has been to require DSOs to include, exceptionally, and for the annual investment plans for the three-year period 2023 to 2025, actions for increasing the capacity for access to new renewable generation and self-consumption. These actions must represent a minimum of 10 % of the investment volume entitled to remuneration on the system of the annual investment plan submitted by the DSO

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<sup>410</sup> Royal Decree-Law 23/2020, of 23 June 2020, which approves energy and other measures for economic reactivation.

and must be prioritised to those areas in which the lack of access capacity for the evacuation of renewable generation and self-consumption has become evident on a recurring basis.

**ff) Mandate for the modification of the Transmission Network Planning 2026**

Recently, by means of Royal Decree-Law 20/2022, of 27 December 2022, the Government has adopted a mandate to initiate, before 31 March 2023, a modification of specific aspects of the development plans for the planning of the electricity transmission grid, to include those urgent actions considered strategic and a priority for the energy transition allowing the development of the industrial value chain.

In this sense, and in order to increase the capacity of the transmission grid, on 16 April 2024 the MITECO approved a specific modification to the Transmission Grid Development Plan for the 2026 horizon, including 73 new actions, 23 of which are aimed at covering new high power demands to decarbonise the economy and accelerate the production of new renewable energies.

Additionally, progress has been made in the process for preparing the planning of the transmission grid horizon 2030. Currently and until October 2024, the TSO is studying the proposals presented by the different stakeholders.

Proposals	Complexity	Effectiveness
Modification proposal: Detailed specifications in distribution for capacity calculation (* in progress)	●●	●●●
Milestones for expiration of access and connection permits	●●●	●●●●●
Hybridization	●●●	●●●●●
Inclusion in the DSOs 2023-2025 investment plans of actions that increase the capacity for access to new renewable generation and self-consumption.	●●	●●●●
Modification of Transmission Network Planning 2026	●●●●	●●●

(● low → ●●●●● high)

## F. Analysis of the permitting procedures in Sweden

### I. General rules for the permission of renewable energy installations/ energy storages

#### 1) Executive Summary

The rules and principles in the Environmental Code are in generally applicable to all production technologies. There is no technology specific legislation in Sweden (e.g., no Wind power Act or Solar Act or similar).

Permits that are required for most production technologies are:

- Local plan and building permits.
- Environmental permits to the extent the activities are deemed environmentally hazardous.
- Permit for water operation to the extent the activities concern water areas.
- If the activities concern protected areas or affect protected species additional permits may be required.

No permits are needed to connect a production facility to the grid. Instead, a connection agreement is required with the relevant grid owner.

The permit procedures do normally not exceed the time frames stipulated in Art. 16 RED<sup>411</sup>.

Some examples of obstacles in the permit-granting process are:

- time delays and unpredictability in the environmental assessment of the application,
- more than one point of entry,
- no order of precedents between different interests, e.g., climate change is not an interest specifically prioritized over any other interest in the environmental legislation.

## 2) Brief description of permit-granting procedure

Energy law including legislation applicable in respect of renewable energy sources does not constitute an independent legal discipline in Sweden. Nevertheless, it would be reasonable to say that the legislation in this field generally falls under the domain of administrative and environmental law. In all areas relevant for this report the legal procedure and the permit procedure have an administrative law character and the Swedish environmental courts that may be involved in the permit procedure will to a large extent handle the procedure on the basis of administrative law principles (e.g., with respect to the investigations that have to be performed before decisions are taken and regarding publication requirements at different stages of the proceedings).

### a) Permit-granting procedure in case of environmentally hazardous activities

The operation of the technologies covered by this report, will at least in case of large size installations and plants, be regarded as environmentally hazardous activities which require some kind of permit under the Environmental Code and the environmental regulations derived from the Environmental Code. Depending on the type of activity and the environmental impact of the operation in question, the operator must file an application for a permit with either the Land and Environmental Court or the Environmental Permit Office (*Miljöprövningsdelegationen*, the "MPD") at the County Administrative Board. Less hazardous activities only require the operator to file a notification to the relevant municipality. In some cases - activities of national interest - the activities will be subject to the Swedish Government's decision of permissibility.

Although the operation of solar energy installations is not expressly indicated as environmentally hazardous activities in the legislation, there is a tendency both on the County Administrative Board side and on the operator side to treat at least the operation of large ground based solar farms as environmentally hazardous.

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<sup>411</sup> RED II (EU) 2018/2001.

Note that smaller installations such as micro wind turbines, solar panels installed on residential buildings, smaller geothermal installations etc. may require some kind of permits but such activities would typically not be regarded as environmentally hazardous at a level requiring a permit as described in this section A II. 1) and thus, the procedure described in this section would not be applicable. For such installations, please refer to the respective technology sections below.

For the sake of completeness, it may be noted that if the activities include construction of water structures or operations of such structures, a permit for water operations under the Environmental Code is required. If an activity requires both a permit for water operations and other permits according to the Environmental Code (e.g., due to the environmental impact of the activity), the permits may be dealt with at a single procedure.

For an overview of the permit requirements in relation to the activities described in this report, please see **Appendix 1**.

#### **aa) Steps in the permit-granting procedure**

The extent of the permit application procedure and requirements connected thereto depend on the type of permit required for the activities. For permits handled by the Land and Environmental Court or the MPD the procedure typically involves the following steps:

##### **(a) Consultation procedure**

The applicant must consult with the County Administrative Board, the local municipality(ies), other relevant authorities, neighbours, and other parties being concerned by the activities. The applicant is responsible for conducting the consultation procedure and the documentation thereof.

##### **(b) Preparation and filing of the application**

The application for a permit must contain information on the environmental impact of the activities (described in an EIA), the applicant's undertakings to reduce this impact and various other information. Comments received during the consultation process shall be considered in the application and the EIA.

##### **(c) The Land and Environment Court's or the MPD's review of the application**

The court/MPD often initiate the procedure by sending out the application to the parties concerned on referral. If these parties (primarily different authorities) request that the application needs to be supplemented (supplements are often requested), the court/MPD will often not make its own assessment of such requests, but the applicant will be required to submit the requested supplementing information, in order not to risk the application to be considered deficient and thus rejected already on that basis.

When the application is deemed complete, the court/MPD shall announce the application to the public ("*kungöra*") which is done i.e. by a notice in the local newspaper. At the same time, the application shall be sent again to the parties concerned on referral. These parties must then assess whether they consider that the permit can be granted and whether special conditions should be imposed on the activities. The applicant is then given the opportunity to respond to the comments submitted by the parties concerned.

#### **(d) Permit decision**

The permit application is assessed against the general rules of consideration, the principles for management of land and water, the applicable environmental quality standards as well as the rules for conservation of natural habitats and of wild fauna and flora set out in the Environmental Code. Please see **Appendix 2** for a general description of the framework for the assessment.

Further, permits may not be issued in conflict with a local plan ("*detaljplan*") or area regulations ("*områdesbestämmelser*") under the Planning and Building Act.

#### **(e) Appeals, if applicable**

Generally, any party who is affected by a permit decision has a right to appeal the decision if the decision has been taken against his or her interests. This could involve neighbours as well as other parties who are deemed to be concerned by the decision ("*sakägare*"). Certain authorities and municipalities may have appeal rights on the basis of express provisions in law. Furthermore, appeal rights are expressly granted in the Environmental Code to any non-profit association and other legal person which (1) has as its main purpose the protection of nature conservation or environmental protection interests; (2) is non-profitmaking; (3) has been operating in Sweden for at least three years; and (4) has at least 100 members or otherwise demonstrates public support for its activities.

#### **(f) Review by the court of appeal**

Permit decisions can as a general rule be appealed against. Which court is responsible for the appeal depends on which institution has made the decision. Decisions made by the municipality can for example normally be appealed to the County Administrative Board, whereas decisions made by the MPD (at the County Administrative Board) can be appealed to the Land and Environmental Court. The court of appeal will normally only review issues that have already been included in the initial decision.

#### **bb) The notification procedure**

The notification procedure enables the relevant authority (for the purpose of this study normally the municipality, but in some cases the County Administrative Board) to assess whether the activity or measure in question complies with the provisions of the Environmental Code and the regulations

deriving therefrom. Thus, the notifying party must provide the supervisory authority with the basis for deciding on any injunction or prohibition and for conditions regarding precautionary measures, etc.

The authority is obliged to reply to a notification. This is done either by a notification or a decision. As the notified activity may not commence until six weeks after the notification has been made, the authority must respond to the notification within this period. It is possible for the authority to extend this time, but the notifying party should be informed of this. If the activities are deemed not to be compliant with the provisions of Ch. 2 of the Environmental Code<sup>412</sup>, the authority may issue a prohibition with respect to the notified activities. If the activities are assessed to comply with said provisions, provided precautionary measures are undertaken, the authority may impose such precautionary measures. If the authority considers that no prohibition, order, or information is necessary, the operator should be informed that the notification does not give rise to any action. However, it should be noted that this does not provide legal protection to the operator. The authority may return at any time and impose any requirements necessary to ensure compliance with the provisions of the Environmental Code.

A notification may appear as a formality only but is in fact similar to a permit application given that it must include quite comprehensive information, investigations and documentation relating to the relevant activities and that the review of the notification is similar to a review of a permit application.

#### **b) Other permit-granting procedures under the environmental legislation**

If there is a risk of damaging wildlife (flora and fauna) a permit may need to be obtained from the County Administrative Board under the Species Protection Regulation ("*artskyddsförordningen*")<sup>413</sup>. Activities which are to take place within a Natura 2000 area will require a permit from the County Administrative Board under Ch. 7 of the Environmental Code. It is generally difficult to obtain such permissions for production facilities. Exceptionally, such permit can be obtained, e.g., if the establishment of a facility does not lead to damage or significant disturbances to the habitats and species that are intended to be protected by the Natura 2000 area in question. If an activity requires both a permit under any of the aforementioned regulations as well as a permit for being an environmental hazardous activity the permits may be dealt with at a single trial.<sup>414</sup>

The types of permits described above are the more comprehensive and time-consuming ones. Apart from those there may be other permits or notifications required under other legislation depending on the activities. A permit may for example be required for the purpose of the handling of combustibles

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<sup>412</sup> Cf. Appendix 2.

<sup>413</sup> 2007:845.

<sup>414</sup> Cf. art. 3 of the Environmental Permit Office Regulation ("*förordning om miljöprövningsdelegationer*", SFS 2011:1237).

and explosives under the Combustibles and Explosive Act ("*Lagen om brandfarliga och explosiva varor*")<sup>415</sup>. Applications for such permits are filed with the municipality.

Where the construction of the facilities requires deforestation, a notification must be submitted to the Swedish Forest Agency ("*Skogsstyrelsen*") under the Forest Protection Act ("*skogsvårdslagen*")<sup>416</sup>. If the deforestation shall take place close to the mountains, a permit will be required by the Agency subject to the said Act. Permission may not be granted if the deforestation contributes to non-compliance with an environmental quality standard or if it is incompatible with interests of significant importance to nature conservation or cultural heritage. The interests of reindeer husbandry must be considered. Before deforestation takes place in year-round reindeer husbandry areas, the Sami village should be consulted.

Before construction activities are commenced, the County Administrative Board must be consulted according to the Cultural Act ("*kulturmiljölagen*")<sup>417</sup> to find out whether any archaeological investigations must be made. If there are archaeological findings in the area in question, a permit according to that act may be required.

### **c) The Planning and Building Act (the planning monopoly)**

The Planning and Building Act<sup>418</sup> regulates the planning of land and water. The Act shall ensure that public interests are considered in the planning and each individual municipality is the primary planning authority (has a "planning monopoly"). The municipality is obliged to adopt a comprehensive master plan ("*översiktsplan*") for the entire area of the municipality. Such plan is not legally binding but will serve as an informative basis for further decisions and is thus relevant for the environmental permit procedure. For more urban areas the municipality normally adopts a local plan ("*detaljplan*"), which is legally binding and can create rights and obligations for those concerned by the plan. Environmental aspects form an essential part of the planning requirements.

Building and construction activities will generally require a building permit under the Act. Permits under this Act may also be required for excavations, land fillings, certain other kinds of ground works and deforestation.

The application for building permits and groundwork permits shall be filed with the municipality. If the building and construction activities in question is to be located within an area which is subject to a local plan, a building permit can only be granted if it is compliant with the local plan. If for example

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<sup>415</sup> SFS 2010:1011.

<sup>416</sup> SFS 1979:429.

<sup>417</sup> SFS 1988:950.

<sup>418</sup> SFS 2010:900.



an operator would like to erect a solar farm or a wind park in a location which is not planned for energy production according to the local plan, any permit would be subject to the local plan being amended. However, it should again be emphasized that outside urban areas, the municipalities have not normally adopted any local plans, which simplifies and speeds up building permit processes considerably.

If the local plan needs to be amended, the operator would typically explore the municipality's interest in amending the plan. If the parties agree on amending the local plan, the process connected with such amendment will typically be financed by the operator (although the municipality would be in charge of the process).

### 3) Information on the duration of the procedures

Duration of procedure (if there are no appeals)	
▶ Permit procedures in Land and Environment Court (new permit environmentally hazardous activities)	Median 501 days from filing of application acc. to statistics for 2021
▶ Permit procedure in MPD (new permit environmentally hazardous activities)	Median 299 days from filing of application acc. to statistics for 2021
▶ Notification procedures with the municipalities (new permit environmentally hazardous activities)	Approx. 1 - 6 months <sup>419</sup>
▶ Other permits, exemptions etc. from or notifications to the County Administrative, Board, municipality, or other authorities	Approx. 1 – 6 months
▶ Building permit	Approx 3 months
▶ New local plan	Approx. 1 – 2 years

The times indicated in the table above in relation to the environmental permit procedures in the Land and Environmental Court and MPD are as reported by the Swedish Environmental Protection Agency ("*Naturvårdsverket*") based on the statistics gathered for year 2021.<sup>420</sup> To get a better understanding of the duration of procedure please see Section 2)a) 2)a)aa)(c) above.

According to the same statistics approximately 30 % of the decisions from the Land and Environmental Courts and the MPDs are being appealed against (note that this statistic regards all kinds of permit related decisions, i.e. not only decisions regarding new permits). The appeal procedure could take 1 – 2 years, in some cases longer time.

<sup>419</sup> It should be noted that there are certain time limits in law connected to notifications in particular, both notifications to the County Administrative Board and the municipalities which give the applicant a right to proceed with its planned activities if the authority has not responded within the prescribed time period. However, that does not necessarily mean that a final decision is made within that time.

<sup>420</sup> See the report "*Uppdrag att samla in och analysera statistik för miljötillståndsprövningen för år 2021*" dated 2022-15-13, NV-06961-2.

As regards building permits, the law stipulates that decisions shall be made within ten weeks after a complete application has been submitted. This timeframe is not always met, but at least it provides a good estimate of what can be expected. The duration of the procedure for adopting a new local plan will depend on a number of factors, however, we deem one to two years to be a reasonable estimate.

#### **4) Presentation of the relevant obstacles**

##### **a) Substantive law**

The business community has highlighted that there is no authority to monitor the so-called promotion perspective in the assessments and that the economic and social dimension of sustainable development are being pushed aside in favour of ecological aspects. This is perceived as a problem.<sup>421</sup>

The aim of the Environmental Code is to promote sustainable development. This is clear both from the portal paragraph and from the general rules of consideration. However, the preparatory works of the Environmental Code emphasise that by sustainable development is meant ecologically sustainable development. Climate change is not a specific interest under the Environmental Code and is not prioritised over the ecological interests.<sup>422</sup>

The environmental assessment is carried out on the basis of the rules and considerations elaborated in Appendix 2. The general rules of consideration of the Environmental Code apply to the extent that they are not unreasonable when weighed against the benefits and costs, whereas other provisions that may be applicable are more absolute, (e.g., the provisions on environmental quality standards, Natura 2000 and the prohibition rules in the Species Protection Ordinance<sup>423</sup>). There are some exceptions and some possibilities of derogation from these more absolute provisions, but they are generally very strict.

There are also provisions of national interests, which open up for taking into account considerations other than environmental (ecological) considerations when making the assessment. However, there is a lack of guidance and strategies for coordinating between national interests - and possible conflicts of interest. There are provisions in the Environmental Code that indicate when an objective should be reviewed by the government if social interests other than the environmental interest are raised in a review and carry more weight than the environmental interest.

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<sup>421</sup> See SOU 2022:33 p. 101.

<sup>422</sup> However, land and water areas that are particularly suitable for facilities for industrial production, energy production, energy distribution, communications, water supply or waste management must according to a provision in the Environmental Code be protected as far as possible against measures that can significantly hinder the creation or utilization of such facilities.

<sup>423</sup> 2007:845.

The government's assessment may be characterised by political considerations, which, however, may not be the case with the reviewing authorities.

During the consultation process and during the process of authorities' and courts' handling of applications there is a strong right for the public to participate when weighing different public and private interests against each other to assess if a certain activity shall be allowed. There are also possibilities for private parties and representatives of the public to participate during the consultation and the decision-making process to safeguard their interests. In the Swedish Environmental Code, various national interests are listed that should be protected against other forms of land use. These different interests are in many cases conflicting. When it comes to the development of electricity production and electricity grids, which in some cases can take up large areas of land (especially in the case of larger electricity grid expansions), there are many individual real estate owners who are affected and whose interests must be considered and be assessed. Furthermore, many major infrastructure projects regularly affect various protected areas or protected species. All these conflicting interests make the decision making unpredictable and also make the consultations and decision-making processes more difficult to manage. One conflicting interest that has had a major impact on the development of offshore wind power in Sweden is national security and the assessment that the Swedish armed forces has made of how certain projects affect the security of the state. It should be emphasised that the Swedish armed forces have opposed the vast majority of offshore wind farms due to national security.

In Sweden there is one conflict of interest that applies only for the northern parts of the country. According to both provisions in the Swedish law and case law, the Sami (Swedish indigenous people) have a right to engage in reindeer husbandry, and thus have a strong protection against activities that make it more difficult for them to conduct reindeer husbandry. This right applies solely to the Sami population and is part of the property protection right in the Swedish constitution. Because large areas of land are required for reindeer husbandry, it has been evident in court cases that this right can have an impact on the possibilities of building electricity lines, wind power plants, hydro power plants, etc.

## **b) Procedural issues**

The Swedish permit process for renewable production units may be seen as rather complex given that there is not one point of entry into the process. Instead, depending on the type of production facility, its environmental impact, location etc., permit applications may need to be filed with different authorities. When considering potential obstacles in the permit process it should be noted that the different parties involved in this process may hold a different view on what the obstacles are. The business community may highlight slightly different obstacles than the permit granting authorities and other authorities involved in the permit process.

From a procedural point of view, the current obstacles in the overall permit process could be summarised in three categories:

- Time delays in the process of assessing a permit application under the Environmental Code.
- Unpredictability in the process of assessing a permit application under the Environmental Code.
- More than one point of entry.

Different kinds of permits, including, where applicable, connections to the grid, require contacts with different authorities and other parties, and the developer must handle all contacts by himself.

#### **aa) Time delays**

Time delays may be a result not only of the current legislation but also of in what way the authorities manage the permit process and how they apply the legislation.

Different factors together affect processing time, and it is not possible to single out individual factors that alone determine the length of the processing time. A recent governmental investigation concluded that the time taken for a permit process is influenced to varying degrees by an interaction between five key factors:<sup>424</sup>

- the effectiveness of the consultation process and effective and early dialogue between the parties involved,
- the quality of the application and the EIA,
- process management by the permit granting authorities,
- the substantive complexity of environmental assessments,
- resources, skills, and priorities.

We agree with the said governmental investigation that the duration of the process is depending on more than one factor and that the factors highlighted by the investigation as mentioned above may well have an impact on the duration.

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<sup>424</sup> SOU 2022:33 *Om prövning och omprövning – en del av den gröna omställningen.*

**bb) The effectiveness of the consultation process and of the effective and early dialogue between the parties involved**

Consultations are often ineffective without a clear division of responsibilities and documentation, leading to unnecessary and often extensive completion requirements.<sup>425</sup> The County Administrative Board may not receive sufficient support from other central authorities and there is generally a lack of coordination of governmental interests.

Limited guidance during the consultation may lead to inadequate documentation, which in turn lead to unnecessary and sometimes extensive requirements to provide supplemental documentation after the submission of the permit application which may slow down the process in the MPD/court.

**cc) The quality of the application and the EIA**

The investigation requirements are unclear with unclear environmental benefits. The requirements for what an EIA and application must contain in each case are unclear and complex, and there is a lack of guidance and support material to guide the applicant. These uncertainties may lead to situation in which authorities involved in the process request quite extensive supplementing investigation, sometimes also on details where the environmental benefits or effects can be questioned. Permit examinations are becoming increasingly detail-oriented, and this leads to that the application becomes extensive in various matters which, in the end, are nevertheless delegated to the supervisory authority for deciding of conditions.

**dd) The process management by the permit granting authorities**

Process management by the permit granting authorities is often not sufficiently active, which may slow down the process. This can delay supplemental investigations and documentation which are deemed to be required before the application can be publicly notified.<sup>426</sup> This could result in unnecessarily long processing times between permit granting authority's receipt of the permit application and its public notification.

The permit granting authority often do not take an independent view on the relevance of the supplementary investigations and documentation requested by the authorities involved. Authorities also often allow extensive and repetitive pleadings from the public. This could lead to that entirely new issues may arise at the main hearing.

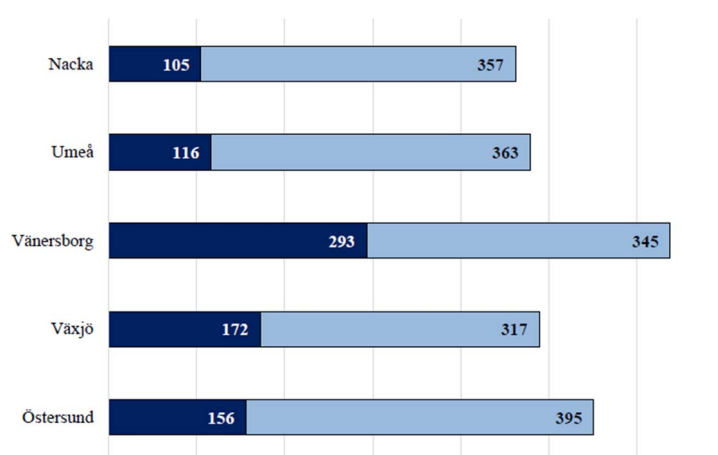
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<sup>425</sup> See under Part 2F.l.2a) at which stage of the permit process is the consultation.

<sup>426</sup> C.f. Part 2F.l.2a) item 3.

To give an estimate on the duration of the procedure from the filing of an application up to and including a permit decision,<sup>427</sup> see the table below which indicates the duration in the five Swedish Land and Environmental Courts in 2021 relating to permit applications for environmental hazardous activities.<sup>428</sup>

The dark blue fields indicate the median time in days for the phase *application until public announcement*. The lighter blue fields indicate the median time in days for the phase *public announcement up to and including the decision*.



The lack of case management or passiveness is also a problem in the MPD at the County Administrative Board, in particular the internal process within the County Administrative Board can take a long time.

#### ee) The substantive complexity of environmental assessments

The environmental assessments of substantive issues that shall be made in connection with a permit application are often complex and there are often many different parties that are affected by the activities and get involved in the procedures.

#### ff) Resources, skills, and priorities.

There seems to be a general lack of technical knowledge and its effects on the environment and the climate as well as on the climate transition within the industries within many of the parties involved

<sup>427</sup> See Sec. A.II.1 item Part 2F.I.2)a)aa)(c) for a description of this part of the permit procedure.

<sup>428</sup> See the Swedish Environmental Protection Agency's report "Uppdrag att samla in och analysera statistik för miljötillståndsprövningen för år 2021" dated 2022-15-13, NV-06961-21, page 29.

in connection with the permit procedure. There is also a general lack of resources to handle the permit applications. This could have an impact on the duration of the permit procedure.

### **gg) Unpredictability**

Unpredictability is an obstacle often emphasised by the business community. This includes issues such as:

- whether it is possible to obtain a permit,
- authorities appear to be acting randomly and adding requirements late in the process,
- non-transparent process and impossible to predict whether a permit will be obtained at all,
- the authorities have too much discretion to interpret their mandate for the reviews. They are increasingly taking on the role as counterparties rather than expert advisers in support of the reviewing authority.

The unpredictability makes it difficult to assess beforehand which investigations will be needed, how thorough they must be, etc. It also makes it difficult to estimate the duration of the process. All in all, it could not be ruled out that the unpredictability in some cases may have a negative impact on new investments in renewable energy facilities.

### **5) Evaluation of already adopted acceleration proposals**

In the last couple of years, no material legislation has been adopted in Sweden aiming at accelerating the permit process.

In order to implement Art. 16 RED II, a new Act entered into effect in 2021, in which the government was authorised to implement regulations on time limits for municipalities' processing of cases concerning permits, notifications or exemptions relating to the construction, upgrading or operation of installations for the production of renewable electricity; and equipment for connecting such installations to the electricity grid.<sup>429</sup> The government has on the basis of this Act issued certain regulations on time limits relating to the permit and notification procedures in the MPD and municipalities setting out time limits in the range of 1 – 2 years, where the longer time limit of 2 years applies to permits, notifications and exemptions relating to the construction of new facilities. The government also set out that the Swedish Energy Agency shall be responsible for a digital point of contact providing

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<sup>429</sup> See the Act with authorisations to issue regulations on deadlines and contact points for certain matters concerning the supply of renewable energy (*lag med bemyndiganden att meddela föreskrifter om tidsfrister och kontaktpunkt för vissa ärenden som gäller tillförsel av förnybar energi, SFS 2021:755*).

information and guidance.<sup>430</sup> We do not see that these regulations will do much difference as regards the duration of the permit procedure. Our understanding is that the MPDs and the municipalities already manage to finalise their review and decide on the permit within these times. As regards the point of contact we believe it is good that there is an authority responsible for gathering information and guidance. However, as seen in Section 4), the main obstacles relate to time delays and unpredictability and those obstacles will not be solved by this measure.

During 2022, the Swedish TSO was given a new assignment via an amended instruction from the government to expand the transmission grid to areas within Sweden's maritime territory where multiple power generation facilities (i.e. offshore wind farms) could be connected to the transmission grid. The expansion of the transmission grid shall aim to fulfil Sweden's target for renewable electricity production. Moreover, the government has during early 2022 decided that Sweden's first state marine plans shall be adopted. In conjunction with this decision, the government initiated another assignment to some state authorities with the objective to identify sea areas that are suitable for energy production. The purpose of these two assignments is to promote offshore wind farms in Sweden. After these two assignments were given, there has been an election in Sweden and a new government has been appointed, with a different view on these topics than the former government. Thus, it is unclear to what extent these two assignments will be completed or if they will be amended and, if so, in what way.

Some state investigations aiming to address issues in connection with the permit process have been initiated and also delivered reports including proposals for changes to the legislation. Most notable is the investigation SOU 2022:33 which had as an overall purpose to facilitate environmental and climate-improving investments through horizontal changes in environmental assessment, and to achieve faster and simpler assessment processes, while ensuring that environmental protection is maintained. The investigation also had the task of investigating whether a limited priority procedure should be introduced for cases and matters that make a significant contribution to achieving the climate objectives. We have been informed by people connected to the investigation that some of the proposals probably will be further elaborated in a Bill to be submitted to the parliament for decision.

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<sup>430</sup> See the Regulation on deadlines and contact point for certain matters concerning the supply of renewable energy (*förordning om tidsfrister och kontaktpunkt för vissa ärenden som gäller tillförsel av förnybar energi*, SFS 2021:757).



## **II. Wind**

### **1) Brief description of the permit-granting procedure**

#### **a) Permit and notification requirements under to environmental regulations**

##### **aa) Permit requirements for large WTG/ wind farms**

Large wind facilities (see definition below) are regarded as environmental hazardous activities and therefore require a permit from the MPD or, depending on the size and number of the WTGs, the Land and Environmental Court.<sup>431</sup>

##### **bb) Notification requirements for mid-size facilities**

Mid-sized wind facilities (see definition below) do not require a formal permit but must be notified to the relevant municipality prior to being constructed.<sup>432</sup> In order to facilitate and expediate the notification process, Art. 25b of the Regulation on Environmentally Hazardous Activities states that the notification process shall be handled by the municipal authority in charge of the building permit process, in conjunction with the process for the building permit according to the Environmental Code and the Environmental Assessment Ordinance.

##### **cc) The environmental assessment**

As regards the environmental assessment to be made by the MPD/court reference is made to the description under Section 1.2)a) and in Appendix 2.

One issue which draws particular interest from the MPD/court in the assessment of wind power is the noise levels to be generated by the proposed WTGs. The Swedish Environmental Protection Agency has published a report providing guidance on guideline values, the available calculation models and measurement methods with respect to noise levels. This report is commonly used as support in connection with permits, notifications, assessment and supervision of WTGs and wind farms.<sup>433</sup> The currently applicable guideline value for noise from WTGs to be measured at residential houses is 40 dBA equivalent level (Leq).

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<sup>431</sup> See Ch. 9, sec. 13-14 of the Environmental Assessment Ordinance. For further information regarding the permit process see Section Part 2F.1.2)a).

<sup>432</sup> See Ch. 9, Art. 15 of the Environmental Assessment Ordinance. For further information regarding the notification process see Section Part 2F.1.2)a).

<sup>433</sup> See the report „Vägledning om buller från vindkraftverk“, 2020-12-01.

#### **dd) The municipal veto**

A permit for wind farms is always subject to the approval of the municipality in which the facilities are intended to be built<sup>434</sup>. This prerequisite is known as “the municipal veto” and it also applies to off-shore wind farms installed within the Swedish territory. The purpose of this veto is to preserve the municipal self-governance over the land and water areas within the municipality,<sup>435</sup> which is a fundamental part of the Swedish constitutional system<sup>436</sup>.

The municipality can enforce its veto any time in the permit process until a decision has been taken. A consent given for example prior to the submission of the permit application will thus not be binding but can later be withdrawn.

#### **b) Building Permit**

The rules on building permits described in Section 1.2)c) apply differently to different WTGs depending on the size and number of the WTGs to be installed. The legislator has chosen to divide the wind installations into four different categories: mini turbines, micro turbines, mid-sized facilities, and large facilities.

##### **aa) Mini WTGs**

A facility consisting only of one WTG will be deemed a mini WTG (“*miniverk*”) if it meets the following requirements set out in Ch. 6, Art. 1, item 6 of the Planning and Building Act<sup>437</sup>:

- The height of the plant is less than 20 metres,
- The rotor diameter is less than 3 metres,
- The distance from the installed WTG to the boundary of the real property in question is longer than the height of the WTG, and
- The WTG is not mounted onto a building.

These types of WTGs do not require a building permit but require a notification to the municipality.

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<sup>434</sup> Cf. Ch. 16, Art. 4 of the Environmental Code.

<sup>435</sup> See prop. 2008/09:146.

<sup>436</sup> Cf. Ch. 14, Art. 2 of the Instrument of Government (*Sw: Regeringsformen*).

<sup>437</sup> 2011:338.

**bb) Micro WTGs**

Micro WTG: ("gårdsverk") will, as compared to mini turbines, require a building permit. Micro WTGs must consist of one WTG only, which has either a height of 20–50 metres or a rotor diameter above 3 metres, i.e. slightly larger than the mini WTGs. This category also includes turbines which do not meet the criteria of a mini turbine, e.g., if the distance to the boundary of the real property it is installed on is shorter than the height of the turbine or because it is mounted onto a building.

**cc) Mid-sized facilities**

A facility consisting of several WTGs, or only one WTG with a height above 50 metres, is classified as a mid-sized facility<sup>438</sup>, provided that it does not constitute a large facility (see below). Mid-sized facilities require a building permit and must also be notified under the environmental legislation (see a).

**dd) Large facilities**

A facility consisting of two or more WTGs higher than 150 metres, or seven or more WTGs higher than 120 metres (these measurements include the rotor blades), is classified as a large facility<sup>439</sup>.

Large wind facilities do not require a building permit but an environmental permit.

Procedure	Level of complexity
▶ Permit-granting procedure	●●● to ●●●● depending on a number of factors such as location, size etc.
▶ Building permit procedure	●

(● low → ●●●●● high)

**2) Information on the duration of the procedure, evaluation**

Please refer to Section A.III as regards the estimated duration of the permit procedures.

It should be emphasised that, as regards permit decisions concerning wind facilities specifically, there is a potentially rather large number of persons that may be entitled to appeal such decisions. The court of appeal has accepted that persons living within a 2–3 km radius of the proposed location for the WTGs (to some extent depending on how affected such person is considered to be by the WTGs in question) have a right to appeal.

<sup>438</sup> According to Ch. 21, Art. 15 of the Environmental Assessment Ordinance.

<sup>439</sup> According to Ch. 21, Art. 13 and 14 of the Environmental Assessment Ordinance.

### 3) **Presentation of the relevant obstacles, both from procedural and from substantive law**

The obstacles presented under Section 1.4) will be relevant also for the permit-granting procedure with respect to wind facilities. In addition to this, the municipal veto must be regarded as a rather large obstacle to wind power development in Sweden, both onshore and offshore within the territorial sea. Due to that a municipal veto applies for the establishment of wind turbines within a municipality, and that this veto can be enforced without any legal basis and without any right for the developer to appeal, the issue of the permissibility of developing wind power is a local political question. According to statistics from the Swedish wind power association<sup>440</sup>, most of all land-based wind turbines are stopped as a result of municipal vetoes or as a result of the municipalities rejecting the construction during the consultation. According to the statistics, more wind turbines are stopped in the southern parts of Sweden, where the need for new electricity production is greatest.

## III. **Solar**

### 1) **Brief description of the permit-granting procedure**

#### a) **Solar panels on existing buildings**

As a main rule, any activity or measure changing the colour, facing, roofing material or other parts of the external appearance of a building requires a building permit. However, if the activity or measure concerns a residential home of up to two families and does not materially change the character of the building or area, no permit is required. This means that solar panels in many cases can be mounted on the roof or façade of a residential building without a building permit. However, the permit requirements always need to be checked as it can also depend on the area, for example if the instalment is to be made on a building situated within a designated zone of particular cultural, historical or environmental value or within or close to areas of importance for military purposes, or if municipal regulations explicitly state that a building permit is required for the type of instalment in question<sup>441</sup>.

No permit or notification under the environmental legislation is required for these types of installations.

#### b) **Solar panels not mounted on an existing building and solar farms**

Solar panels that are not mounted on an existing building may in some cases be considered as a new building and as such subject to the building permit requirements. For example, the Land and Environment Court of Appeal ("*mark- och miljööverdomstolen*") has in one case ruled that a construction

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<sup>440</sup> <https://svenskvindenergi.org/wp-content/uploads/2022/03/Kommunala-vetot-2020-och-2021-2022-03-18-slutversion.pdf>.

<sup>441</sup> Cf. Ch. 9, Art. 3 c of the Planning and Building Regulation.

consisting of a 7.5 m long, 3.5 m and between 3 to 8 m tall with solar panels mounted on top, constituted a building.

Anyone who is going to carry out an activity or take a measure that is not subject to a permit or notification requirement, but that may significantly change the natural environment, is obliged to make a notification for consultation with the County Administrative Board<sup>442</sup>. There is no formal requirement in the Environmental Code that an EIA must be prepared for these kinds of projects, but the County Administrative Board has the right to request that an EIA is prepared and as far as we are aware that is often required at least in respect of larger solar farms. If an EIA is required, the operator is also obliged to consult with other parties and authorities than the County Administrative Board. The County Administrative Board has the option of ordering the operator to take precautionary measures to limit or prevent damage to the natural environment or, if such measures are not sufficient to protect of the natural environment, to prohibit the activity. This means that the consultation procedure relating to solar farms will in many cases be very similar to a permit procedure required for environmentally hazardous activities (cf. Section I.2)a).

Where the solar farm is to be installed at agricultural land, the County Administrative Board will in its environmental assessment also specifically consider the interest of preserving arable land which can be said to be a prioritised interest<sup>443</sup>. The Environmental Code provides that if the activities result in a change of use of the land in question, the activities will be permissible only if (i) they are needed to meet essential public interests, and (ii) this need cannot be met in a way that is satisfactory from a public point of view by using other land. It may be noted that the interest of preserving the very high-yielding arable land in the Southern parts of Sweden is indeed prioritised and the County Administrative Board will typically take a very restrictive view on any project aiming to exploit such land.

Procedure	Level of complexity
▶ Permit-granting procedure	●●●
▶ Building permit	●

(● low → ●●●●● high)

## 2) Information on the duration of the procedure, evaluation

The duration of the procedure mainly depends on whether an EIA is required by the County Administrative Board or not. Therefore, it is difficult to give a general estimate (for details see Section C.2)). Generally, a time frame of up to a year may be realistic if the decision is not appealed.

Duration of procedure	

<sup>442</sup> Cf. Ch.12. Art. 6 of the Environmental Code.

<sup>443</sup> Cf. Ch. 3, Art. 4 of the Environmental Code.

▶ Small installations	●
▶ Larger installations (e.g., solar farm)	●●●

(● short → ●●●●● long)

### 3) Presentation of the relevant obstacles, both from procedural and from substantive law

The obstacles presented under Section I.4) will be relevant also for the permit-granting procedure with respect to solar facilities. In addition, thereto the following issues should be highlighted with respect to these procedures.

One of the main obstacles when it comes to solar farms placed on the ground is that the consultation procedure with the County Administrative Board is unpredictable and the County Administrative Board in different counties may handle the procedure differently and require various degrees of investigations.

One of these unpredictable investigations regards investigations with respect to alternative locations. It is not clear how extensive investigations may be required in each case, i.e. how many alternative locations must be investigated, and which area is relevant to look for alternative locations in. It is, for example, not clear whether it is sufficient to investigate the close vicinity or whether the whole county or perhaps the whole bidding area<sup>444</sup> should be subject to the investigation.

The County Administrative Board may, in its discretion, request that the applicant produces an EIA. That is not a formal requirement for solar farms under the Environmental Code but is nevertheless something that can be requested. As far as we are aware, the possibility to request an EIA is applied differently in different counties. If an EIA is required, this will lead to that the applicant must consult with parties that can be affected by the solar farm. The process will then be similar to a permit process for activities which are environmentally hazardous (see Section I.2)a).

In fact, these uncertainties have led to that some applicants for large solar farms choose, as a voluntary measure, to prepare a formal permit application including an EIA already from the beginning instead of starting off with, on the face of it, the shorter and easier consultation procedure described in Section III.1)b).

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<sup>444</sup> The Swedish electricity market is divided into four different bidding areas, from north to south.

#### IV. Geothermal

##### 1) Brief description of permit-granting procedure

The installation of geothermal facilities requires prior notification to the municipality<sup>445</sup>. For small residential buildings, wishing to install rock heat or ground heat systems, such notification would normally be sufficient, and no further notification or permit will be required. If the activity involves deep drilling or any activity with more material environmental impact, a notification would most likely not be sufficient. It should be emphasised that in Sweden that kind of larger geothermal installations is not common and is not expressly regulated in the environmental legislation. However, if for example the activities, such as deep drilling, would involve some kind of water operation, a permit from the Land and Environmental Court (or in some cases a notification to the County Administrative Board) for water operations would be required. As regards the procedure and assessment in the event a permit is required see Section I.2).

The municipality may stipulate that a permit (and not only a notification) is required to set up also a small installation for rock heat within the municipality or within certain parts thereof, if it is necessary to protect human health or the environment. Municipalities may also impose their own requirements for geothermal permit applications/notification documentation. Most municipalities require a geographically detailed map indicating the drilling shafts, details of the planned shaft, information from relevant authorities about nearby pipes, cables, wells etc., as well as the consents (or comments) obtained from the neighbours.

Municipal permits for rock heat, in particular, have been subject to judicial review in court on many occasions, with recent court practice indicating a restrictive view for repealing the municipal decision to deny the permit. The precautionary principle, which is a basic principle in the Environmental Code, is relevant also with respect to these kinds of installations. In a specific case this means that the applicant may need to consider the risk of contamination of the groundwater and demonstrate to the municipality which measures to take to avoid or minimise this risk. The applicant may also need to demonstrate which steps he intends to take to ensure that there are no other unnecessary detrimental effects caused to the human health or the environment. Even if there is no specific proof of a hazard, the risk itself is sufficient to refuse a permit if the risk is perceivable of some actual harm and not of negligible extent. In other words, the burden of proof lies on the applicant in proving that a geothermal drilling will be environmentally acceptable and safe.

Procedure	Level of complexity
▶ Notification procedure (smaller installations, no material impact)	●

<sup>445</sup> According to Art. 17 of the Regulation on Environmentally Hazardous Activities and health protection.

▶ Permit-granting procedure (large installations in some cases)	●●●
▶ Building permit procedure	Not applicable unless the geothermal installation requires the construction of new buildings.

(● low → ●●●●● high)

**2) Information on the duration of the procedure, evaluation**

Due to limited experience with geothermal facilities, it is difficult to generally give a time estimate on the duration of the procedure. Generally, the permission for larger installations where special permits for example for water operations are needed are lengthier.

<b>Duration of procedure</b>	
▶ Small installations requiring a notification	●
▶ Larger installations where permits for e.g., water operations are required	●●●

(● short → ●●●●● long)

**3) Presentation of the relevant obstacles, both from procedural and from substantive law**

Where a permit is required, the obstacles presented under Section 1.4) will be relevant also for the permit-granting procedure with respect to geothermal facilities.

**V. Energy storage**

**1) Brief description of permit-granting procedure**

Energy storage facilities can be of different kinds. In this Section we will consider storage facilities in the form of batteries for the purpose of storing electricity and storage facilities for hydrogen gas, since we consider these are the most discussed storage alternatives at the moment.

A storage facility/battery storage that is connected to the electricity grid is to be treated as a production facility according to the Electricity Act. Due to the unbundling rules applicable with respect to grid companies, a grid company will therefore as a main rule not be allowed to own storage facilities. There is a reason to highlight this matter because it might have been reasonable to think that a storage facility connected to the grid could be regarded as a facility part of the transmission or distribution system and as such being subject to the same permit requirements as the grid (c.f. the regulations relating to natural gas where gas storages are subject to the specific permit requirements set out in the Natural Gas Act).

There are no express permit requirements with respect to battery storages in the environmental legislation. It cannot be ruled out that the construction and operation of very large-scale battery storages



could be regarded as environmentally hazardous activities depending on the type of technology used, the design and size of the facility, type and volumes of chemicals and other substances used in them etc., and therefore requiring some kind of permit under the environmental legislation. However, we are not aware that any of the storage facilities constructed so far in Sweden have been subject to any environmental permits. As to building permits, different municipalities have different views on if battery storages in containers require building permits or not. Smaller batteries of the kind connected to solar panels on residential buildings or battery storages placed within an existing building do not require any building permits.

As for hydrogen storage facilities, the permit requirements will depend on, among other things, the type of facilities and connected installations, gas volumes to be stored, etc. For storage activities as such, permits may be required under the Environmental Assessment Ordinance I. The construction of the storage, including construction of geological repositories to be used for storage, will normally require a building permit.

If the storage facility is a large-scale pumped-storage hydroelectricity installation, it would normally be assessed as water operations that require a special permit<sup>446</sup>.

Procedure	Level of complexity
▶ Permit-granting procedure	Will depend on type of storage, where it will be placed, how it will be constructed etc.
▶ Building permit procedure	●

(● low → ●●●●● high)

**2) Information on the duration of the procedure, evaluation**

As regards the duration of the procedures, please see Section I.3).

**3) Presentation of the relevant obstacles, both from procedural and from substantive law**

In cases where a permit is required, the obstacles presented under Section I.4) will be relevant also for the permit-granting procedure with respect to energy storage facilities.

It should be noted that there are different kinds of storage facilities in operation today in Sweden. However, the kind of large-scale facilities that are being discussed, in particular with respect to hydrogen storage, must be regarded as a fairly new issue. Considering the lack of experience of the Swedish authorities for these types of installations, and as there is often a lack of detailed specific regulation

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<sup>446</sup> According to chapter 11 of the Environmental Code.

for the various installations, there may be uncertainties regarding how large-scale facilities will be assessed according to both the environmental legislation and the Seveso legislation, regarding which permits are required and what kind of investigations and precautions the operators may be obliged to undertake.

**VI. Electrolysers**

**1) Brief description of permit-granting procedure**

The regulation regarding hydrogen facilities is in general underdeveloped in Sweden. This applies to regulation regarding transmission and distribution as well as permits for production and storage. Instead, the permits are handled case by case, depending on the nature of activities at the facility and the connecting facilities and installations in question. As described in Section V.1), permits may include building permits, environmental permits, permits and notifications according to the Act on the Prevention and Control of Major Chemical Accidents (Seveso), etc. Permits may be required for the construction and operation of electrolysers as well as distribution pipelines under Ch. 9 of the Environmental Code and under the Act on the Prevention and Control of Major Chemical Accidents (implementing the so-called Seveso Directive). In the event the production of hydrogen exceeds 1,500 MWh per year a permit application will need to be filed by the County Administrative Board. In the event the production is lower, a notification with the municipality is required<sup>447</sup>.

Procedure	Level of complexity
▶ Permit-granting procedure	●●●
▶ Building permit procedure	●

(● low → ●●●●● high)

**2) Information on the duration of the procedure, evaluation**

As regards the duration of the procedures see Section A.III.

**3) Presentation of the relevant obstacles, both from procedural and from substantive law**

Where a permit is required, the obstacles presented under Section I.4) will be relevant also for the permit-granting procedure with respect to electrolysers. See also Section V.3).

It may be noted that the construction and operation of electrolysers is a fairly new thing in Sweden and the facility that we are aware of, being subject of a permit application recently, is to be constructed as part of an industrial process which is already permit granted and located in connection

<sup>447</sup> Cf. Ch.21, Art. 5 and 6 of the Environmental Assessment Ordinance I.

with an industrial plant.<sup>448</sup> Considering the lack of experience of the Swedish authorities for these types of installations there may be uncertainties regarding how these facilities will be assessed according to both the environmental legislation and the Seveso legislation and what kind of investigations and precautions the operators may be obliged to undertake.

## **VII. Grid connection**

### **1) Brief description of the procedure and regulatory framework**

In order to connect an energy plant/network to the grid the producer needs to make an application to the grid owner. According to the Electricity Act all grid owners with network concession are obliged to accept such applications on objective, non-discriminatory and reasonable terms. Connection can under certain circumstances be denied, i.e. if the grid does not have enough capacity and an extension of the capacity cannot be socio-economically motivated. If the connection is granted it should be completed within reasonable time, normally not exceeding two years. In order to ensure quick and easy connections, all grid operators shall have standardised procedures for the connection of energy producing or storage facilities. A timetable for the connection shall be provided by the grid operator and the connection shall be granted at a reasonable cost. Small production units (max. 43.5 kW) owned by consumers shall be connected free of charge. The principles for the distribution of costs caused by necessary technical adaption of the grid shall be made public by the grid operator. As a main rule, the connecting party shall bear the grid company's "customer specific" costs for the connection, i.e. costs that the grid company otherwise would not have had.

Producers with a capacity of at least 100 MW can connect directly to the Swedish national grid (220 kV network) after an application to the Swedish TSO *Svenska kraftnät*. A connection to the 400 kV network requires at least 300 MW. An application is also needed when input or withdrawal to the grid changes. Plants with less capacity must instead connect to regional or local grids after application and approval of the relevant grid owner.

The application process for connections to the grid is generally made in four steps. The application process may, however, differ depending on which grid an operator would like to connect to, and that particular grid operators' guidelines and procedures. The process normally starts with an inquiry to the grid operator. The grid operator will then provide a preliminary assessment of whether the inquiry meets the basic requirements. If the answer is positive, the inquiry is to be followed by a formal application. The grid operator will then investigate whether it is possible to connect the plant/network to its grid and the actions that are needed. Once the investigation is completed, the grid operator presents an estimation of the connection fee and timetable. As a third step the parties may sign a letter

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<sup>448</sup> The Swedish steel company *Ovako* was in 2022 granted a permit for fossil free production of hydrogen at a new facility to be located at its premises in Hofors (a place appr. two hours north of Stockholm).

of intent followed by a technical feasibility study made by the grid owner. The fourth step is a formal agreement with the grid operator that governs the conditions for connection and specifies the timetable for connection.

If the parties cannot agree on the terms, the connection agreement can be filed to the Swedish NRA for review and decision. Decisions from the NRA can be appealed to the Administrative Court in Linköping.

## **2) Information on the duration of the procedure, evaluation**

The time-consuming part of the connection procedure is normally not the contracting part, i.e. to enter into an agreement with the relevant grid company. What could take time is the grid company's work to make available the connection point and/or the required power at that point. If there is available capacity in network and only minor cable work is required (which may be the case when it comes to small solar installations e.g., placed on residential houses or micro wind turbines) the connection would typically be arranged fairly quickly, although it should be noted that to the extent there are many connection projects going on in the same area, the finalisation of the connection may take some time, *inter alia*, depending on the resources available at the grid company.

If there is a lacking capacity in the grid and the grid thus needs to be expanded the connection will take longer. If new cables, new transformers, switchgears, or other installations need to be constructed, new permits may be required (concessions or environmental permits). In such case we estimate that the process from the signing of the connection agreement and obtaining of the concession (or environmental permit) until the connection would take least three years. This is in line with the Swedish TSO's official information as regards the duration, i.e. that one can expect that it, in larger scale grid projects, will take at least three years from the time a connection agreement is signed until the connection is in operation and a longer time than that where the connection requires expansion or development of the underlying national grid and such measures requires permits (concessions or environmental permits).

## **3) Presentation of the relevant obstacles, both from procedural and from substantive law**

As described above, matters relating to grid connection are not regulated in detail in law. Instead, the legislator has left most of the matters to the market participants to solve. We have not identified any major obstacles in the connection processes themselves. One issue that sometimes has been mentioned is, however, that it is uncertain whether and how a grid operator may prioritise applications for connections, or if they must be handled in turn depending on when the applications were made. As stated above, the grid operator's proposed terms for the connection can be filed to the Swedish NRA if the parties cannot agree, and this could potentially also include questions concerning connection times and priorities. In addition, the NRA also has general supervision regarding compliance of the

Swedish Electricity Act and can initiate a supervisory case. However, we are not aware that questions regarding prioritisation have been examined by a court.

If major reinforcements are required in the underlying grids to connect an installation to the grid, the time it takes to connect will often be significantly longer than if there is already capacity in the grid. As described above, this is because it often takes a long time to plan and obtain permissions for longer cables. Permits for electricity grids are beyond the scope of this investigation, but it should still be pointed out that larger electricity grid projects have both material obstacles (e.g., conflicts with individual and public interests, requirements for extensive EIA, etc.) and procedural obstacles in the form of many appeals, special procedures for access to real property, etc.

**Annex 1 High level overview of permits for activities covered by the study for Sweden**

	Government	Permit A Environmental Court	Permit B County Administrative Board	Notifications to County Administrative Board (not Notification C)	Notification C and other notifications to the municipality	Building permit	Comments
a-	Yes (if outside of Swedish territory but within exclusive economic zone)	Yes (if within Swedish territory)	-	-	-	-	Municipal veto applies within Swedish territory
b-	-	-	Yes, (Ch. 21 Art. 13-14 – Environmental Assessment Ordinance)	-	-	-	Municipal veto applies
c-	-	-	Optional (Ch. 9 Art. 6b, Environmental Assessment Ordinance)	-	Yes (Ch. 21 Art. 15 – Environmental Assessment Ordinance)	Yes (unless an optional application for environmental permit is made)	Municipal veto applies optional application for environmental permit is made
d-	-	-	-	-	-	Yes	
e-	-	-	-	-	-	No (but a notification is required)	
f-	-	-	-	-	For drilling (Art. 17 of the Regulation on environmental	-	See also Section D.1 of the study.

a-	Government	Permit A Environmental Court	Permit B County Administrative Board	Notifications to County Administrative Board (not Notification C)	Notification C and other notifications to the municipality	Building permit	Comments
esi-					hazardous activities and health protection		
- (;)							Permit for water operations and other permits may be required, see Section E.I of the study.
ing	-	-	-	Yes (Ch.12. Art. 6 of the Environmental Code)	-	Yes	
r- bat-	-	-	-	-	-	Depends (on residential building for up to 2 families often no permit required)	
r-	-	-	-	-	-	In some cases.	See Section E.I of the study.
r-						Any buildings, including construction of geological repositories require permits.	Various permits may be required, see Section E.I of the study.

a-	Government	Permit A Environmental Court	Permit B County Administrative Board	Notifications to County Administrative Board (not Notification C)	Notification C and other notifications to the municipality	Building permit	Comments
	-	-	Yes, (Ch. 21, Art. 5 Environmental Assessment Ordinance)	-	-	Any buildings require permits.	Additional permits required, see Section the study.
	-	-	-	-	Yes (Ch. 21 Art. 6 Environmental Assessment Ordinance)	Any buildings require permits.	Additional permits required, see Section the study.



## 5) **Appendix 2 An Overview of the Environmental Assessment in Substance for Sweden**

### **General rules of consideration (Ch. 2 of the Environmental Code)**

The fundamental rule of consideration of the Environmental Code is the precautionary principle. Anyone who pursues an activity or intends to do so is obligated to take the necessary precautions to prevent or hinder damage or nuisance to human health and the environment. This principle is supported by certain other principles inter alia the following:

- The knowledge requirement, i.e. the requirement to obtain the knowledge that is necessary to protect human health and the environment.
- The localisation principle, i.e. the requirement to locate the activities so that their purpose is achieved with a minimum of damage or nuisance of human health and the environment.
- The precautionary principle, i.e. to take measures or restrictions in their activities or take other precautionary measures to prevent, prevent or counteract the occurrence of damage or other inconveniences to the environment or health.
- The eco-cycle principle, i.e. to take measures or restrictions in their activities or take other precautionary measures to prevent, prevent or counteract the occurrence of damage or other inconveniences to the environment or health.
- The principle of economy, i.e. to take measures to economize on energy and primarily use renewable energy sources.
- Best available techniques, i.e. that the best available techniques must be used in professional activities to prevent, hinder, or counteract the occurrence of damage or other adverse effects on the environment or health.
- Product choice principle, i.e. that the operators to avoid using or selling chemical products or biotechnological organisms that may be harmful to human health or the environment if they can be replaced by less hazardous alternatives.

The requirements of Ch. 2 apply to the extent that they are not unreasonable when weighing up the benefits and costs in accordance with Ch. 2, Art.7 of the Environmental Code.

### **Basic and special provisions for management of land and water (Ch. 3-4 of the Environmental Code)**

Certain factors must be considered when a change in the use of land or water is planned. For example, areas that are particularly vulnerable from an ecological point of view shall, to the extent possible, be protected against activities that may damage the natural environment, whereas areas that are particularly suitable as sites for facilities for e.g., energy production, energy distribution or other industrial activities shall to the extent possible be protected against activities that may be prejudicial to the establishment or use of such sites.

In areas of national interest environmental intervention may only be undertaken where they can be implemented in a manner that does not significantly damage the natural and cultural assets of these areas.

### **Environmental Quality Standards (Ch. 5 of the Environmental Code)**

The EU directives setting out environmental quality standards regarding inter alia air, water and soil quality are implemented in the Environmental Code and Ordinances issued pursuant to the Code.

Regional and local authorities must ensure that environmental quality standards are observed when they consider permits and otherwise apply the Environmental Code.

### **Nature Protection – Protection of areas and flora and fauna (Ch. 7-8 of the Environmental Code)**

Ch. 7 includes provisions which establish a variety of protections for certain areas such as:

National Parks – for these areas, a high level of protection applies.

Nature and Culture Reserves – specific protective provisions regulate the use of the areas, which can be established either on private land or on public land.

Natura 2000 sites – the protection is in many ways similar and often parallel to the protection of National Parks and Nature Reserves.

Shore protection areas – the purpose of this protection is to safeguard public access to shore areas and maintain habitats for flora and fauna on land and in water.

Habitat Protection Areas and Animal and plant sanctuaries – specific forms of protection, generally for smaller areas valuable for certain animals or plants.

Environmental Protection Areas – large area of land or water designated an environmental protection area by the government, e.g. due to the fact that the area is polluted.

Water Protection Areas – area of land or water designated a Water Protection Area for the purpose of protecting surface water or groundwater supplies.

Ch. 8 includes provisions concerning the protection of flora and fauna. These provisions cover a variety of measures, activities, and prohibitions in order to protect species from extinction or overexploitation, or in order to fulfil international undertakings with respect to the protection of such species. Regulations regarding protection of species are detailed in Ordinances issued pursuant to the Code.

In summary, the abovementioned provisions for protection of areas and species could in various ways limit the establishment and operation of activities. If the planned activities concern protected areas or risk affecting protected species, a specific permit or an exemption would normally be required to be obtained from the relevant authority (normally the County Administrative Board or the municipality) in order to proceed with the activities.

## Part 3 Recently adopted acceleration measures on the EU level

### A. Executive summary

- The Renewable Energy Directive (EU) 2018/2001 (commonly referred to as the RED II Directive)<sup>449</sup>, adopted in the context of the Clean Energy for All Europeans package in 2018/2019, was only the first little step towards more streamlined administrative procedures for renewable energy projects. The Directive's next revision proposal (commonly referred to as the RED III Directive)<sup>450</sup>, as part of the Green Deal's first set of concrete legal reform proposals to reduce GHG emissions by 55% until 2030 (the Fit-for-55 package), did not yet bring along significant further measures to accelerate and simplify permit granting procedures for renewable energy projects either. However, in the context of the REPowerEU plan, the removal of obstacles to a fast deployment of renewable energy became a real priority. The additional revision proposal of the RED II Directive (commonly referred to as the RED IV Directive)<sup>451</sup> finally addressed the slow expansion of renewable energies not only on the permit-granting but also on the area planning level. Additionally, the Emergency Regulation, fast-tracked and adopted in December 2023 for the duration of 18 months (until mid-2024), made several measures designed to immediately shorten permit-granting processes come into force. Hereby the RED III and IV Directives proposals, which resulted in the Directive (EU) 2023/2413, were partially anticipated. Directive (EU) 2023/2413 is foreseen to be implemented in EU Member States regarding specific provisions until 01/07/2024<sup>452</sup> and otherwise within 18 months after its entry into force<sup>453</sup>
- The above-mentioned measures of the Directive (EU) 2023/2413 recently adopted on European level, aiming at accelerating the deployment of renewable energy, address the majority of the identified reasons for a slow deployment of renewable energy. If implemented properly at Member State level, they are a great progress and would certainly accelerate renewable energy development to a large extent. Such measures were quite unrealistic

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<sup>449</sup> Directive (EU) 2018/2001 of the European Parliament and Council of 11 December 2018 on the promotion of the use of energy from renewable sources.

<sup>450</sup> COM(2021) 557 final.

<sup>451</sup> COM(2022) 222 final.

<sup>452</sup> This applies to the revised/new Art. 15e, Art. 16, 16b, 16c, 16d, 16e and 16f of the of Directive (EU) 2018/2001.

<sup>453</sup> This applies to all other provisions.

until recently, before the war in Ukraine started. These measures are in essence the following:

○ **Designation of suitable areas:**

- Obligation of Member States to map within 18 months from entry into force of the Directive (EU) 2023/2413 (as well as review and update), in an integrated and coordinated multilevel way, areas necessary for national contributions towards the 2030 RES target, with the possibility of building on their existing spatial plans;
- Obligation for Member States to adopt within 27 months from entry into force of the Directive (EU) 2023/2413 plans designating (within the previously mentioned areas) a significant number of “renewables acceleration areas”, i.e. particularly suitable areas for renewable energy sources (biomass combustion plants and hydro-power plants may be excluded); compliance with established rules and implementation of appropriate mitigation measures shall result in the presumption of conformity with nature conservation rules; previously designated areas may be, within 6 months from entry into force of the RED IV Directive, declared by Member States as renewables acceleration areas;
- New article on public participation with reference to the Directive 2001/42/EC, which concerns consultations on draft plans;

○ **Streamlined permitting procedures:**

- Clarified scope and beginning of the “permit-granting process” (30 days for plants located in go-to areas and within 45 days for plants located outside of go-to areas, following the receipt of the application); obligation of the Member States to provide support to competent authorities in order to facilitate the permit granting process;
- Permit-granting process in renewables acceleration areas
  - Shorter permit-granting procedures: one year maximum (and two years for offshore), six months maximum for repowering of plants (and one year for offshore); six months maximum for the installations below 150 kW (and one year for offshore);

- Screening within 45 days from the date of submission (and 30 days in case of installations of less than 150kW and repowering of plants) and environmental impact assessment within six months following the submission of complete documentation only in the case of significant unforeseen adverse effects on the environment;
- Presumption of approval for specific administrative steps provided that there is an explicit final decision on the outcome of the process;
- Permit-granting process outside of renewables acceleration areas
  - Shorter permit-granting procedures: two years maximum (and three years for offshore), one year maximum for repowering of plants and for the installations below 150 kW (and two years for offshore).
- **Inclusion of several provisions of the Emergency Regulation:**
  - Maximum three months permit-granting process for solar energy equipment in artificial structures and for ground source heat pumps;
  - Rebuttable presumption of overriding interest for renewable energy plants when balancing legal interests in the individual cases for the purposes of Articles 6(4) and 16(1)(c) of Directive 92/43/EEC (commonly known as Habitats Directive), Article 4(7) of Directive 2000/60/EC (commonly known as Water Directive) and Article 9(1)(a) of Directive 2009/147/EC (commonly known as the Birds Directive);
  - Maximum three months permit-granting procedure for connections to the transmission or distribution grid if the repowering does not result in an increase in the capacity of the renewable energy installation beyond 15%;
  - No environmental impact assessment for the repowering of solar plants that do not require the use of additional space;
  - For the repowering of renewable energy power plants environmental impact assessment only regarding the potential impact

stemming from the change or extension compared to the original project;

○ **Other:**

- Limitation of the screening and environmental impact assessment of reinforcement of the grid infrastructure necessary to integrate renewable energy into the electricity system to the potential impacts stemming from the change to or expansion of the original grid infrastructure;
- Obligation of the Member States to promote the temporary testing of innovative renewable energy technologies in pilot projects in a real-world environment;

## **B. Introduction**

The European Commission has long recognised that lengthy permit-granting procedures are among the most important barriers to expanding renewable energy development across Europe.

In terms of renewable energy, Directive (EU) 2018/2001 (also called RED II)<sup>454</sup> provided for the very first measures to simplify national permit-granting procedures for such projects (including one-stop shops, a maximum duration of such procedures and digitalised administrative procedures).<sup>455</sup> In addition, the Internal Energy Market Directive<sup>456</sup> obliges Member States to ensure that specific, simplified and streamlined authorisation procedures exist for small decentralised and/or distributed generation projects (this is true for most renewable energy projects) and encourages the preparation of guidelines for that specific authorisation procedure.<sup>457</sup>

However, the European Commission soon realised that further measures are necessary for reaching the EU's increased climate ambition and targets. This was emphasised under the Green Deal and formulated in the RED III Directive proposal<sup>458</sup> that

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<sup>454</sup> Directive (EU) 2018/2001 of the European Parliament and Council of 11 December 2018 on the promotion of the use of energy from renewable sources.

<sup>455</sup> RED II is a recast of the directive 2009/28/EG on the promotion of the use of energy from renewable sources (also called the Renewable Energy Directive, short RED), which has been the cornerstone of the European renewable energy policy since 2009.

<sup>456</sup> Directive (EU) 2019/944 of the European Parliament and of the Council of 05/06/2019 on common rules for the internal market for electricity.

<sup>457</sup> Cf. Article 8(3) Directive (EU) 2019/944.

<sup>458</sup> COM(2021) 557 final.

was issued as part of the Fit-for-55 package in July 2021. This proposal included to raise the EU's renewable energy target from 32% (as adopted under RED II) to 40% which in return required to table a set of measures that would, *inter alia*, accelerate RES expansion across Europe. Yet it was only after Russia's invasion of Ukraine and in the context of Europe's gas import dependency, that the European Commission launched as part of the RED IV Directive proposal<sup>459</sup> more far-reaching measures – Accelerated and simplified permit granting procedures – that would help reach the again raised 2030 RES target of 45%.

The EU countries remained divided on the overall ambition and 2030 target levels,<sup>460</sup> but in the end a compromise on a RES target of at least 42.5% share of energy from renewable sources in the Union's gross final consumption of energy in 2030 was reached in the Directive (EU) 2023/2413 (the final product of the RED III and RED IV Directive proposals). In turn, there was broad agreement that accelerating and simplifying permit granting procedures is essential for meeting such higher target levels. The acceleration measures contained in the Directive (EU) 2023/2413 will be discussed in the following.

Firstly, an insight into the relevant, pre-existing provisions of the RED II Directive is given. This is followed by an overview of the amendments aimed at the acceleration of permit-granting procedures stemming from the European Commission's RED III Directive proposal of 14 July 2021, including a short overview on the trilogue procedure regarding this proposal. The outline then focuses on the acceleration measures introduced by the RED IV Directive proposal of 18 May 2022 and also includes a brief insight into the different positions in the legislative trilogue negotiations. In both cases the study outlines here the proposals that were not adopted but that would be still worth pushing for in the future. Finally, an overview on the provisions of the Emergency Regulation as proposed on 9 November 2022 and adopted on 19 December 2022 is given.

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<sup>459</sup> COM(2022) 222 final.

<sup>460</sup> Many governments stuck with the initial pre-war 40% target, as tabled back in 2021 under RED III. In turn, 8 countries – Austria, Denmark, Estonia, Germany, Greece, Luxembourg, Portugal and Spain – supported the 45% target.



In addition, further proposals aiming to reinforce the EU's climate policies are currently being passed.<sup>461</sup> Here the reform of the Energy Market Design<sup>462</sup> can be mentioned. Another example is the European Commission proposal for a Net Zero Industrial Act,<sup>463</sup> complemented by the proposal for a proposal for a Critical Raw Materials Act.<sup>464</sup> Regarding the area of hydrogen, the Hydrogen and Decarbonised Gas market package comes in play.<sup>465</sup> And finally, the European Commission already came forward with the Wind Power Package to support the wind sector.<sup>466</sup> Although all these acts will contribute to the energy transition, they do not directly address lengthy and complex permit-granting procedures for renewable energy installations. Therefore, they are not subject to the following overview.

### **C. Directive (EU) 2023/2413**

The recently adopted Directive (EU) 2023/2413 revised the existing Renewable Energy Directive (EU) 2018/2001.

#### **I. Directive (EU) 2018/2001 before recent revision (RED II)**

RED II was issued based on Article 194(2) TFEU and had to be transposed into national law by 30 June 2021. In the context of the Clean Energy for All European Package, RED II was the first step towards more streamlined administrative procedures

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<sup>461</sup> Regarding the acceleration of permit-granting in the area of hydrogen, see also the Proposal for a Directive of the European Parliament and of the Council on common rules for the internal markets in renewable and natural gases and hydrogen, COM/2021/803 final, paragraph 47 et seq. and Art. 7(3) to (8).

<sup>462</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) 2019/943 and (EU) 2019/942 as well as Directives (EU) 2018/2001 and (EU) 2019/944 to improve the Union's electricity market design COM/2023/148 final and Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) No 1227/2011 and (EU) 2019/942 to improve the Union's protection against market manipulation in the wholesale energy market COM/2023/147 final.

<sup>463</sup> Cf. Proposal for a Regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe's clean energy technologies manufacturing ecosystem (Net Zero Industry Act).

<sup>464</sup> Cf. Proposal for a regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/102, COM/2023/160 final.

<sup>465</sup> Cf. Proposal for a Directive of the European Parliament and of the Council on common rules for the internal markets in renewable and natural gases and hydrogen, COM/2021/803 final and Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the internal markets for renewable and natural gases and for hydrogen (recast), COM/2021/804 final.

<sup>466</sup> Cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. European Wind Power Action Plan, COM(2023) 669 final and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering on the EU offshore renewable energy ambitions, COM/2023/668 final.

for renewable energy projects being adopted. The RED II Directive introduced in this respect several new legal elements:

**1) Article 15 – Administrative procedure, regulations, and codes**

Article **15(1)(2)(a)** regulated that Member States have to take the appropriate steps to ensure that all administrative procedures are streamlined and expedited at the appropriate administrative level and that predictable timeframes are established for the authorisation, certification and licensing procedures for renewable energy projects (as referred to in the first subparagraph of Article 15(1)).<sup>467</sup>

Furthermore, Article **15(1)(2)(d)** stipulated that simplified and less burdensome authorisation procedures, including a simple-notification procedure, must be established for decentralised devices and for producing and storing energy from renewable sources.

**2) Article 16 – Organisation and main principles of the permit-granting process**

According to **Article 16(1) to (3)**, Member States had to set up or designate one or more contact points, which – upon request by applicants – guide them through the entire administrative permit application and granting process and facilitate it. In addition, applicants were also allowed to submit relevant documents in digital form. Finally, the contact point had to make a manual of procedures for developers of renewable energy production projects available and provide corresponding information online, particularly addressing small-scale projects and renewables self-consumers projects.

RED II also introduced a maximum duration of the permit-granting process applicable to renewable energy installations. According to the **Article 16(4)**, the permit-granting process must not have exceeded two years for power plants, including all relevant procedures of competent authorities; the permit-granting process for installations with an electrical capacity of less than 150 kW according to **Article 16(5)** and for the repowering of existing renewable energy installations according to **Article 16(6)** must not have exceeded one year. In justified cases, both periods could, however, be extended by up to one year.

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<sup>467</sup> These are: the authorisation, certification and licencing procedures for installations and associated transmission and distribution networks for the production of electricity, heating or cooling from renewable sources, for transforming biomass into biofuels, bioliquids, biomass fuels or other energy products and for renewable liquid and gaseous transport fuels of non-biological origin.

### 3) **Article 17 – Simple-notification procedure for grid connections**

Finally, the RED II also contained provisions intended to simplify grid connection procedures. **Article 17** obliged the Member States to establish a simple notification procedure for the grid connection of installations or aggregated production units of renewables self-consumers and demonstration projects with an electrical capacity of 10.8 kW or less, or equivalent for connections other than three-phase connections (and set out that the approval of installations may have been deemed granted in the absence of a decision by the distribution system operator within one month following the notification). Moreover, it stipulated that these procedures may also be applied to installations or aggregated production units with an electrical capacity of above 10.8 kW and up to 50 kW if grid stability, reliability and safety of the grid are maintained.

## II. **RED III – Directive proposal**

The RED II revision proposal by the European Commission of 14 July 2021 (also commonly called RED III Directive proposal)<sup>468</sup> was part of the “Fit for 55 package”.

The main legal basis for this proposal was Article 194(2) TFEU, according to which measures may be proposed to develop new and renewable forms of energy, which is one of the objectives of the EU’s energy policy, set out in Article 194(1)(c) TFEU.<sup>469</sup>

### 1) **Key points of European Commission’s RED III proposal**

The Commission’s RED III Directive proposal as such was not aimed at amending the relevant pre-existing Articles 15 (administrative procedures, regulations, and codes), and 16 (organisation and duration of the permit granting process) of the RED II Directive.

Regarding the acceleration of permit-granting procedures, the Commission merely proposed strengthening the existing **Article 15(8)** which dealt with regulatory and administrative barriers to long-term renewables power purchase agreements.

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<sup>468</sup> COM(2021) 557 final; In addition, the proposal also entailed amendments to Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action as well as to Directive 98/70/EC relating to the quality of petrol and diesel fuels (as regards the promotion of energy from renewable sources).

<sup>469</sup> Art. 194(2) TFEU is also one of the legal bases for the adoption of RED II. The RED III proposal is additionally based on Art. 114 TFEU, i.e. the legal basis for the internal market, to amend Directive 98/70/EC on fuel quality.

Moreover, the proposal provided for a new clause in **Article 15(9)** to review the administrative procedures one year after the entry into force of the RED III Directive.

## 2) The trilogue procedure

In September 2022 a trilogue procedure was initiated regarding Commission's RED III proposal. In the following the positions of the European Parliament<sup>470</sup> and the Council of the European Union<sup>471</sup> are briefly presented.

### a) European Parliament

In addition to the European Commission's RED III proposal, the European Parliament proposed a few more amendments to **Article 15**. However, besides the new **Article 9(7a)** aiming at facilitating permit-granting for joint offshore energy projects, none of these proposals were incorporated into the final text.

In detail:

The European Parliament suggested extending the scope of application of the existing **Article 15(1)(1)** on proportionate and necessary permit-granting rules to cover *renewable hybrid power plants*. Furthermore, the European Parliament advocated for explicitly mentioning in **Article 15(1)(2)(a)**, which aims at streamlining all administrative procedures, *regional and municipal processes*. These suggested amendments did not become part of Article 15.

With regard to decentralised devices and for producing and storing energy from renewable sources<sup>472</sup> the Parliament also recommended an explicit reference in the existing **Article 15(1)(2)(d)** to the *introduction of single contact points* for authorisation procedures (in addition to the simplified notification already required under the RED II). Such provision was not incorporated into Article 15. However, the general obligation of Member States to set up single contact points can (still) be found in the now rephrased **Article 16(3)**.<sup>473</sup>

Additionally, the Parliament put forward an amendment of the preexisting **Article 15(8)**, which deals with the regulatory and administrative barriers to long-term

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<sup>470</sup> Cf. Amendments adopted by the European Parliament on 14 September 2022, Pg\_TA(2022)0317.

<sup>471</sup> Cf. General Approach of the Council of 24 June 2022, ST 10488 2022 INIT.

<sup>472</sup> These are to be defined, according to the Parliament's proposal, as "energy from renewable non-fossil sources, namely wind, solar (solar thermal and solar photovoltaic) and geothermal energy, osmotic energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas" (see proposed Article 2(2)(a)).

<sup>473</sup> Cf. below, point. ( Part 3. C. I. 2).

renewables power purchase agreements. The Parliament suggested firstly expanding the scope of this provision from long-term renewables power purchase agreements to long-term renewables *energy purchase agreements, including renewables power purchase agreements, renewables heating and cooling purchase agreements and renewables hydrogen purchase agreements, co-located energy storage projects as well as cross-border ones*, secondly clarifying the barriers to be removed by the Member States (such as *barriers to permitting*) and thirdly adding provisions on the obligation of Member States to facilitate *digital processes* (including *public hearings* and *participation procedures*). Minus the fact that Article 15(8) is now devoted to long-term renewables *energy purchase agreements*, the above-mentioned suggestion was not incorporated into the existing Article 15.

Furthermore, in **Article 15(9)**, the Parliament suggested stipulating that one year after the entry into force of this amending Directive the Commission should publish and revise guidelines for Member States on accelerated and simplified permitting practices as well as introducing a monitoring and assessment process. The latter would allow the Commission to take additional measures to support the Member States, if needed. This suggestion did not find full support in the trilogue negotiations either. Article 15(9) now merely provides that one year after the entry into force of this amending Directive the Commission will consider if any additional measures are necessary to support the Member States in implementing Articles 15(1) and (3), 16 and 17. This may include the development of key performance indicators.

Finally, as proposed by the European Parliament, a new **Article 9(7a)** will aim at facilitating permit-granting for joint offshore energy projects. Member States will have to *reduce the complexity and increase the efficiency and transparency of the permit-granting process*, as well as *enhance cooperation among themselves by establishing a single contact point if appropriate*. Furthermore, to enhance broad public acceptance, they may *include renewable energy communities in joint cooperation projects on offshore renewable energy*.

## **b) Council of the European Union**

Although it may seem like the amendments additionally suggested by the Council within the RED III trilogue negotiations were not incorporated, the majority of the proposals can now be found in the final text, although partially in different articles. They concern long-term renewables power purchase agreements, the overriding public interest of renewable energy projects and repowering.

In detail:

According to the Council's proposal, Article 15(8), which regards the regulatory and administrative barriers to long term renewables energy purchase agreements should be replaced by Article 15(8a), and an obligation of the European Commission should be added to analyse, following the assessment of the Member States, the *barriers to long-term power purchase agreements and issue guidance on the removal of these barriers*. This proposal became part of **Article 15(8)**.

Furthermore, the Council put forward the proposal of a new **Article 15(8b)** to allow Member States to restrict the application of provisions from EU nature conservation and water policy frameworks in the planning and permitting process of renewable energy projects carried out for *imperative reasons of overriding public interest* (based on the *presumed public interest for renewable energy installations* when applying the exemption provisions of European nature conservation law and a *priority provision*). This proposal forms now part of the new **Artikel 16f**.<sup>474</sup>

Moreover, the Council suggested adding a new **Article 15(8c)** that obliges the Member States to limit the assessment of impacts derived from *repowering* to the potential impacts resulting from the change or extension of the original project, although according to Council's proposal the Member States may exclude hydropower from this provision. Minus the proposal on hydropower, this provision is now part of the new **Article 16c** on repowering.<sup>475</sup>

Finally, **Article 15(8d)**, as proposed by the Council, provided that by 15/03/2025 and every following two years, as part of their integrated national energy and climate reports under Article 17 of Regulation (EU) 2018/1999<sup>476</sup>, Member States should also report on the effect of the acceleration measures on biodiversity and by 31/12/2026, the Commission should examine these measures and may present, as appropriate, a proposal to revise Article 15(8b). However, this idea was not incorporated into the final text.

### c) Interim conclusions

It follows from the trilogue positions regarding the RED III Directive, that the Council already early on put forward provisions regarding the overriding public interest of renewable energy projects and repowering. As will be shown below, these two

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<sup>474</sup> Cf. below, point Part 3 C.III.2) c)

<sup>475</sup> Cf. below, point Part 3C.III.2)b)bb)(2)(a)Part 3C.III.2)b)bb)(2)(b).

<sup>476</sup> Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, OJL 328, 21.12.2018, p. 1–77; pursuant to its Art. 20(b)(5) Member States shall report on the implementation of the measures set out in Art. 15 to streamline administrative procedures.

suggestions were also among those implemented in the framework of the Emergency Regulation. Further proposals by the European Commission were yet to be presented (see next).

### III. RED IV – Directive proposal (as part of the REPowerEU initiative)

On 18 May 2022, following the REPowerEU Communication of 8 March 2022<sup>477</sup>, the European Commission published the REPowerEU recommendation<sup>478</sup> on speeding up permit-granting procedures for renewable energy projects. By this recommendation additional guidance was provided to help Member States speed up permitting for renewable energy installations to rapidly reduce dependency on fossil fuel imports from Russia and other countries by markedly accelerating the green transition, through the rapid expansion of renewable energy sources. Of bigger importance than the recommendation is, however, the proposal for an additional and more far-reaching revision of the Directive (EU) 2018/2001 (RED II) (also commonly called RED IV Directive proposal) published the very same day.<sup>479</sup>

#### 1) Key points of European Commission's RED IV proposal

The proposal was the EU's policy response to Russia's war on Ukraine and its impact on EU energy markets, which made it even more obvious that the Union needed to accelerate the deployment of renewable energy to increase its independence from third countries. At the same time, the European Commission's proposal was based on the results of the RES Simplify study<sup>480</sup> and took into account the views of stakeholders, public authorities, project developers, and associations on permit-granting procedures. The surveyed stakeholders had identified lengthy and complex administrative procedures as one of the key obstacles for investments in renewables and related infrastructure.<sup>481</sup> Therefore, the RED IV proposal focused on measures to simplify and significantly streamline regulatory approval procedures. As it

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<sup>477</sup> Cf. REPowerEU: Joint European Action for more affordable, secure and sustainable energy of 08/03/2022, COM(2022) 108 final ("REPower EU Communication").

<sup>478</sup> Commission Recommendation on speeding up permit-granting procedures for renewable energy projects and facilitating Power Purchase Agreements of 18/05/2022, C/2022/3219 final.

<sup>479</sup> COM(2022) 222 final; In addition, the proposal also entails amendments to Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency.

<sup>480</sup> Technical support for RES policy development and implementation – Simplification of permission and administrative procedures for RES installations ("RES Simplify"); interim report of the RES Simplify study, prepared for the Commission, is available under <https://data.europa.eu/doi/10.2833/239077>.

<sup>481</sup> Cf. COM(2022) 222 final, p. 1 et seq., p. 6.

comprehensively addressed most of the identified reasons for lengthy and complex permit-granting procedures, it was in general very positive.

The obligation for Member States to map the land and sea areas necessary for national contributions towards the 2030 renewable energy target (a new **Article 15b**) as well as to designate “renewables go-to areas” particularly suitable to produce renewable energy was one of the main aspects of the proposal (a new **Article 15c**).

Furthermore, the proposal contained changes to the existing **Article 16 RED II** on the organisation and the duration of the permit-granting process in general (in particular, regarding the scope and start of the process) but also specific provisions on the permit-granting process in renewables go-to areas (a new **Article 16a**), outside renewables go-to areas (a new **Article 16b**) and for the installation of solar energy equipment in artificial structures (a new **Article 16c**).

Finally, a new **Article 16d** was meant to ensure that plants to produce energy from renewable sources, their connection to the grid, the related grid itself or storage assets are presumed to be of overriding public interest for specific purposes.

## 2) The trilogue procedure

Further amendments to the RED IV Directive proposal, suggested by the European Parliament (in the following “EP position”)<sup>482</sup> and the Council of the European Union (in the following “Council position”)<sup>483</sup>, were discussed within the procedure.

In the following the main RED IV Directive contents regarding permitting procedures as well as the related EP and Council perspectives will be outlined (suggested minor changes to the wording of the new provisions proposed by the European Commission are neglected).

### a) Designation of suitable areas

As mentioned above, one of the main aspects of the RED IV proposal was the obligation of the Member States to map and designate areas suitable for renewable energy installations.

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<sup>482</sup> Amendments adopted by the European Parliament on 14 December 2022, Pg\_TA (2022)0441.

<sup>483</sup> General approach of the Council adopted on 21 December 2022, ST 16240 2022 INIT.



**aa) New Article 15b – Mapping of areas necessary for national contributions towards the 2030 RES target:**

**(1) European Commission**

According to European Commission's proposal, a new **Article 15b** provided for an obligation of Member States within 1 year after entry into force of the RED IV Directive to identify the land and sea areas necessary for renewable energy installations to meet national goals in respect of the 2030 target of renewable energy share in the gross final consumption of energy and to promote multiple use scenarios for these areas. In this context, it also needs to be mentioned that according to the European Commission's RED IV proposal, **Article 3(1)** was meant to foresee that the abovementioned 2030 target would be at least 45%.<sup>484</sup>

Such areas identified by the Member States were meant, according to the European Commission's proposal, to be commensurate with the estimated trajectories and planned installed capacity by renewable energy technology set in national energy and climate plans as updated under Article 14 of Regulation (EU) 2018/1999<sup>485</sup>.

The factors which will be considered when identifying these areas were, according to European Commission's proposal: the availability of renewable energy resources and the potential for renewable energy production, the projected energy demand, and the availability of or the potential to create relevant grid infrastructure, storage, and other flexibility tools.

It is particularly noteworthy, that regarding this new Article 15b the European Parliament and the Council agreed that the mapping must be enacted in an integrated multilevel way in coordination with all relevant national, regional, and local authorities. They both also advocated for a further expansion of the scope of the areas' identification obligation and an extension of the list of factors, which Member States must consider when mapping areas.

Most importantly, however, both, the Parliament, and the Council, agreed on the obligation of the Member States to periodically review and update the identified areas, at least in the context of the update of national climate and energy plans under Article 14 Regulation (EU) 2018/1999 (Governance Regulation). The reference to this Regulation is important, as this legal act empowers the European Commission to

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<sup>484</sup> This proposal supersedes the amendment of Article 3(1) of Directive (EU) 2018/2001 by the RED III Directive proposal adopted on 14 July 2021, COM(2021) 557.

<sup>485</sup> Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, OJ L 328, 21.12.2018, p. 1–77.

assess the Member States' efforts to reach their national targets and, if needed, to undertake any necessary measures to ensure the collective achievement of the Union's 2030 targets for renewable energy.<sup>486</sup> According to the explanatory memorandum of the RED IV Directive proposal, the latter does not create a new planning and reporting system but is subject to the existing planning and reporting framework under Regulation (EU) 2018/1999 and a future revision of the Governance Regulation would allow a consolidation of these reporting requirements. This revision is already foreseen for 2024. The currently "soft" control mandate of the European Commission needs to be reinforced, as the reporting in form of National Energy and Climate Plans (NECPs) is not delivering on the Member States reaching their target levels. The big question is how to design more adequate instruments for the European Commission in this respect.

In detail:

## **(2) European Parliament**

### **(a) Involvement of authorities of all levels**

The European Parliament suggested that the mapping and planning for the deployment of renewable energy resources according to the new **Article 15b** is performed by the Member States in *an integrated multilevel way in coordination with all relevant national, regional, and local authorities*. This suggestion found support in the trilogue negotiations.

### **(b) Identification of areas**

The mapping should serve not only to identify the domestic potential and the available land and sea areas but also *surface and subsurface areas* for the deployment of renewable energy resources. It should further serve to identify *the installed capacity as well as the land, surface, subsurface and sea areas needed* for the production of energy from renewable sources *and their related infrastructure, such as grid and storage facilities, including thermal storage*. Both suggestions found support in the trilogue negotiations.

Thus, regarding area identification, the European Parliament also suggested stipulating an obligation for the Member States to deploy a mechanism supporting the necessary renewable heating network and power grid development in order to

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<sup>486</sup> Regarding a further reaching monitoring and assessment process, as suggested by the Parliament in the context of permit-granting procedures, cf. Parliament's suggestions on an Article 15 (g), see above point Part 3C.II.2)a) C. II. 2) a), on an Article 16, see below, point III.2) b) aa) and on Article 16f, see below point III.2) c).

provide a fully integrated energy system. This suggestion did not become part of the final compromise between the institutions.

In addition, if large-scale biomethane production plants are nationally defined as installations to carry out operations of recovery of waste<sup>487</sup>, Member States should be allowed, as proposed by the European Parliament, to include these plants in renewable energy sources when designating the renewables acceleration areas. This suggestion did not become part of the final compromise between the institutions either.

However, as finally suggested by the European Parliament, the new Article 15b now provides, that the installation of renewable energy projects shall be compatible with pre-existing uses of multiple use areas.

### **(c) Reference to targets as well as energy and climate plans**

In addition to the targets set in Article 3<sup>488</sup>, the European Parliament suggested referring to the sub-targets set out in Articles 15a, 22a, 23(1), 24(4) and 25(1) of Regulation (EU) 2021/1119<sup>489</sup> and Article 2 thereof which foresees climate neutrality by 2050. This suggestion did not find support in the trilogue negotiations.

The identified areas should in the European Parliament's opinion be commensurate with the estimated trajectories, and the total planned installed capacity to be generated by renewable energy technology set not only in the national energy and climate plans updated under Article 14 but also pursuant to *Article 15(6) of Regulation (EU) 2018/1999* (long-term strategies) *as well as maritime spatial plans, including the plans referred to in Article 8 of Directive 2014/89/EU*<sup>490</sup>. Only the second idea was partially introduced into the new Article 15b, as this Article now provides that "Member States may build upon their existing [...] maritime spatial plans carried out in accordance with Directive 2014/89/EU".

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<sup>487</sup> As listed in Annex II, point (11), to Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste.

<sup>488</sup> According to Parliament's position on the RED III proposal, Member States shall collectively ensure that the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 is at least 45 %; see also the national targets suggested by the Parliament in Article 3(2)-(5), cf. Pg\_TA(2022)0317.

<sup>489</sup> Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action.

<sup>490</sup> Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning.

#### **(d) Extended list of factors to be considered**

Besides the availability of the renewable energy resources, the European Parliament suggested that the following factors shall be considered when identifying the areas: the projected energy demand *at national and regional level, taking into account the potential flexibility of the active demand response and expected efficiency gains and energy system integration*; not only the availability of relevant grid infrastructure, storage and other flexibility tools but also of *energy networks* and the potential to create as well as *upgrade* such grid infrastructure and storage; *the potential of involving renewable self-consumers and renewable energy communities as assessed in accordance with Articles 21 and 22; the results of open, inclusive and effective public consultations, the involvement of relevant local authorities, and all relevant stakeholders, to ensure that the public opinion is taken into account in the identification of the areas referred to in Articles 15b and 15c; renewable energy projects on expected new artificial structures such as parking areas, roads, railways and industrial areas; the expected industrial development and employment associated with renewable projects in affected local communities.* This suggestion of a conclusive list did not find support in the trilogue negotiations. However, the suggested amendments regarding the factors “projected energy demand” and “grid infrastructure” were partially included in the final version of Article 15b.

#### **(e) Revision and update of identified areas**

The European Parliament proposed that Member States should also be obliged to periodically review and update the identified areas, at least in the context of the update of the national climate and energy plans pursuant to Article 14 of Regulation (EU) 2018/1999.

Finally, the European Parliament suggested that Member States should be obliged to encourage and support local and regional authorities to develop and implement trajectories or targets for renewable energy produced by cities, renewables self-consumers and renewable energy communities.

This second proposal did not – contrary to the first – become part of the final version of Article 15b.

### **(3) Council of the European Union**

#### **(a) RES target**

Firstly, it must be noted that according to the Council’s position, the 2030 target of renewable energy share in the gross final consumption of energy defined in **Article 3(1)** should be set lower than proposed by the European Commission, i.e. *at least*

40% instead of 45%. The compromise reached provides that the Member States shall collectively ensure that the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 is at least 42,5%. However, they shall also collectively endeavour to increase the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 to 45%.

#### **(b) Mapping deadline**

In turn, the Council was less ambitious when it comes to the deadline for the obligation of the Member States to map areas necessary for national contributions towards this 2030 RES target: *18 months* after entry into force of the RED IV Directive versus 1 year, as proposed by the European Commission. This suggestion found support in the trilogue negotiations.

#### **(c) Identification of areas**

The Council suggested expanding the mapping obligation of the Member States, as proposed by the European Commission to *inland waters* and enable, as stated in **Article 15b**, that the *Member States may build upon their existing spatial planning documents* and consider *existing plants and cooperation mechanisms* to comply with their national energy and climate plans. This suggestion was included in the final version of Article 15b, which now at the initiative of the European Parliament also expressly refers to, as already mentioned, maritime spatial plans carried out in accordance with Directive 2014/89/EU.

#### **(d) Involvement of authorities of all levels**

Similarly, to the European Parliament, the Council also suggested that the Member States are obliged to ensure in the mapping process *coordination among all the relevant national, regional and local authorities and entities, including network operators*. This proposal, as already mentioned above, found support in the trilogue negotiations and in a "weaker wording"<sup>491</sup> was integrated into the final version of Article 15b.

#### **(e) Extended list of factors to be considered**

While the European Parliament listed many more factors which Member States should be obliged to consider when mapping areas, the Council suggested a non-

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<sup>491</sup> "[...], where appropriate"

exhaustive list of these factors (*in particular*). The Council did, however, just like the European Parliament, suggest adding that *further upgrades* of grid infrastructure and storage should also be taken into account and introduced another factor of the non-exhaustive list: *the environmental sensitivity of the land and sea area*. The first two suggestions became part of the final compromise between the institutions.

#### **(f) Revision and update of identified areas**

Just like the European Parliament, the Council eventually suggested an obligation clause regarding a periodical *review and update* of the identified areas. This provision features in the final version of Article 15b.

#### **bb) New Article 15c – Renewables acceleration areas**

##### **(1) European Commission**

A new **Article 15c**<sup>492</sup> foresaw, according to European Commission's proposal, the obligation of Member States to adopt a plan or plans designating within the areas referred to in Article 15b(1) "renewables go-to areas"<sup>493</sup>. These areas are particularly suitable for the installation of energy production from renewable sources since the deployment of renewable energy in these areas is not expected to have significant environmental impacts (cf. the proposed definition in the new **Article 2 (ga)**<sup>494</sup>).

The proposed Article 15c further provided that Member States – when adopting a plan designating "renewables go-to areas" – should give priority to artificial and built surfaces, transport infrastructure areas, parking areas, waste sites, industrial sites, mines, urban wastewater treatment sites and degraded land not usable for agriculture, but should exclude Natura 2000 sites, nature parks and reserves, the identified bird migratory routes and other comparable areas identified by appropriate tools and datasets, all of which need to be explained in the plan.

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<sup>492</sup> Temporarily and partially implemented by the Emergency Regulation; please note that according to para. 61 and Art. 11(6) of the Proposal for a Regulation of the European Parliament and of the Council of 22/06/2022 (COM(2022) 304 final) on nature restoration, Member States are obliged to coordinate the development of national restoration plans with the designation of the renewables go-to areas.

<sup>493</sup> As defined according to the proposal in Art. 2 (ga): "renewables go-to-area" refers to a specific location, whether on land or sea, which has been designated by a Member State as particularly suitable for the installation of plants for the production of energy from renewable sources, other than biomass combustion plants.

<sup>494</sup> "a specific location, whether on land or sea, which has been designated by a Member State as particularly suitable for the installation of plants for the production of energy from renewable sources, other than biomass combustion plants".

As proposed by the European Commission, Article 15c finally provided for an obligation of the Member States when adopting a plan designating “renewable go-to areas” to establish rules for the designated areas. This should include appropriate mitigation measures to reduce potentially negative environmental impacts if necessary. In addition, it provided that compliance with such rules and implementation of appropriate mitigation measures should have resulted in the presumption of conformity with certain nature conservation rules<sup>495</sup>. Under certain conditions, it allowed the temporary use of novel mitigation measures for one or several pilot projects.

Before such a plan gets adopted, it must – according to the proposal – be subject to an environmental assessment<sup>496</sup> and, if applicable<sup>497</sup>, to the appropriate assessment under Article 6(3) of Directive 92/43/EEC (Habitats Directive). Finally, the plan shall be made public and periodically reviewed<sup>498</sup>.

The positions of the European Parliament and the Council on this article differed in the trilogue negotiations – besides the term for the areas in question – only with regard to a few points, in particular an obligation of the Member States to designate enough renewables acceleration areas to reach the renewable energy targets, the inclusion of areas suitable for the installation of biomass combustion plants into the circle of potential renewables go-to/acceleration areas and on the deadline for plan or plans designating renewable go-to-areas.

Other than that, the European Parliament and the Council made a few suggestions which found mutual support (in particular regarding the areas which should be prioritised or excluded and regarding the determination of the size of the acceleration areas). Noteworthy is also, that they both recognised the need to stipulate that Member States may designate areas previously designated as suitable for an accelerated deployment of one or more renewable energy technologies as renewables go-to areas and that the area designation plans need to be reviewed in the context of an update of national energy and climate plans.

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<sup>495</sup> The proposal lists here Art. 6(2) and 12(1) of Directive 92/43/EEC, Art. 5 of Directive 2009/147/EEC and Art. 4(1)(a)(i) and (ii) of Directive 2000/60/EC, but “without prejudice to para. 4 and 5 of the new Art. 16a (Permit-granting process in renewables go-to areas”.

<sup>496</sup> Carried out under the conditions set out in Directive 2001/42/EC.

<sup>497</sup> If including artificial and built surfaces located in Natura 2000 sites, likely to have significant impacts on those sites; this limitation does not form part of the final version of the Art. 15c.

<sup>498</sup> At least in the context of the update of the national energy and climate plans under Art. 14 of Regulation (EU) 2018/1999.

## (2) European Parliament

### (a) Term and its definition

The European Parliament suggested calling the “go-to-areas” *acceleration areas*, which was eventually accepted by the European Commission and the Council and to not exclude biomass-combustion plants.<sup>499</sup>

Additionally, the European Parliament suggested adding to the definition of *acceleration areas* in **Article 2 (9a)** “[...] taking into account the assets needed for their connection to the grid and related energy networks.” However, this latter suggestion was not deemed necessary in the trilogue negotiations.

### (b) Coordination between authorities

Similarly to Article 15b, here as well, the European Parliament emphasised the need of the Member States to *coordinate* their actions *with the local and regional authorities*. However, in the trilogue negotiations a reference to “competent authorities” was deemed sufficient.

### (c) Size and amount of designated areas

The European Parliament further suggested that *the size of those areas should be commensurate with the objectives for renewable energies and sub-targets set out in the RED IV Directive and the national energy and climate plans updated pursuant to Article 14 of Regulation (EU)2018/1999*.

Furthermore, according to the European Parliament, Article 15c should have provided that *the overall amount of designated land and sea areas shall significantly contribute to reach the 2030 renewable energy target and shall be included in national energy and climate plans updated pursuant to Article 14 of Regulation (EU)2018/1999*.

A reference to the renewable energy targets in the suggested form did not become part of the new Article 15c. However, the following provision was introduced: “*While retaining the discretion to decide on the size of these areas, Member States shall aim that the combined size of these areas is significant and that they contribute to the achievement of the objectives set out in this Directive.*”

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<sup>499</sup> See more on this below, point Part 4 E. VIII.



#### **(d) Identification and prioritisation of areas**

The European Parliament also suggested extending Member States' obligation regarding the prioritisation of certain areas and adding to the list *facades of buildings, direct surroundings of transport infrastructure areas, on-farm sites, artificial and built surfaces, such as urban wastewater treatment sites, artificial lakes, inland water bodies or reservoirs*. This suggestion was, as regards facades of buildings, transport infrastructure and their direct surroundings, parking areas and farms, included in the final version of Article 15c. According to European Parliament's further proposal not only bird *but also marine mammal* migratory routes *and – in accordance with the best available data – ecological corridors* should be excluded. This proposal became – in a changed wording – part of the final Article 15c.

Finally, according to the European Parliament, to identify the areas where the renewable energy installations would not have a significant environmental impact also *specific field surveys* should be used *if necessary and the data available in the context of the development of a coherent Natura 2000 network should be taken into account*. Only the second one of these two suggestions was incorporated into the final version of Article 15c.

Additionally, the European Parliament suggested that when designating areas, the Member States shall also *remove administrative barriers and allocate sufficient well-trained staff and administrative resources*. This suggestion did not find support in the trilogue negotiations.

The European Parliament also introduced the proposal that *already designated areas for the installation of wind or solar power plants may be declared by the Member States as renewables acceleration areas by considering that the existing spatial plans comply with the requirements of Article 15c*. This suggestion does not feature in the final version of Article 15 c either. Instead, a similar proposal by Council was incorporated into the final Article 15c.<sup>500</sup>

#### **(e) Environmental assessment**

A special provision is suggested for sea areas: *designation of these areas shall comply with Directive 2014/89/EU with regard to the use of an ecosystem-based approach to maritime spatial planning*. This suggestion has not been incorporated into the final version of Article 15c.

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<sup>500</sup> Cf. below, point Part 3. C. III. 2) bb).

## **(f) Update of plans**

In the European Parliament's view, the plans must not only be published and re-viewed in the context of an update of national energy and climate plans *ensuring synergies with Directive 2014/89/EU*<sup>501</sup> but also *updated on an on-going basis to record, in electronic form, new capacity*. However, in the trilogue negotiations this amendment was not deemed necessary.

## **(3) Council of the European Union**

### **(a) Definition of the term**

The final definition of "renewables acceleration areas" in **Article 2** also encompasses – as suggested by the Council – a location on *inland waters*.

Additionally, the Council proposed that, when ensuring that the competent authorities adopt a plan or plans designating these areas for one or more types of energy sources, Member States *may decide to exclude* not only *biomass combustion* but also *hydropower plants*. This proposal became part of the final new Article 15c.

### **(b) Area designation deadline**

In Article 15c, the Council foresaw – less ambitiously than the Commission and the Parliament – a period of 30 months rather than 2 years following the RED IV Directive's entrance into force for adoption of a plan or plans designating renewable go-to-areas. The institutions finally agreed on 27 months.

### **(c) Size of designated areas**

According to the Council's proposal, the Member States shall finally decide on the size of such renewable "go-to-areas" *in view of the specificities and requirements of the technology or technologies for which they set-up renewables go-to areas*. This suggestion has been incorporated into the final version of Article 15c.

### **(d) Identification of areas**

Finally, the Council proposed to introduce a new paragraph 4, according to which *within 6 months from the entry into force of the RED IV Directive, Member States may declare under certain conditions as renewables go-to areas specific areas which have been already designated as areas suitable for an accelerated deployment of one or*

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<sup>501</sup> Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning, OJ L 257, 28.8.2014, p. 135-145.

*more renewable energy technologies* is of particular relevance. The institutions agreed upon introducing this provision into the final version of article 15 c.

**cc) New Article 15d – Public participation**

The only position that contained a proposal for **Article 15d** on public participation was that of the European Parliament.

Here, the Parliament considered obliging the Member States to ensure that the plans mentioned in Articles 15b and 15c are developed in a timely, open, inclusive manner that is effective, and that the public is given chances to participate in those plans' developments. In addition, Member States shall – according to this proposal – identify and inform electronically and by public notices or by other appropriate means the public (likely) affected by or interested in the plans.

It was questionable whether this proposed new Article was essential, given the existence of European secondary law on public participation in addition to existing international agreements. In the end, the institutions agreed, that a reference in the new Article 15d to Article 6 Directive 2001/42/EC, which concerns consultations on draft plans, is sufficient. A compromise was also reached in so far as according to the final version of Article 15d the public affected or likely to be affected by plans designating renewables acceleration areas should be identified and "*Member States shall promote public acceptance of renewable energy projects by means of direct and indirect participation in the projects by local communities*".

**dd) New Article 15e – Areas for grid and storage infrastructure necessary to integrate renewable energy into the electricity system**

As proposed by the Council (under the Council mandate as Article 16d) the final text now also contains an article on areas for grid and storage infrastructure necessary to integrate renewable energy into the electricity system.

According to article 15e (1) Member States may – to support and complement the renewables acceleration areas – adopt a plan or plans to designate such areas for grid and storage infrastructure where they are not expected to significantly impact the environmental or where such impacts can be duly mitigated or at least compensated. These plans shall in particular be subject to an environmental assessment in accordance with Directive 2001/42/EC and, where applicable, to an assessment in accordance with Article 6(3) of Directive 92/43/EEC. However, Article 15e(2) allows Member States to exempt projects in such areas from certain impact assessments and instead subject such projects to a screening based on existing data from the environmental assessment in accordance with Directive 2001/42/EC, which has to be

finalised within 30 days (see Article 15e (3)). Pursuant to Article 15e (4), Member States shall ensure, if applicable, appropriate and proportionate mitigation or – if not available – compensation measures. Finally, Article 15e (5) deals with reinforcement of the grid infrastructure and limits the screening to the potential impacts stemming from the change/extension compared to the original grid infrastructure.

**b) Streamlined procedures**

**aa) Rephrased Article 16 – Organisation and main principles of the permit-granting process**

**(1) European Commission**

Article 16 was rephrased in the European Commission's proposal.

The scope of the term "permit-granting process" was extended to all relevant administrative permits to build, repower and operate also *co-located energy storage facilities* and the term *assets necessary for their connection to the grid* is clarified by adding *including grid connection permits and environmental assessments*.

The beginning of the permit-granting process was clarified. According to the proposal, it coincided with *the acknowledgement of the validity of the application*, which must take place *no later than fourteen days for plants located in go-to areas, and one month for plants located outside of go-to areas following the receipt of the application*. The proposal stated that *if the developer has not sent all the information required to process an application*, the competent authority shall *request the developer to submit a complete application within fourteen days from this request*, and – if applicable – *may reject the application, which may be resubmitted in the future*.

The proposal further obliged the Member States to ensure that *within 2 years from entry into force of the RED IV proposal all procedures are carried out in an electronic format*.

Finally, the proposal also obliged the Member States to apply *the most expeditious administrative and judicial procedures available for appeals in the context of a project for the development of a renewable energy installation or its related grid connection, including those related to environmental aspects*.

At the initiative of the European Parliament the scope of the term "permit-granting process" was extended in Article 16 compared to European Commission's proposal to further energy sources and the need for accelerated authorization of energy assets necessary for the integration of the renewable energy plants in the system was recognized. Member States are now also obliged to provide the financial and

technical support necessary to accelerate the permit-granting procedures and single contact points must specifically target online not only small-scale projects and renewables self-consumers online, but also renewable energy communities.

In turn, at the initiative of the Council the deadline for the acknowledgment of validation was prolonged and an easy access for the general public to simple procedures for the settlement of disputes concerning the permit-granting process was agreed upon.

In detail:

## **(2) European Parliament**

### **(a) Term “permit-granting process”**

The European Parliament suggested clarifying the scope of the term “permit-granting process” by also mentioning *hybrid power plants, heat pumps, power and thermal facilities* as well as *assets necessary for the connection to integrate renewables into heating and cooling networks*. The institutions have agreed upon including a similar provision into the final first paragraph of Article 16.

In addition, the European Parliament suggested the application of the rephrased Article 16(1) as well as Articles 16a and 16b to the *parallel permit-granting process for network system developers regarding related energy assets necessary for the integration of the renewable energy plant in the system as well as assets necessary for their connection to the grid which are not integrated in the permit-granting process under Article 16(1) for the specific renewable energy plant*. This was however not deemed necessary in the trilogue negotiations.

The Parliament finally suggested adding the *assets necessary for the development of the energy infrastructure networks required to integrate renewable sources into the system* to the clause in Article 16 regarding the most expeditious administrative and judicial procedures available for appeals, which has also been accepted in the trilogue procedure.

### **(b) Financial and technical support**

Noteworthy is also the suggestion to oblige Member States to *provide support, including technical and financial support, to regional and local authorities in order to facilitate the permit granting process and to ensure a financing of qualified staff, upskilling, and reskilling of their competent authorities at national, regional, and local level which is proportionate with the overall renewable energy needs identified under Article 15b, and with the planned installed renewable energy generation capacity as*

*foreseen in national energy and climate plans*. This proposal – although with a different wording – also became part of the final Article 16.

### **(c) Validation deadline**

While the European Parliament agrees with the European Commission's proposal of having a deadline for the competent authority to validate the application, it suggests that it should be *14 working days* for installations located in renewables acceleration areas. Council's proposal was however the one which prevailed.<sup>502</sup>

### **(d) Information of the public**

In addition, the European Parliament suggests amendments to Article 16 to ensure that Member States not only set up one or more contact points but also *inform the public about the permit-granting process* and that contact points address distinctly online not only small-scale projects and renewables self-consumers but also *renewable energy communities, collective and individual projects* and *guide them through the administrative process of receiving support under the renewables support schemes*. In the final version of Article 16 only the second proposal has been included and only as far as it regards renewable energy communities.

### **(e) Reporting procedures**

Furthermore, in the Parliament's view *the Commission should be obliged to develop reporting procedures for Member States* regarding their efforts to ensure compliance with the permitting requirements set out in this Article and in Articles 16a and 16b and assist them if *corrective measures* are needed. This proposal did not find support in the trilogue negotiations.

## **(3) Council of the European Union**

### **(a) Acknowledgment of completeness**

The Council preferred the term *completeness* versus validation of the application and suggested less ambitiously that the acknowledgment of completeness of the application by the competent authority shall take place within *30 days* for plants located in go-to areas and within *45 days* for plants located outside of go-to areas, following the receipt of the application. Additional deadlines for the applicant to complete its application in case the applicant has not sent all the information required to process the application are considered superfluous and deleted. The term completeness and

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<sup>502</sup> Cf. above, point III.2) b) aa) (1)

the deadlines proposed by the Council can be now found in the final version of Article 16.

#### **(b) Informing the public**

The Council – just like the Parliament – believed that contact points should specifically target online not only small-scale projects and renewables self-consumers, but also *renewable energy communities*, and *collective and individual* renewable self-consumer projects. As already mentioned above, in the final version of Article 16 this proposal has been included only as far as it regards renewable energy communities.

#### **(c) Settlement of disputes**

In addition, the Counsel suggests that Member States are obliged to ensure, *in the context of the existing national rules, where applicable*, that not only applicants but also the *general public* have easy access to simple procedures for the settlement of disputes concerning the permit-granting process. This proposal is now in its essence part of the final version of Article 16.

#### **(d) Duration of the permit-granting process**

Finally, the Council suggested clarifying in Article 16 that the duration of the permit-granting process shall not include the time necessary for any plant or grid *construction, repowering or upgrade*, unless it coincides with other administrative stages of the permit-granting process. This clarification was also introduced into the final version of Article 16.

### **bb) New Article 16a – Permit-granting process in renewables acceleration areas**

#### **(1) European Commission**

In the European Commission's proposal, a new **Article 16a** was inserted to regulate the details of the streamlined permit-granting process in renewables go-to areas.

This process entailed according to this proposal an exemption from the requirement to carry out a dedicated environmental impact assessment, except for biomass combustion plants, and from an assessment of implications for Natura 2000 sites. Instead, competent authorities shall screen applications within 30 days from the date of submission (and 15 days in case of installations of less than 150 kW and repowering of plants) to identify any unforeseen negative effects on the environment. After this deadline, the applications shall be authorised without requiring any express

decision, and in case of a negative decision, the applicable assessment must be conducted within 6 months following the screening decision.

Article 16a, as proposed by the European Commission, also provided for a maximum duration of the permit-granting process: in principle one year, but for repowering and installations below 150 kW six months; in justified cases on the ground of extraordinary circumstances both periods may be extended by up to three months. The lack of reply within these deadlines shall (in principle) result in the specific administrative steps to be considered as approved and all resulting decisions shall be published.

In the trilogue negotiations regarding Article 16a the European Parliament and Council disagreed in particular on the maximal duration of the permit granting procedures and their possible extensions and on the exact formulation of the presumption of approval. On the other hand, the European Parliament made further suggestions on acceleration of repowering, which has met with the approval of the Council.

In detail:

## **(2) European Parliament**

### **(a) Duration of the permit-granting process**

The European Parliament suggested more ambitiously that for projects in renewables acceleration areas, *including their related energy network elements and grid connection*, in principle, the permit-granting process referred to in Article 16(1) shall not exceed *nine months* instead of one year, as suggested by the European Commission. In the end, however, the institutions agreed on a period of one year.

According to the Parliament, the six months permit-granting process for the repowering of plants, as suggested by the European Commission, should also directly apply to those installations *increasing the capacity and the need for related energy network developments without increasing the occupied area* and the six months permit-granting process for the installations below 150 kW should also directly apply to *power and thermal facilities*. Only the second proposal became part of the final Article 16a.

Additionally, the Parliament advised to foresee that connections to the transmission or distribution grid shall be permitted in principle within one month if the repowering does not result in an increase in the capacity of the renewable energy installation beyond 15%. This proposal has been incorporated into the new **Article 16c** on repowering, however a three months period was stipulated.



## **(b) Environmental impact assessment**

According to the Parliament, the question of whether a project needs to conduct an environmental impact assessment should not apply to the *repowering of solar plants that do not require the use of additional space and that adhere to the applicable environmental mitigation measures established for the initial installation*. Additionally, the *repowering of renewable energy power plants or of a related grid infrastructure, which is necessary to integrate renewables into the electricity system*, shall only undergo such prior determination and/or an environmental impact assessment regarding the *potential impact stemming from the change or extension compared to the original project*. Both suggestions are now included in the new **Article 16c** on repowering, the first having been extended to the screening process as now foreseen by Article 16a.

The Parliament further suggested expanding the scope of application of the exemption from the requirement to carry out a dedicated environmental impact assessment – as suggested by the European Commission – to *generation plants that combine different renewable energies* and to include not only co-located storage facilities as well as their connection to the grid, but also *the related energy network, the related transmission and distribution network, and the related assets necessary for the development of the electricity networks required to integrate renewable energy sources into the system*. Only this first suggestion became part of Article 16a. Specific reference to the production of renewable hydrogen, as proposed by the European Parliament, was not introduced either.

The Parliament also suggested clarifying that an exemption from an assessment of implications for Natura 2000 shall be possible *provided that the requirements of Article 15c(1), point (b) and Article 15(c)(2) of the RED IV<sup>503</sup> are fulfilled*. In the trilogue negotiations only the reference to Article 15c(1), point (b) was deemed necessary.

## **(c) Informing the public**

All decisions resulting from permitting procedures should according to the European parliament be made public. This provision has not been incorporated into the new article 16a. However, the new, general Article 16 now provides that decisions resulting from the permit-granting processes regulated in this Article shall be made publicly available.

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<sup>503</sup> Regarding the adoption of plans designating renewables acceleration areas.

**(d) Presumption of approval**

Furthermore, the Parliament restricts the European Commission's proposal to consider the lack of reply within the established deadlines as approval to the case of a *request by the developer*. This suggestion did not find support in the trilogue negotiations.

**(e) Sharing of best practices**

Finally, the Parliament suggests an obligation for the Member States to share and utilise best practices in the permit-granting process. This proposal did not find support in the trilogue negotiations.

**(3) Council of the European Union**

**(a) Duration of the permit-granting process**

The Council suggested stipulating in Article 16a that the maximum one-year duration of the permit-granting process may be extended by six months versus three months as suggested by the European Commission.

It further suggested an additional maximum two-years duration of the permit-granting process for offshore renewable projects and an additional maximum one-year duration in the case of repowering of such offshore renewable project or of their capacity of less than 150 kW, in justified cases extendable by six months.

All these suggestions became part of the final Article 16a.

**(b) Environmental impact assessment**

The Council further suggested – in contrast to European Commission's proposal – not to exclude biomass combustion plants from the general exemption from environmental impact assessment in renewables go-to areas, provided that these projects, just like any others, comply with the rules and measures set out in Article 15c(1)(b))<sup>504</sup>. The Council also suggested clarifying, similarly to the Parliament, that an exemption of renewable energy projects from an assessment of implications for Natura 2000 shall be possible *provided that the requirements of Article 15c(1)(b) are fulfilled*. Both proposed amendments are now included in Article 16a.

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<sup>504</sup> This suggestion seems still in line with the Council's proposal on provisions regarding biomass combustion plants in Art. 15c, see above point III.2)a)bb)(1).

Additionally, Article 16a now also stipulates, that if the screening process results in a decision according to which significant unforeseen adverse effects on the environment are to be expected, such projects should be subject to environmental impact assessments. However, pursuant to Article 16a under justified circumstances, including where this is needed to accelerate renewables deployment to achieve the climate and renewable energy targets, Member States may exempt wind and solar photovoltaic projects from such assessments. With regard to such exemptions, the Council also suggested that *the operator adopts proportionate mitigation measures or pays a monetary compensation to address those adverse effects*, or if applicable *pays a monetary compensation for species protection programs as long as the renewable power plant is in operation*. Furthermore, according to Council's opinion, the applicable assessment should be carried out in the event of a negative decision within six months, *extendable by another six months, following the submission of complete documentation including information necessary for such assessment* (and not – as proposed by the Commission – within six months following the screening decision). All these proposals form now part of the new Article 16a.

#### (c) Screening

Regarding the screening obligation by the competent authorities, the Council added in its position on Article 16a that such screening *shall also aim to identify if any of such projects is subject to transboundary assessment according to Article 7 of the Directive 2011/92/EU<sup>505</sup>* and that it should be finalized within *45 days*, in case of *installations of less than 150 kW* and *repowering 30 days*, which is significantly longer than proposed by the European Commission. All these proposals now form of the final version of Article 16a.

#### (d) Presumption of approval

Finally, the Council also restricted Commissions proposal on the presumption of approval and suggested instead that Member States *may provide that the lack of reply of the relevant administrative bodies within the established deadline shall result in the specific administrative steps to be considered as approved*. This proposal forms now part of the final version of **Article 16a**, as an obligation of the Member States but only for the specific intermediary administrative steps (and not with regard to the final decision which needs to be explicit), unless the screening process results in an environmental impact assessment or where the principle of administrative tacit approval does not exist in the national legal system of the Member State concerned.

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<sup>505</sup> EIA Directive.

cc) **New Article 16b – Permit-granting process outside renewables acceleration areas**

(1) **European Commission**

According to European Commission's proposal, a new **Article 16b** was meant to regulate the details of the streamlined permit-granting process outside renewables go-to areas.

Article 16b, as proposed by the European Commission, particularly specifies that an environmental assessment must be carried out in a single procedure that combines all relevant assessments for a given project. If the specific projects have adopted appropriate mitigation measures, Article 16b specifies that any killing or disturbance of the species protected under Article 12(1) Habitats Directive and Article 5 Birds Directive shall not be considered deliberate.

Article 16b, as proposed by the European Commission, also provides for a maximum duration of the permit-granting process: in principle 2 years; for repowering and installations below 150 kW 1 year; in justified cases on the grounds of extraordinary circumstances, both periods may be extended by up to 3 months.

Finally, according to European Commission's proposal, Article 16b obliges the Member States to facilitate the repowering of projects located outside go-to areas.

Just like with regard to Article 16a, here as well, the main discussion point between the European parliament and the Council was the maximal duration of the permit-granting procedure. However, noteworthy is the consensus on special provisions for repowering projects, equal for renewables acceleration areas and areas outside of these areas.

(2) **European Parliament**

The European Parliament suggested that the permit-granting process outside renewables acceleration areas according to Article 16b should, in principle, take no longer than *18 months* instead of 2 years as proposed by the Commission and that this period shall also apply to renewable *hybrid power plants and their related energy networks*, and no longer than *6 months* for repowering and installations below 150 kW instead of 1 year as suggested by the Commission. These proposals did not find support in the trilogue negotiations.

According to the Parliament, the permit granting process for the repowering of plants, as suggested by the European Commission, should also outside of renewables acceleration areas not exceed *six months* (instead of one year as proposed by

the European Commission) and also directly apply to those installations *increasing the capacity and the need for related energy network developments without increasing the occupied area*. These suggestions were also not incorporated into the new Article 16b.

Further proposed amendments corresponded with the amendments suggested by the Parliament regarding Article 16a on shorter permit-granting procedures for *grid connections when repowering does not resulting in an increase in the capacity beyond 15%*, on exceptions from assessments in *re-powering of solar installations* and on limitations of assessments in *repowering* cases in general to *impacts stemming from the change*.<sup>506</sup> As already mentioned above all these proposals form now part of the new **Article 16c**.

### (3) Council of the European Union

Just like concerning Article 16a, here as well, the Council suggested an extra maximum duration of the permit-granting process for *offshore renewable projects*, which according to its position, should not exceed *three years* or *two years* in case of offshore repowering or installations below 150 kW.

Furthermore, the Council suggested that the maximum two-year duration of the permit-granting process as proposed by the European Commission may, in on the grounds of extraordinary circumstances or *on the grounds of extended periods needed for assessments under applicable Union environmental law*, be extended by up to *6 months* instead of 3 months.

### dd) New Article 16d – Permit-granting process for the installation of solar energy equipment

#### (1) European Commission

The proposal also foresaw a new **Article 16c (now Article 16d)**, which was devoted to streamlined permit-granting process for the installation of solar energy equipment in artificial structures.<sup>507</sup> According to this proposal, the permit-granting process should not exceed 3 months, and such installations shall be exempted from the

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<sup>506</sup> Cf. above point C. III. 2) b) bb) (2) (b).

<sup>507</sup> Temporarily and partially implemented by the Emergency Regulation.

obligation to carry out a dedicated environmental impact assessment under Article 2(1) of Directive 2011/92/EU<sup>508</sup>.

The positions of the European Parliament and the Council on this Article differed mainly regarding the scope of application of the shortened permit-granting process.

In detail:

## **(2) European Parliament**

The European Parliament suggested shortening the procedure to *1 month*, to extend the scope of application of Article 16c (now Article 16d) also to solar energy equipment<sup>509</sup> *on rooftops, and co-located energy storage assets* and introducing an obligation of the Member States to provide for a *simple-notification procedure as set out in Article 17 of the RED II Directive for solar installations of 50 kW or less, including renewables self-consumers, jointly acting renewables self-consumers and renewable energy communities*. Only the proposal regarding collocated energy storage assets was introduced into the new Article 16c (now Article 16d).

In addition, Member States should – according to European Parliament’s proposal – *make sure that requirements for construction still in place are removed and establish a roadmap to remove other barriers and to enhance the accelerated deployment of solar energy*.

Finally, the proposal foresaw an obligation for the Member States to ensure that the installation of building-integrated solar installations is exempt from environmental impact assessment under Article 2(1) of Directive 2011/92/EU and from building permitting.

None of these latter two proposals found support in the trilogue negotiations.

## **(3) Council of the European Union**

In turn, the Council suggested adding to the original proposal of Article 16c (now Article 16d) by the European Commission a clause according to which Member States may exclude certain areas or structures from the scope of application of the

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<sup>508</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 1–21 (EIA Directive).

<sup>509</sup> The Parliament suggests defining “solar energy equipment” in Art. 2(9b) as “equipment that converts energy from the sun into thermal or electrical energy, in particular, solar thermal and solar photovoltaic equipment”.

shortened permit-granting process for *reasons of cultural or historical heritage protection, or reasons related to national defence interests or for safety reasons*. This additional clause forms now part of Article 16d.

#### ee) **New Article 16e – Acceleration of the deployment of heat pumps**

Only the European Parliament's position contained a proposal for a new article (now **Article 16e**) on the acceleration of the deployment of heat pumps.<sup>510</sup> However, Article 7 Emergency Directive already anticipated this new provision.<sup>511</sup> The introduction of a new Article regarding the acceleration of deployment of heat pumps found therefore support in the trilogue procedure.

This article foresaw, as proposed by the European Parliament, that the permit-granting process for the installation of heat pumps shall not exceed one month and that for heat pumps of up to 12 kW and heat pumps installed by a renewables self-consumer, jointly acting renewables self-consumers and renewable energy communities of up to 50 kW grid connections to the transmission or distribution grid should be permitted following notification to the relevant entity.

The Article on the acceleration of the deployment of heat pumps, as proposed by the European Parliament, also provided that decisions resulting from permit-granting processes shall be made publicly available.

In contrast to these proposals the new Article 16e now provides, that for ground source heat pumps the permit-granting process shall not exceed *three months* and that the above-mentioned heat pumps connections to the transmission or distribution grid shall be permitted within *two weeks* after notification to the relevant entity, unless there are justified safety concerns, further works are needed for grid connections or there is technical incompatibility of the system components. The new Article 16d now also provides, that Member States may not apply the provisions of this Article to the installation of heat pumps in certain areas or structures, due to *reasons of cultural or historical heritage protection, or for reasons related to national defence interests or safety reasons*.

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<sup>510</sup> Temporarily and partially implemented by the Emergency Regulation.

<sup>511</sup> See below point, D. II. 6).

**c) New Article 16f – Overriding public interest**

**aa) European Commission**

Finally, according to European Commission's proposal, a new article (now **Article 16f**) was meant to ensure that by three months from entry into force of the RED IV Directive and until climate neutrality is achieved, plants for the production of energy from renewable sources, their connection to the grid, the related grid itself or storage assets are presumed to be of overriding public interest when balancing legal interests in the individual cases for the purposes of Articles 6(4) and 16(1)(c) of the Habitats Directive, Article 4(7) of the Water Directive and Article 9(1)(a) of the Birds Directive.<sup>512</sup>

**bb) European Parliament**

The European Parliament only added to this proposal an obligation of the Commission to *issue no later than one month after entry into force of the RED IV Directive guidance on the implementation of Article 16d in line with existing requirements under Union law and with relevant rulings of the Court of Justice of the European Union*. However, this suggestion did not find support in the trilogue negotiations.

**cc) Council of the European Union**

The Council, on the contrary, suggested stipulating the overriding public interest of renewables in Articles 15(8b).<sup>513</sup> However, this suggested Article 15(8b) essentially corresponded with the European Commission's proposal, with the exception that Member States were permitted to not apply these provisions *to certain parts of their territory as well as to certain types of technologies or to projects with certain technical characteristics in accordance with the priorities set in their national integrated energy and climate plans*. This suggestion found support in the trilogue negotiations and was introduced into the new Article 16f.

Finally, regarding species protection, the Council suggested that the construction and operation of renewable energy installations and the related grid infrastructure development should only be given priority in the process of balancing legal interests *if and to the extent that appropriate species conservation measures are undertaken*. However, this suggestion did not find support and does not feature in the new Article 16f.

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<sup>512</sup> Temporarily and partially implemented by the Emergency Regulation.

<sup>513</sup> Cf. above regarding the RED III Directive proposal, point C. II. 2)b).



d) **Other suggestions**

aa) **Article 15 – Administrative procedure, regulations and codes (new paragraph 2a)**

(1) **European Commission**

The European Commission finally suggested inserting in the existing **Article 15a new paragraph 2a** obliging Member States to promote the temporary testing of new renewable energy technologies in pilot projects in a real-world environment while applying appropriate safeguards.

(2) **European Parliament**

The European Parliament supported this proposal and suggested specifying that this testing should concern *innovative renewable energy technologies*<sup>514</sup>, *including production, sharing and storage technologies* under safeguards not only for the secure operation of the electricity system, as proposed by the European Commission, but for the *energysystem* in general. The Parliament also suggested adding the obligation for Member States *to ensure, that – without prejudice to simple notification procedures for grid connections pursuant to Article 17 – the procedure for the permitting of such innovative renewable energy technologies is at least as fast as in renewables acceleration areas.*

Only the second proposal regarding a reference to the maximum procedural duration in the renewables' acceleration areas does not feature in the final version of Article 15.

(3) **Council of the European Union**

In addition to Commission's proposal for a new Article 15(2a), the Council, who also preferred using the term *innovative* rather than *new*, suggested inserting a definition of *innovative renewable energy technologies* in a new Article 2(9c): "*a renewable energy generation technology that improves in at least one way comparable state-of-the-*

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<sup>514</sup> These are defined, according to the Parliament's position on the RED III proposal as "a renewable energy generation technology that improves in at least one way comparable state-of-the-art renewable energy technologies or makes exploitable a largely untapped renewable energy resource and involves a clear degree of risk, in technological, market or financial terms, which is higher than the risk generally associated with comparable non-innovative technologies or activities", cf. Pg\_TA(2022)0317.

*art renewable energy technologies or makes exploitable a largely untapped renewable energy resource*". This definition can now be found in Article 2 (14aa).

## **bb) No new Article 16f on reporting obligations of Member States**

Finally, the European Parliament suggested – additionally to the provisions proposed by the European Commission – a new **Article 16f** providing for reporting obligations of the Member States to the European Commission on the duration of the permit-granting processes for plants for the production of energy from renewable sources in as well as outside the renewable acceleration areas and on the impact of Article 16d on the duration of the permit-granting process and legal proceedings. This Article also foresaw that the Commission should evaluate the information provided by Member States and, if appropriate, propose changes to relevant legislation. However, in the end, no such Article was incorporated, which is regrettable.<sup>515</sup>

The only provision which foresees future additional measures can be found in the already mentioned new Article 15(g), which now provides that one year after the entry into force of the RED III Directive the Commission will consider if any additional measures are necessary to support the Member States in implementing Articles 15(1) and (3), 16 and 17, which may include the development of key performance indicators.<sup>516</sup>

## **D. Regulation (EU) 2022/2577 (Emergency Regulation / RED V)**

### **I. Introduction**

Before the adoption of the Directive (EU) 2023/2413, the most important legislative act already in force at EU level aiming at accelerating approval procedures was the Regulation (EU) 2022/2577, establishing a framework to accelerate the deployment of renewable energy (also known as the Emergency Regulation).<sup>517</sup> The relevant Commission proposal of 09/11/2022 was fast-tracked and adopted by the Council on 19/12/2022.

In connection to the cost of living and the energy crisis, the European Union recognised that rapid temporary but directly applicable action was needed to accelerate Europe's transition to clean energy. Thus, the legal basis for the Emergency Regulation is Article 122 TFEU. As a regulation, its provisions are binding and directly

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<sup>515</sup> Cf. another similar proposal by the European Parliament for Art. 16, above, point C. III. 2) c) bb).

<sup>516</sup> Cf. above, point C. II. 2) a).

<sup>517</sup> Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy.

applicable in all Member States to the extent that they do not require an act of transposition by the Member States.

The Regulation entered into force the day after its publication in the Official Journal of the European Union (i.e. on 30 December 2022) and will remain in force for 18 months from its entry into force (Article 10).

The Emergency Regulation partially anticipated the implementation of the REPowerEU proposal of May 2022 (RED IV) and the timeframe for concluding negotiations among EU institutions on this file as well as its transposition into national law. Lengthy and complex administrative procedures were identified as one of the main barriers to the pace and scale of investment in renewable energy and related infrastructures. According to the legislative memorandum, some of the measures to accelerate permitting procedures for renewable energy installations set out in the proposal of May 2022, in particular measures addressing the presumption that renewable energy projects are of overriding public interest, the repowering of installations and permitting procedures for solar installations on existing structures, could be quickly implemented by the Member States without the need for costly changes to their national procedures and legal systems.<sup>518</sup> Furthermore, the energy crisis required immediate and targeted action in these areas and further measures to promote certain technologies that swiftly reduce the use of gas for heating purposes, e.g., heat pumps.<sup>519</sup>

## **II. Relevant provisions of the Emergency Regulation**

### **1) Scope of application (Articles 1 and 2)**

The provisions of the Regulation apply to all permit-granting procedures which will begin (by acknowledgement of receipt of a complete application) within the period of validity of the Regulation, it is from 31 December 2022 until 30 June 2024. In addition, Member States may also apply the provisions of the Regulation to ongoing proceedings. The permit-granting processes are essentially defined as all administrative stages of all relevant administrative permits issued to build, repower, and operate renewable energy plants including heat pumps, co-located energy storage facilities, and assets necessary for their connection to the grid, including grid connection permits and environmental impact assessments where those are required.

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<sup>518</sup> Cf. recital 4 of Regulation (EU) 2022/2577 (Emergency Regulation).

<sup>519</sup> Cf. recital 5 of Regulation (EU) 2022/2577 (Emergency Regulation).

## 2) **Overriding public interest (Article 3)**

The first of the introduced measures is the introduction of a rebuttable presumption that renewable energy projects are of overriding public interest and serve public health and safety as defined in relevant EU environmental legislation<sup>520</sup>. This presumption means amongst others that a simplified review for certain exceptions applies to these projects.<sup>521</sup>

Regarding species protection, Article 3 regulates however, that the priority provision shall only apply if and to the extent that appropriate species conservation measures contributing to the maintenance or restoration of the populations of the species at a favourable conservation status are undertaken and sufficient financial resources as well as areas are made available for that purpose.

## 3) **Solar energy (Article 4)**

The installation of solar panels on artificial structures is generally less complex than the one of ground-mounted installations and can quickly help mitigate the effects of the current energy crisis.

The Emergency Regulation, therefore, provides for a maximum duration of three months for permitting processes for the installation of solar energy systems and associated on-site storage and grid connections on existing or future artificial structures that were built for purposes other than solar energy generation. These installations will also benefit from a special exemption from the obligation to carry out environmental assessments under Directive 2011/92/EU based on the assumption that there will not be any concerns regarding competing land uses or environmental impacts.

For self-supply facilities, the Emergency Regulation introduces the concept of their tacit administrative approval in the relevant permit issuance procedures based on the immediate positive impact of those facilities on consumers and their limited adverse effects on the environment.<sup>522</sup>

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<sup>520</sup> In particular, the Habitats Directive, the Birds Directive and the Water Framework Directive (i.e. Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy).

<sup>521</sup> Cf. recital 8 subsequent of Regulation (EU) 2022/2577 (Emergency Regulation).

<sup>522</sup> Cf. recital 11 of Regulation (EU) 2022/2577 (Emergency Regulation)

#### **4) Repowering (Article 5)**

The repowering of wind energy installations with more efficient turbines means that the existing capacity can be maintained or increased while using fewer, larger, and more efficient turbines, benefitting from the existing grid connection, a likely higher level of public acceptance and knowledge of the environmental impact.

The Emergency Regulation sets out a maximum duration of six months for permit-granting procedures for repowering projects in the field of renewable energy. Where an environmental impact assessment is required for repowering a renewable energy facility or the grid infrastructure required to integrate renewable energy into the electricity grid, the assessment is limited to the potential impact of the modification or expansion compared to the original project. In addition, a simplified procedure for grid connection is applicable with immediate effect if the repowering results in no more than a limited increase in total capacity compared to the original project.<sup>523</sup>

#### **5) Go to areas (Article 6)**

Given the current exceptional situation in the energy sector, Member States may exempt specific projects from certain environmental assessment requirements laid down in Union legislation. This applies to renewable energy projects, energy storage projects and electricity grid projects necessary for integrating renewable energy into the electricity system.

However, the introduction of such exemptions is subject to two conditions: (i) the project must be implemented in an area designated for renewable energy or electricity grids and (ii) such area was subject to a strategic environmental assessment. Furthermore, proportionate mitigation measures or, if these are not available, compensatory measures, should be taken to ensure species protection.<sup>524</sup>

#### **6) Heat pumps (Article 7)**

The faster and easier installation of heat pumps is a means of strengthening the security of supply and coping with difficult market situations. The use of renewable energy in the heating sector, which currently accounts for almost half of the energy consumption in the Union, can thus be increased.

To speed up the installation and use of heat pumps, the Emergency Regulation thus introduces targeted and shorter procedures for obtaining permits for such

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<sup>523</sup> Cf. recital 15 of Regulation (EU) 2022/2577 (Emergency Regulation)

<sup>524</sup> Cf. recital 6 of Regulation (EU) 2022/2577 (Emergency Regulation)

equipment, including a simplified procedure for connecting smaller heat pumps to the electricity grid.

## Part 4 Proposals regarding further suggestions and implementation

### A. Executive Summary

- The length of administrative procedures is the most important barrier that prevents renewable energy projects from materialising. As the study of the status quo of the here analysed national legal systems shows, there is various reasons for delays.
- The new rules on the acceleration of permitting procedures in the Renewable Energy Directive as well as in the Emergency Regulation address many of the relevant obstacles in the permitting process and are an enormous step for the acceleration of approval procedures in Europe.
- However, due to the national characteristics, in particular with regard to the responsibilities of the national and the regional level, the effective and speedy implementation of the revised Renewables Directive will be a major challenge. In addition, an increased number of qualified staff within the competent authorities will be necessary to effectively apply the new rules.
- The discussion on both, further complementary measures on EU-level and efficient and “fitting” implementation measures on national level, will have to continue. In our analysis we have identified several suggestions in this respect. Our proposals regarding the European level are of a general nature. They are followed by general thoughts on topics, which will require additional efforts of the national legislators within the implementation process of the Directive (EU) 2023/2413 to secure the effectiveness of these new acceleration rules. Finally, we make specific proposal for the national legislators of Sweden, France, Spain, and Germany linking them to the obstacles identified on national level in Part 2.
- Our proposals for legislative changes on the European level are in particular the following:
  - Taking into account the poorly staffed public authorities, a project’s climate relevance should be considered in the approval procedure, i.e. projects serving the energy transition should be prioritised under procedural law.
  - It should be considered whether it is possible to ensure in the specialised laws, in particular the European species protection law, that the requirements for exemptions from prohibitions are further specified in a binding manner (or it could be made mandatory for the

Member States to make binding specifications on the national level).

- Clear rules for the permission of storage facilities and electrolysers should be developed on the EU level, so that no legal uncertainties prolong the permitting process. A clear rule excluding electrolysers from the scope of application of the Industrial Emissions Directive (IED)<sup>525</sup> and a more specific definition of the term "adequate safety distance" in the Directive 2012/18/EU (Seveso III Directive)<sup>526</sup> regarding storage facilities for hydrogen would also be useful to accelerate the approval procedures.
- The European law could also guarantee uniformity regarding public online access to data used in previous permitting procedures like findings of environmental impact assessments, nature conservation surveys and other information relevant for the implementation of renewable energy projects.
- However, the most important task to achieve the acceleration of permitting procedures in practice will be to effectively implement the European provisions of the Directive (EU) 2023/2413 into national law.
  - Here the Member States will have to become creative to fulfil the aims of the Directive. This will be the case in particular with regard to consequences of the non-compliance with the now shorter procedural deadlines, binding specifications regarding species protection law, the implementation of acceleration of judicial procedures and – related with this topic – measures aiming at increasing the acceptance of renewable energy projects.
  - What should in our view also be considered on national level is a more effective exchange of information ("dual use") between the planning and permitting procedures authorities or a clearer legal guidance instructing the competent authorities that certain issues are to be analysed only on one level.

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<sup>525</sup> Directive 2010/75/EU.

<sup>526</sup> The aim of the Directive is to prevent major accidents at the (administrative) planning stage and to limit their consequences for human health and the environment.



- Furthermore, municipal veto rights should be limited to extraordinary cases and the possibility for the competent authority/ the state to override this veto should exist, if the general requirements for the permission of a renewable energy plant are fulfilled.
- Last but not least, more qualified staff and digitalisation of procedures, which would both hugely contribute to accelerated permitting, are also topics in the responsibility of Member States.
- Finally, some concrete proposals for national legislators in Sweden, France, Spain and Germany have been deduced by us from the analysis in Part 1 regarding the biggest obstacles for the deployment of renewable energy identified in these countries. Some of them overlap with the above-mentioned points (e.g., ensuring qualified staff or limiting the municipal veto rights). Others in turn are additional (e.g., increased predictability of permitting procedures) and more specific (e.g., simplification of permitting of geothermal heat installations).

## **B. Introduction**

The expansion of renewable energy is the central cornerstone for the transformation of the energy supply in Europe and for achieving the ambitious goals for the reduction of greenhouse gases. In the recent years it has become obvious that the complexity, variety, and excessive duration of permission procedures for renewable energy installations is one of the major obstacles for a speedy ramp-up of renewable energies, as delays in processing project authorisations put the timely reaching of energy and climate targets there is an urgent need for the acceleration of permitting processes.

Thus, in an open consultation in the framework of the revision of the Renewable Energy Directive approximately half of the project developers and associations ranked the length of administrative procedures as the most important barrier that prevents renewable energy projects from materialising.<sup>527</sup> Respondents also ranked competition with environmental regulations and the complexity of the applicable requirements or procedures among the most important barriers. When asked about the main bottlenecks for processing renewable energy project permits, complexity of coordination at different levels of government or administration is presented as the main barrier by public authorities (75%), followed by lack of human resources (50%).

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<sup>527</sup> Explanatory memorandum of the proposal of 18.05.2022, COM(2022) 222 final, recital 16.

Besides the problem of lengthy and complex administrative procedures other issues in connection with the permitting have also been identified as relevant obstacles. One central issue in this regard is the lack of public acceptance. Public acceptance results in local resistance against renewable energy projects and may delay the permitting procedure in particular by filing remedies against permits.

### **C. Overview of the results of the study in Part 1 and 2**

In our report we have firstly analysed the legal framework for the permission of renewable energy installations in four different Member States of the European Union – Germany, France, Spain, and Sweden. In general, for all countries it has been confirmed that there are major obstacles in the process of permitting renewable energy installations. On the one hand, the processes for approval procedures are very lengthy. On the other hand, certain rules do not allow for the installation of renewable energy plants in certain areas. In any case, acceleration measures for the permission of renewable energy installations are urgently needed in all countries.

Thus, one can find certain similar reasons for the slow process of permission. One very obvious point which has been identified in all country specific analyses is the insufficient staffing of the permit-granting bodies and environmental assessment authorities. Other reasons which have been identified in many countries are the deviations from procedural time limits and the difficulties in the interpretation of specific indeterminate legal terms (in particular in nature protection/ species protection laws). Also, climate protection or the production of renewable energies is not defined as an overriding interest in the planning process or in the approval procedure.

Still, the reasons for the slow process and the obstacles in the approval procedure differ substantially and are specific in the different countries. These differences are mainly based on the different legal and administrative structures and, only to a lower extent, on the different substantive conditions for the permission of renewable energy plants. Examples for very specific problems are the complex interaction of responsibilities between the national level on the one hand and the regional/ local level on the other hand which are a major problem in Spain and also, to a lower extent, in Germany, but which do not play a role in Sweden and to a little extent in France. Veto rights for the municipalities are, on the other hand, a major problem in Sweden where many projects cannot be implemented due to the resistance of municipalities while such veto rights are less relevant in other countries. Major differences also exist in the area of grid connection. While it is a major problem in Spain and also, to a lower extent, in France, the grid connection process in Germany and Sweden is, up to now, not a central problem for the installation of new renewable energy capacities. As a last example, the relevance of lacking local acceptance of

renewable energies for new projects differs very much in the four analysed countries. While it seems a relevant problem in Spain and also in Germany it is of less importance in France while in Sweden the lacking consent of the municipalities is a major obstacle.

Apart from the different legal backgrounds and the diverse reasons for the slow permitting procedures, the general need for an acceleration process in the sector of renewable energies has been recognised in all four countries. Therefore, there have been amendments to the legal framework in all four countries with the aim of an acceleration of the permitting process, and there are legal initiatives for more changes still going on. The extent of already implemented legal amendments, however, differs in the four countries. A central role for the future changes in the legal framework will, of course, play the new rules on the European level from the Emergency Regulation and from the amended Renewable Energy Directive.

#### **D. Summary and deductions from the European legal framework**

The acceleration of permitting procedures for renewable energy projects has not been at the heart of the activities of the European legislator until very recently. Thus, the provisions on permitting in Renewable Energy Directive 2018/2001 before its recent revision („RED II“) were not very specific. On the contrary, the Directive contained rather general rules, particularly regarding certification and licensing processes and grid connection.<sup>528</sup> Only in 2022 the focus of legal activities on the European level with regard to renewable energy has shifted substantially and in the endeavours for a ramp-up of the deployment of renewable energy the acceleration of permitting procedures has become one of the cornerstones.

The first really meaningful document of the European Commission in this regard, after the RED III proposal,<sup>529</sup> has been the Commission Recommendation (EU) 2022/822 of 18 May 2022.<sup>530</sup> At the same time the Commission has published the proposal (commonly referred to as RED IV) for a far more reaching revision of the Renewable Energy Directive containing a substantial number of instruments aiming at the acceleration of permitting processes.<sup>531</sup>

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<sup>528</sup> Cf. Part 3, Ch. C.I.

<sup>529</sup> Cf. Part 3, Ch. C. II..

<sup>530</sup> Commission Recommendation (EU) 2022/822 of 18 May 2022 on speeding up permitting procedures for renewable energy projects and facilitating Power Purchase Agreements

<sup>531</sup> Cf. Part 3, Ch. C. III..

In the course of emergency measures securing energy supply as a reaction to the war in Ukraine, the first particularly urgent measures for the acceleration of permitting procedures (as an instrument for the necessary ramp-up of renewable energies) have been enacted by the Commission already in December 2022 in the form of the so-called “Emergency Regulation”.<sup>532</sup> This Regulation partially and temporarily (for 18 months) anticipates the implementation of the RED IV Directive proposal of May 2022.

The Renewable Energy Directive with the amendments by the RED III and RED IV Directives proposals, which resulted in the Directive (EU) 2023/2413, builds on the Emergency Regulation and contains further substantive rules on speeding up permitting procedures. We have analysed the new rules in detail in Part 2 of our study. In short, they pertain obligations of Member States regarding the designation of areas for the deployment of renewable energy installations, general rules on streamlined permitting procedures as well as more concrete provisions on accelerated permitting procedures in and outside the designated renewable acceleration areas and finally provisions already contained in the Emergency Regulation.

In general, the new rules on the acceleration of permitting procedures in the revised Renewable Energy Directive address many of the relevant obstacles in the permitting process and are an enormous step for the acceleration of approval procedures in Europe. The new rules concern not only general topics (such as renewable energies as an overriding public interest, shorter deadlines, or the exclusion of environmental impact assessments (EIA) for the acceleration areas) but also specific issues such as repowering, solar energy installations in artificial structures or heat pumps. The latter target specifically renewable energy sources which do not require a complex permitting procedure and at the same time can substantially contribute to reaching the renewable energy targets.

While the provisions of the Emergency Regulation mostly apply directly, the new rules of the revised Renewable Energy Directive will have to be implemented into national law. Due to the above-mentioned national characteristics, in particular regarding the responsibilities of the national and the regional level, the effective and speedy implementation of the new rules will be a major challenge. At the same time, the necessary implementation of these new provisions also offers the chance for substantive changes in the national legislations and provides an opportunity to all

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<sup>532</sup> Cf. Part 3, Ch. D.

Member States to revise, simplify and improve their national legislation on permitting procedure while transposing European law.<sup>533</sup>

At least in some respect, it looks like the European Commission will try to accompany this process and give a helping hand. For instance, the revised Renewable Energy Directive requires Member States among others to designate renewables acceleration areas for one or more types of renewable energy sources. This obligation must be fulfilled already by 21 February 2026. To this end, the European Commission has launched at the beginning of 2024 an initiative, which will provide guidance to Member States on designating renewables acceleration areas to be issued by April 2024.

## **E. Proposals for legislative changes on the European level**

Even though the amendments in the Renewable Energy Directive are very comprehensive and are in our view the most relevant step for the acceleration of permitting procedures, we have identified from our analysis of both the European legislation and the national laws certain issues which were not addressed by the Directive (EU) 2023/2413. In the following we therefore present several additional proposals for further acceleration measures on the European level.

### **I. Detailed regulations for the permission of energy storages and electrolyzers**

While the discussion and the legal amendments in the area of permitting processes have mainly focussed on the permission of renewable energy facilities, in particular wind and solar energy plants, the permitting process of storage facilities and of electrolyzers has received less attention so far. However, at least storage facilities are now part of the European legal rules on the acceleration of permitting procedures in the Directive (EU) 2023/2413.<sup>534</sup> Electrolyzers, on the other hand, are not mentioned in the relevant regulations.

On the national level, our analysis has confirmed that the permission of storage facilities and to an even lower extent the permission of electrolyzers are regulated, and that there are little experiences with the permission of storages and electrolyzers. The reason for this might be the little relevance of storage facilities and electrolyzers in the energy system so far so that permitting issues are not a central issue. Another

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<sup>533</sup> On the challenge and relevance of national implementation see below Part 4C.

<sup>534</sup> Cf. above, Part 3C.

reason might be that there are no major problems with the permission of storage facilities and electrolysers.

However, there are promising developments on the European level. Thus, for example in Article 15e of the revised Renewable Energy Directive, on the planning level the Member States are now entitled to adopt plans to designate dedicated infrastructure areas for the development of grid and storage projects that are necessary to integrate renewable energy into the electricity system. The provision is, however, in contrast to the rule on go-to-areas for renewable energy projects no obligation but under discretion of the Member States ("may").

In our perspective, the regulative framework for the permission of storage facilities and electrolysers should be further developed. Clear guidelines should exist for the permission of such facilities so that no legal uncertainties prolongate the permitting process. Moreover, procedural rules for the acceleration, such as maximum durations of permitting processes should also apply to storages and electrolysers. On the European level, as a next step in the legislation in the energy sector, clear guidelines, similar to the rules for the permission of renewable energy installations, should be introduced with regard to electrolysers and also, where such rules do not exist yet, to energy storage facilities. Positive developments are visible in this regard on the European level according to which an exemption from the EIA also for storage facilities is possible where Member States have adopted plans to designate infrastructure areas for storage projects.<sup>535</sup>

## **II. Permits for electrolysers: Amendment to the Industrial Emissions Directive**

An essential tool for accelerating the granting of permits for electrolysers may be a changed assessment in the classification of electrolysers for hydrogen production. The Industrial Emissions Directive (IED)<sup>536</sup> stipulates that activities listed in Annex 1 are subject to an obligation to hold a permit (Article 4 IED) with public participation (Article 24 IED). The production of hydrogen as an inorganic chemical is covered by no. 4.2. lit. a) of Annex 1 to the IED provided the production is carried out on an industrial scale. The headline of Annex 1 no. 4 IED indicates that only activities of the

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<sup>535</sup> Cf. Art. 15e para. 2 of the revised RED II providing an exemption for grid and storage projects which are necessary to integrate renewable energy into the electricity system provided that the project is located in a dedicated infrastructure area.

<sup>536</sup> Directive 2010/75/EU.

chemical industry are included, and that the production of substances has to be carried out by chemical or biological processing on an industrial scale.

Activities of the energy industry are systematically regulated in Annex 1 no. 1 IED and include, in particular, installations for producing fuels or combustibles, as indicated by the insertion of the gasification or liquefaction of coal or other fuels under no. 1.4 IED. However, it does not include a provision on hydrogen production, so this criterion of the IED does not apply to electrolyzers either.

It should also be noted that according to Article 1 IED, this Directive “*lays down rules on integrated prevention and control of pollution arising from industrial activities*”. However, electrolyzers do not cause environmental pollution since the only chemical product of the water electrolysis is oxygen and there is no risk of vibrations during the operation of the installations.

Therefore, while there is much to support the argument of electrolyzers not being covered by the IED, this cannot be derived from the Directive with legal certainty. For example, a corresponding regulation at the national level has been questioned in Germany based on the argument that the interpretation and application of the IED are unclear.<sup>537</sup> In terms of legal certainty, a clarifying amendment to the IED would therefore be desirable, according to which the production of hydrogen for energetic use is not subject to the obligation to hold a permit with public participation.

### III. Hydrogen storage

The expansion of hydrogen storage is limited by the maximum quantities that can be stored according to the provisions of the national transpositions of the Directive 2012/18/EU (Seveso III Directive).<sup>538</sup> Hydrogen is highly flammable and thus hazardous. Therefore, it is listed as a hazardous substance.<sup>539</sup> In view of the risks and accidents associated with this substance, it was considered appropriate to apply specific

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<sup>537</sup> LEE.SH, *Kurzstellungnahme zur genehmigungsrechtlichen Situation systemdienlicher Elektrolyseure*, [Short opinion on the permit regulations governing electrolyzers serving the needs of the grid], 2019, page 4, available at [https://www.lee-sh.de/datei/de/lee%20osh%20genehmigung%20elektrolyseure%20nov%202019\\_11.pdf](https://www.lee-sh.de/datei/de/lee%20osh%20genehmigung%20elektrolyseure%20nov%202019_11.pdf); cf. also German Hydrogen and Fuel Cell Association (dwv), *Planungs- und Genehmigungsverfahren-Beschleunigung von Elektrolyseuren Regulatorische Vorschläge zur Änderung der 4. BImSchV und des UVPG* [Accelerating planning and permitting procedures for electrolyzers, regulatory proposals to amend the 4<sup>th</sup> Immission Control Ordinance and the Environmental Impact Assessment Act] 2022, page 13 (available at: <https://dwv-info.de/wp-content/uploads/2023/04/20220331-DWV-GGSC-Vorschlaege-Genehmigungsbeschleunigung-Elektrolyseure-min-1.pdf>).

<sup>538</sup> The aim of the Directive is to prevent major accidents at the (administrative) planning stage and to limit their consequences for human health and the environment.

<sup>539</sup> Part 2 of Annex I.

thresholds – 5 tonnes for the lower tier and 50 tonnes for the upper tier – instead of the general classification under flammable gases, whose thresholds are 10 tonnes for the lower tier and 50 tonnes for the upper tier.<sup>540</sup>

One of the variables that could limit the ramp-up of the hydrogen market is the vagueness of the term "adequate safety distance" in the Seveso III Directive. The term "appropriate safety distance"<sup>541</sup> is undefined. For example, under German law "appropriate safety distance" may have a different meaning under major accident prevention and building laws. A general guideline does not define safety distance for hydrogen specifically. Thus, the authorities generally rely on time-consuming expert opinions for every single case which slows down the respective administrative procedures.

A more specific definition regarding storage facilities for (only renewable?) hydrogen would be useful to accelerate the approval procedures. Since there are basic project categories of different sizes in the field of production, storage and use of renewable hydrogen, and therefore also typical storage sizes, these specifications could be based on these project categories. Specifically, there could be one category for smaller hydrogen storage facilities for production from smaller electrolyzers (up to x MW electrolyser capacity? approx. 2 MW? storage size y t?), one for medium-sized storage facilities and finally a third for large-scale storage facilities. The classification of the project categories would have to be defined on the basis of technical expertise. As the term "adequate safety distance" is defined in the Seveso III Directive and the problem of preventing major accidents involving hydrogen is the same in all Member States, we believe that regulation at EU level is appropriate. At the same time, it would avoid competitive disadvantages where Member States are incentivised to adopt regulations for the smallest possible safety distances. It would also help to create a level playing field across the EU for the market introduction of hydrogen.

#### **IV. Provision of data**

The provision of data is highly relevant for the implementation of renewable energy projects. This concerns both the permitting procedure and the general project development process. The relevant data, for example, includes environmental data (e.g., regarding species protection), data regarding the land, on which the renewable energy installation is installed, data regarding the planning process or the grid

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<sup>540</sup> Thresholds are limits that represent the minimum quantities that are likely to be present at a site and trigger inclusion in the lower or upper tier under the Directive.

<sup>541</sup> Art. 13 subs. 2 (a) of the Directive.



connection. In the permitting procedure this data must mostly be collected by the applicant and is in some cases provided by the authorities or by the grid operator.

The permitting process might be accelerated, and unnecessary costs might be saved if all existing data was provided to the applicants in the permitting process. In this context, the right of access must, of course, adequately consider the statutory provisions on data protection and the protection of trade and business secrets.

Furthermore, it should be ensured that all laws and all other sets of rules to which laws refer (in Germany, these include e.g., the DIN standards, which only have to be ordered at a publisher subject to a fee) are accessible online and in two languages, i.e. in the national language and English. This is because only the English version enables foreign investors and project developers to get an overview of the statutory requirements.

Additionally, the municipalities should be obliged to make the regulations they have issued accessible also online. In Germany, this would primarily concern the land use plans and the development plans, in which the municipalities determine which land areas of the municipal territory may be used in which way (for construction purposes).

Furthermore, findings of environmental impact assessments, nature conservation surveys and other information relevant for implementing projects should be accessible on a central data exchange system. Additionally, this would save needlessly carrying out the same assessments simultaneously or repeating them.

Understanding the subsurface is of crucial importance, particularly for geothermal projects. Depending on the respective region, mining authorities may already have information from previous subsurface investigations (in many cases from explorations of the hydrocarbon industry). The accessibility to these data varies across Europe. In Germany, data obtained by companies from previous exploration activities are often sold to project developers. Even though it is possible to access the data available to the public authorities, e.g., from 2D or 3D seismic surveys, the periods in which these data must be made public are differently regulated in the Member States of the European Union. In this respect, a European requirement might contribute to achieving uniformity of the law and serve as a foundation for better access.

The provisions should, however, be designed in such way that legal disputes with the original data owners are prevented.<sup>542</sup>

The provision of data must, of course be in line with the existing rules on data protection. As the relevant legislation on data protection mostly applies only to personal data it is probably in most cases not relevant as the relevant data for renewable energy projects regards no personal data.

More relevant is probably the protection of business secrets which should, of course, be assured. Moreover, generally economic interests of the persons/ companies who collected the data must also be considered. In particular, the companies that have collected the data, should receive a compensation if their collected data is used by third parties.

## **V. Prioritising permit-granting procedures according to climate relevance**

One of the main problems in granting permits is the lack of technical staff and resources in public authorities. While this problem is generally acknowledged, it cannot be solved in a short period of time. As long as public authorities remain poorly equipped, it is important to find ways to use existing capacities most effectively for climate protection projects.

For this reason, a project's climate relevance should be considered in the approval procedure. We suggest that projects serving the energy transition should be specially marked as "climate-positive" in approval procedures and prioritised under procedural law. This should apply to all types of approval procedures and all renewable energy installations and their corresponding transport infrastructure. Our suggestion is a response to the limited resources currently available to public authorities. Prioritisation should help ensure that climate-positive projects can be implemented as quickly as possible, despite a shortage of staff.

Applications for approval of such projects should be classified as climate-positive at the beginning of administrative proceedings. To simplify practical implementation by the approval authorities and judicial review, a project's climate relevance should either be defined by a specific regulation at the national level (catalogue of climate-positive projects) or assessed in a climate assessment report commissioned by the applicant or project developer. A catalogue of climate-positive projects has the

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<sup>542</sup> Cf. the proceedings on the constitutionality of the Geological Data Act (*Geologiedatengesetz* – GeoDIG) currently pending in Germany, ruling of the Administrative Court of Mainz of 16/11/2022, File ref.: 4 L 383/22.MZ.

advantage that it is unlikely to cause any relevant additional work in the approval procedure. The catalogue could be adapted according to needs and developments. The advantage of creating a climate assessment report, however, is that it allows for a greater evaluation of the climate relevance in terms of content in addition to procedural prioritisation. An expert report that scientifically determines and assesses the climate relevance of a project could be included in the substantive review and thus ensure that climate protection can be fully assessed alongside other concerns, such as environmental protection (through a specialised species protection report or an environmental report following an environmental impact assessment).

Firstly, classifying an application for approval as climate-positive should result in the application being given priority over other applications by the responsible public authority. More specifically, this implies that staff members of the public authorities must process an application marked as climate-positive ahead of other applications – even if the other applications have already been submitted earlier. Alternatively, a pool of staff could be set up exclusively for the processing of climate-positive projects which can be used at short notice when climate-positive projects are received and, in particular, when there is a work overload due to other applications.

Secondly, according to our suggestion, classifying a project as climate-positive should initiate the applicability of specific rules accelerating the permitting procedure and procedural facilitations.

## **VI. Specification of assessment criteria under species protection law**

Species protection law, which is strongly influenced by European law, is one of the criteria for the approval of renewable energy installations. In addition to reducing the scope of the assessment under species protection law as far as possible, a legally binding specification of the assessment criteria may be an essential tool for increasing the speed at which permits are granted, ensuring legal certainty for project developers, public authorities, and courts alike.

The amendments to the Renewable Energy Directive show that the potential for acceleration in this field was previously recognised in principle. For example, the new Article 16f of the amended Directive (EU) 2018/2001 provides that in the permitting process, the planning, construction and operation of renewable energy installations, their connection to the grid and the related grid itself and storage assets are presumed as being in the overriding public interest and serving public health and safety when balancing legal interests under the Habitats, Birds and Water Directives. This Article thus ensures greater clarity and accelerates permitting procedures.

However, there are still further uncertainties in connection with the granting of exemptions under the above-mentioned Directives. In addition to an exceptional reason, the exemptions also require the lack of reasonable alternatives and safeguarding the conservation status of a species' population. The European Parliament seems to have recognised these continuing uncertainties. After all, in its position on the Commission's RED IV Directive proposal, it suggested that Article 16d also stipulates that, to reduce legal uncertainty, the Commission should issue guidelines on implementing this Article according to existing requirements of the Union law and relevant rulings of the Court of Justice of the European Union. However, it is questionable whether non-binding guidelines are sufficient to accelerate the permitting procedures.

Instead, it might be possible to ensure in the specialised laws that the exemption requirements are further specified in a binding manner. The German legislator has already provided binding requirements for the application of the provision of sec. 45 subs. 7 of the Federal Nature Conservation Act (*Bundesnaturschutzgesetz* – BNatSchG), by which the exemption provisions of the Habitats Directive and the Birds Directive were implemented into German law, to onshore wind energy installations. These requirements are laid down in sections 45b and 45c BNatSchG.<sup>543</sup> They do not only provide for a binding specification of the exemption criteria, but also for binding requirements for the application of the prohibition criteria (in particular, the requirement to further specify the significantly increased risk<sup>544</sup>, which is also regulated in the Act and serves to narrow down the prohibition criteria). This prevents a situation in which the prohibition criteria are generally considered to be met and the solution is regularly sought using the exemption criteria.<sup>545</sup>

The specification of species protection requirements at the national level could be made mandatory at the European level. Hence, the Member States could be obliged to further specify the vague legal terms to such an extent that they would not lead to any difficulties of interpretation in the legal practice and thus to delays in permitting procedures. This should, of course, in no way undermine the level of species protection in European legislation in general. Instead, the goal is an effective implementation in a way that the procedural rules allow for a speedy control and implementation of the rules.

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<sup>543</sup> Cf. BeckOK Umweltrecht, Giesberts/Reinhardt/*Gläß*, 65<sup>th</sup> edition, sec. 45 BNatSchG, marg. no. 36.

<sup>544</sup> Cf. sec. 44 subs. 5 no 1 BNatSchG.

<sup>545</sup> Cf. Stiftung Umweltenergierecht, Reformansätze zum Genehmigungsrecht von Windenergieanlagen [Approaches to reform the law governing permits for wind energy installations], p. 32.

Another alternative would be to further develop species protection law at the European level instead of at the national level. One possibility that should be considered in particular (alternatively to the significance requirement) is a European law definition of the prohibition criteria that does not focus on the protection of specific individuals but on the population of the species concerned.<sup>546</sup> The new Article 16b(2) sentence 3<sup>547</sup> RED III at least further specifies the criterion of deliberate practice which has also been subject to considerable uncertainties so far.

## **VII. Reduction of grid losses and of renewable energy plants**

One of the major challenges regarding the installation of renewable energy plants are the processes for grid connection.<sup>548</sup> The European legislation contains in the Renewable Energy Directive rules on the procedure for the grid connection aiming at a speedy process and containing maximum durations for the process for grid connection.

Another relevant issue regarding grids is the high level of grid losses. Without such grid losses less energy from fossil sources would have to be produced and thus less CO<sub>2</sub> to be emitted. This issue is not directly connected to the permitting process, but it is also important for the possible reduction of carbon gases in the electricity supply. The regulative framework would have to be adapted to give grid operators an incentive to modernise their equipment and to considerably reduce grid losses. Under European law guidelines for such regulation might be provided, e.g., in the Electricity Market Directive. In a second step, such legislation would have to be implemented in the national legislations.

## **VIII. Adaptation of the EIA Directive?**

One of the central reasons for the delay of permission procedures of renewable energy plants in many countries is the environmental impact assessment (EIA) which is legally prescribed by European legislation. It has been widely discussed to which extent the EIA might be abolished or at least reduced. As a result, one of the core provisions of the revised RED II Directive is the omission of the EIA in the so-called Renewable Acceleration Areas (Go-to-areas). This solves from our perspective the most urgent problem with regard to the EIA and is considered one of the main

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<sup>546</sup> Cf. Stiftung Umweltenergierecht, Reformansätze zum Genehmigungsrecht von Windenergieanlagen [Approaches to reform the law governing permits for wind energy installations], p. 32.

<sup>547</sup> "Where the specific projects have adopted necessary mitigation measures, any killing or disturbance of the species protected under Art. 12(1) of Directive 92/43/EEC and Art. 5 of Directive 2009/147/EC shall not be considered deliberate."

<sup>548</sup> Reference to other text parts.

contributions of the new rules under the Directive (EU) 2023/2413. Therefore, at this stage, we do not consider it necessary to amend the relevant EIA Directive immediately to reduce the length of the EIA process. We do, however, suggest observing the experiences on the national level with the omission of the EIA. If under national legislation the experiences are not satisfactory, it should be analysed again whether more amendments are necessary to speed up the permitting process.

#### **F. Most relevant challenge on the national level: Implementation of the Directive (EU) 2023/2413**

On the European level, the amendments by the Directive (EU) 2023/2413 have brought substantive changes of the legislative framework for permitting procedures. The rules are relatively detailed and address many of the relevant obstacles for a speedy permitting procedure. From the perspective of renewable energies, the rules contain an enormous progress for the acceleration of permitting procedures.

As the rules are contained in a Directive, they are – in contrast to the Emergency Regulation – not directly applicable in the Member States. Thus, the provisions of the Directive (EU) 2023/2413 necessarily require an implementation into national law.

In our analysis of the national legal frameworks, we have shown that in all countries substantive obstacles for a speedy permitting procedure exist, but that the obstacles have very different reasons. The necessary implementation of the Directive (EU) 2023/2413 now offers the chance for substantive changes in the national laws. This also provides an opportunity to all Member States to revise, simplify and improve their respective national legislation on permitting procedure while transposing European law.

In some aspects the provisions of the Directive are very specific, and it is clear how the implementation has to be carried out. For example, the obligation to adopt plans for acceleration areas is so concrete that it can be implemented in a quite straightforward manner. But even in this case, the role of implementation is important. For example, it must be decided on which level the plans will be adopted, how detailed the plans are and which legal binding quality they will have.

In many other aspects there is a discretion of the Member States how and to which extent the rules of the Directive are to be implemented. For example, acceleration areas for storage and grids “may” be introduced (cf. Article 15e of the revised RED II) but there is no strict legal obligation. For an acceleration of permitting processes Member States should be encouraged to use of this option in the Directive.

In other fields, the implementation leaves very much discretion to the Member States to which extent certain Directive provisions are to be implemented. For example, Member States shall ensure public participation or shall promote public acceptance of renewable energy projects (see Art. 15d para. 1 RED III). It is completely open by which means public participation and acceptance shall be implemented. This clearly illustrates how important the national implementation is.

It will thus be the most important task for the acceleration of permitting procedures in the near future to effectively implement the European provisions of the Directive (EU) 2023/2413 into national law. Only an effective implementation of the European provisions on the national level will ensure that the European norms have a real effect on the acceleration of permitting procedures in practice.

If a Directive is not transposed into national law within the deadline provided for in the Directive, this failure constitutes a violation of European law. In such case, treaty violation proceedings against the Member States in question may be opened. Of course, it is important that such proceedings exist, and they may in practice be an important threat for Member States to implement European legislation. Generally, however, such treaty violation procedures are only a means of last resort. Its proceedings also take a long time.

Therefore, it appears very important to support the implementation on different levels. For example, different actors like NGOs, associations, civil society, and economic actors should put pressure on the legislators in the Member States to effectively implement the provisions of the Directive. Moreover, such actors might develop own suggestions for the transposition and might also supervise whether the Directive is sufficiently implemented.

Moreover, the introduction of new legal rules will not be sufficient for the acceleration of permitting procedures, but other measures – as for example the provision of sufficient human resources within the competent authorities – are at least equally relevant.<sup>549</sup> This shows that huge efforts will be necessary in all Member States for an efficient acceleration of permitting procedures.

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<sup>549</sup> Cf. below sub Part 4G.III.

## **G. Relevant aspects for the adaptation of national laws in general**

### **I. Specific aspects of the implementation of the Directive (EU) 2023/2413 into national law**

#### **1) Deadline for permit-granting procedure**

The revised RED II Directive provides in different articles strict deadlines for the possible duration of permitting procedures (see Article 16a para. 1 and 2; Article 16b para. 1; Article 16c para. 1 of revised RED II). Moreover, the beginning of the permit granting process and thus the start of the permissible duration of the procedure is defined (see Article 16 para. 2 of the revised RED II). Such rules are very clear and must be implemented strictly by each Member State.

At the same time, no consequences are conclusively foreseen for cases in which the deadlines are not met. For certain cases, it is provided that the absence of a reply by the authority within the deadline ***following the submission of a complete application*** has the effect that the specific intermediary administrative steps are to be considered as approved (see Article 16a para. 6 of the revised RED II). In other cases, it is for the national legislator to determine the legal consequences of exceeding the respective deadline. In addition to the strictly legal consequences, the Member State would also have to take other effective measures to ensure that the deadlines are not exceeded.

#### **2) Species protection**

Species protection is, in particular for larger projects and mostly for wind energy projects, a major issue in the permitting process of renewable energy projects. It has already been described which improvements on the European law level should be introduced to simplify the procedure. In the absence of more specific rules on the European level, the national implementation offers a wide variety of measures to simplify and speed up the process of permitting.

The aim of such measures must in no way reduce the level of the protection of species as this a very important issue which should not conflict with renewable energies. It is, however, important that the process for determining and resolving possible conflicts is much speedier and does not result in major delays in the permitting procedure.

The practice shows that authorities are in many cases overstrained with the detailed analysis of species protection issues. It also often requires detailed and complex analyses of the particular situation in the specific case. Against this background,



specifying the scope of species protection rules in binding guidelines or directives at national level appears to be an important measure. This would increase the legal certainty and may avoid lengthy analyses in each individual case, at the same time ensuring a high level of species protection. Thus, the national implementation of European provisions on species protection law can be an important instrument for speeding up the permitting procedure. This should, on the other hand, in no way undermine the level of European legislation on species protection in general. Instead, the goal is an effective implementation in a way that the procedural rules allow for a speedy control and implementation of the rules and thus lead to an acceleration of the permitting procedure.

### **3) Acceleration of judicial procedures**

Judicial procedures against permission decisions of renewable energy plants may result in substantive delays. This has been identified – to different extents – in the national analyses. This problem is now partly addressed by the Directive (EU) 2023/2413, which requires Member States to ensure that administrative and judicial appeals in relation to renewable energy projects and their associated grid connections and energy infrastructure networks are subject to the most expeditious administrative and judicial procedures available at the relevant national, regional, and local levels (cf. Article 16 subs. 7 RED III)<sup>550</sup>.

The formulation of this provision is, however, very vague, and open. It is therefore crucial that Member States implement this provision in an effective way. It is very important to consider the relevant structures on the national, as well as on the local level.

### **4) Increasing the acceptance of renewable energy projects**

A more effective way than speeding up judicial procedures against permission decisions of renewable energy plants is generally avoiding such judicial procedures. A key way of doing this is through measures to improve the acceptance of renewable energy projects in local communities. This can result in people refraining from taking legal action against renewable energy projects and delaying the approval process, for example during the public participation process.

The problem of lacking acceptance which has also been highlighted in the national analyses (in particular with regard to Spain and Germany) is now also addressed by the Directive (EU) 2023/2413. In this regard, it is provided that public acceptance

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<sup>550</sup> Cf. Part 3C.I.2)

shall be promoted by means of direct and indirect participation in the projects by local communities.<sup>551</sup> This provision must be implemented by specific measures in the Member States. There is a wide range of possible measures. It is therefore very important that the legislative and administrative measures taken at national level make full use of these possibilities. Research on effective measures for increasing the acceptance should be taken into account.

Moreover, other means than direct and indirect participation should also be considered. One possible example are favourable electricity tariffs for residents in close neighbourhoods to renewable energy plants. Moreover, it should be ensured that taxes – or possibly other levies – paid by the renewable energy plant operators go to a certain extent to the concerned communities. In this way the communities and municipalities benefit directly from renewable energy plants which may substantially contribute to an increasing acceptance of renewable energy plants. In this regard, it should be legally assured that payments to municipalities from renewable energy installation operators are considered legally permissible and do not violate criminal law provisions (bribery etc.).<sup>552</sup>

## **II. General proposals for national legislation apart from the implementation of the Directive (EU) 2023/2413**

### **1) Interaction between spatial planning and permitting processes**

A general aspect is a more effective interaction between the spatial planning process and the permitting process. In both procedures similar issues are analysed. While on the spatial planning level this is executed in a more general way, on the permitting process level it is carried out in more detail. In any case, many aspects are often analysed twice. By a more effective exchange of information (“dual use”) or by a clearer legal guidance instructing the competent authorities that certain issues are to be analysed only on one level.

This aspect is indirectly addressed by the Directive in particular in the rules on the adoption of acceleration areas where certain steps of the permitting procedure, in particular the EIA, may be left out. It is, however, a general aspect which should be considered in national legislation in a broader perspective. Therefore, national legislation should provide for clear rules which aspects are analysed on the spatial planning level and which aspects are to be scrutinised on the permitting level.

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<sup>551</sup> Cf. Part 3C.I.

<sup>552</sup> Cf. on this point also below proposals on the German law.

## 2) Reduction of municipal veto rights

One practical obstacle which has been identified from the national analyses are the veto rights of municipalities against projects or against spatial planning. Due to constitutional rights of municipalities, the latter have a general right to participate in decisions which have an impact on the local community. While such right is well justified and plays an important role for the functioning of local communities, it should not be used as a measure against renewable energy projects which are of utmost importance for the societies.

It should therefore be clearly legally regulated under which circumstances such veto rights may be executed. The requirements for such vetoes should be very limited to extraordinary cases. If the general requirements for the permission of a renewable energy plant are fulfilled, then it should be possible for the competent authority/ the state to override the veto of a municipality.

### III. Sufficient equipment of permitting authorities and qualified staff

**Many measures for** speeding up permission procedures can only be realised in practice if the competent authorities are equipped with sufficient staff and the necessary technical resources for implementing the permitting process. Therefore, it is crucial to ensure that the competent authorities are equipped with sufficient human and technical resources to be able to fulfil their obligations.

This issue is partly addressed in the Directive (EU) 2023/2413 (see Article 16 para. 7 of the revised RED II).<sup>553</sup> Thus, Member States shall provide adequate resources to ensure qualified staff, upskilling, and reskilling of their competent authorities in line with the planned installed renewable energy generation capacity. This also requires sufficient financial resources from the state for financing the authorities.

### IV. Digitalisation and technical resources

Apart from human resources technical resources are equally important. This is mostly relevant for the necessary digitalisation of the processes. The Directive (EU) 2023/2413 provides for example that Member States shall ensure that all documents can be submitted in electronic form (see Article 16 para. 3 of the revised RED II).<sup>554</sup> A further digitalisation of processes is important and should be promoted by the

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<sup>553</sup> Cf. Part 3C.I.2).

<sup>554</sup> Cf. Part 3C.I.2).

authorities.<sup>555</sup> Generally, the processes should become more standardised where this is possible.

Besides the general digitalisation other means for an acceleration of processes should be implemented so that the work of permit-granting authorities becomes more effective and thus faster. One example with positive experiences from the German procedure is the prominent role of a project manager who functions as a link between the authority and the permit applicant and may take over many tasks in support of the authority. Another point which has already been mentioned above is the central provision of data from other authorities or within the same permit-granting authority.

## **H. Specific proposals for the national legislation**

Hereinafter, we will enumerate suggestions for the different reviewed legislations.

### **I. Proposals Sweden**

#### **1) General substantive obstacles and proposed solutions**

The general substantial obstacles for the deployment of renewable energy described in Part 2 could be summarised as follows:

- (a) There is a limited scope to give greater weight to climate in relation to human health and the environment in the assessment to be made under Chapter 2 of the Environmental Code;
- (b) Climate is not a special interest when assessing the use of land, water, and the physical environment under Chapter 3 of the Environmental Code; and
- (c) Climate is not given any special weight when assessing whether exemptions from or permits under the strict rules of environmental quality standards under Chapter 5 of the Environmental Code, the protection of areas and biodiversity under Chapters 7 and 8 of the Environmental Code and the Species Protection Ordinance (2007:845) may be granted.

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<sup>555</sup> Cf. also above Part 4E.IV on the digital provision of data.

## 2) Renewable energies as overruling public interest

On the face of it, the easiest way to handle the above obstacles would be to change the legislation to add the production from renewable sources, construction of electrical grids, pipelines, storage facilities and other assets to connect such production units to the grid and enable transportation, distribution, etc. as overriding interest. This could be done for example as follows:

To meet the obstacles in (a) and (b) a new rule could be added in Chapter 2 of the Environmental Code which provides that special consideration shall be given to whether an activity or measure contributes significantly to the climate when balancing against negative impacts on human health and other environmental aspects in the permit assessment. In Chapter 3 of the Environmental Code, it could possibly be emphasised more clearly that activities important for the climate are of public interest and possibly an overriding interest. As regards (c), the Environmental Code rules on environmental quality standards and the area and species protection rules are to a large extent based on EU law. To give greater priority to activities aiming at the deployment of renewable energy when assessing permits under those rules, changes of the relevant EU legislation would be required. This matter is addressed in the RED IV Directive proposal, which for example suggests that plants for production of energy from renewable sources and associated grid and storage assets should (subject to certain conditions) be presumed to be of an overriding public interest.<sup>556</sup> As regards the national rules relating to area protection, the Environmental Code provides under which conditions exemptions can be granted. A possible change of the legislation could be to extend the exemptions or to make a clarification that production from renewable sources and electricity cables and associated assets constructed to connect such production to the overall grid is an interest to be given extra weight.

Although changes or adaptations to the legislation could be made to promote the climate interest, it may of course be questioned if a solution to simply make it an interest which overrides other interests is appropriate. For example, it may be questionable making renewable energy an overriding interest in Chapter 3 of the Environmental Code, since that could have as a consequence that land is not efficiently used. High yielding agricultural land may then to a larger extent be used for production of renewable energy rather than for food production,<sup>557</sup> which is in the longer term neither necessarily the best use of such land or sustainable for human health

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<sup>556</sup> Cf. Part 3C.III.1).

<sup>557</sup> For an owner of high yielding agricultural land, it is currently much more profitable to lease the land to an operator of a solar farm than to lease it to a farmer for growing of crops.

perspective. Another example is in the northern parts of Sweden where such overriding rights could negatively impact the reindeer husbandry rights of the Sami people and endanger the survival of reindeer herding. These types of conflicting interests are primarily not a legal matter and thus we have from a legal perspective no opinion on how these conflicts should be solved. We just note the complexity of the issue of balancing conflicting interests, which can to some extent also be seen in the trilogue procedure of the RED IV directive. There it was for example suggested by the Council of the European Union that the construction and operation of renewable energy plants and related grid infrastructure should only be given priority when balancing legal interests if and to the extent appropriate species conservation measures are undertaken. However, this suggestion did not find support and does not feature in the new Article 16e.<sup>558</sup>

Unpredictability and time delays are often regarded as being two main obstacles. We cannot see that these obstacles would in practice be fully solved by clearer rules on how to handle conflicts of interests or possibly making renewable energy an overriding public interest. Such changes may possibly have an impact on the predictability as to whether a permit may be granted for planned measures and activities in a certain area, however, we do not think it would in a material respect impact the permit procedure *per se*, i.e. the unpredictability with respect to the various parts in the procedure would not be solved.

A more efficient solution, instead of putting too much emphasis on making renewable energy a prioritised interest, may be to instruct the relevant authorities to a larger extent than today to cooperate to identify areas which the authorities jointly agree, taking into account a number of aspects and also ecological interests, are suitable for establishing wind farms, solar farms, electrolyzers including distribution pipelines, etc. We believe that this could lead to a greater predictability. Such cooperation would not necessarily require any changes in law but could at least be initiated by an instruction from the Government. We note the possibility under the Environmental Code to protect areas of land and water, which are particularly suitable for industrial production, energy production and energy distribution, against actions which could significantly impede their construction or use.<sup>559</sup> We also note that one of the topics of the RED IV proposal is an obligation of the Member States to map and designate areas suitable for the installation of renewable energy installations.<sup>560</sup>

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<sup>558</sup> Cf. Part 3C.III.2)b)ee).

<sup>559</sup> Cf. Ch. 3 Sec. 8 of the Environmental Code.

<sup>560</sup> Cf. Part 3C.III.2)a).

### 3) Changes to increase predictability and shorten processing times

The general procedural obstacles for the deployment of renewable energy could be summarised as being time delays and unpredictability. There is not one overall solution to these obstacles. More likely they can be improved by taking a number of different actions from changes in the legislation, policy changes and allocation of additional resources.

As regards changes in the legislation the Swedish Government initiated an investigation in 2020 aiming at improving the environmental permit process. The result of the investigation is inter alia a proposal including a large number of changes to the legislation to handle the obstacles<sup>561</sup>, many of which are of quite a legal technical nature. It is difficult to say to what extent these proposals may eventually lead to new or amended legislation. The proposals have been circulated to a number of authorities and business organisations for review with varied responses, which is in line with what could be expected. We share the investigation's conclusion that the solution does not lie in a few major changes to an essentially functioning system, but rather in many small changes, which together aim to shorten the processing times and increase predictability.<sup>562</sup>

### 4) Designation of areas suitable for renewable energy production plants

A solution that is not necessarily a legislation matter but more of an administrative or policy matter is to designate areas suitable for renewable energy production plants. Provided that this is done through cooperation between the relevant authorities, in a thorough way, considering not only circumstances which may benefit the production as such but also ecological and environmental matters, this may be a way to facilitate the permit process. As noted above, the Environmental Code already includes rules making it possible to designate or protect areas suitable for energy production. However, these rules are aiming at protecting certain areas from other activities and will not provide any presumption that the construction of the production plant within such area will meet the environmental requirements of the Environmental Code. As far as we understand the RED IV proposal, the Member States would when adopting a plan that designates areas suitable for renewable energy also establish appropriate mitigation measures to reduce negative environmental impacts, and the compliance with those measures would result in a presumption of conformity of certain conservation rules.<sup>563</sup> The proposal appears to be based on the

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<sup>561</sup> SOU 2022:33, "Om prövning och omprövning – en del av den gröna omställningen", published in 2022.

<sup>562</sup> SOU 2022:33 p 19.

<sup>563</sup> Cf. Part 3C.III.

prerequisite that the permit matters are generally managed on a central level in the Member States, whereas the Swedish administration is decentralised placing a lot of the power on the regional and municipal level. It is thus not clear how the proposal as regards designation of suitable areas would be implemented in Sweden. Nevertheless, this kind of proposal may provide a feasible solution for some of the obstacles mentioned above, e.g., the effectiveness of the consultation process (some matters subject of the consultation may already be settled within the frames of plan of the designated areas) and the scope of the authorities mandate for review and right to add requirements late in the process (since the relevant authorities would possibly already have been involved in the plan that designate suitable areas).

#### **5) Time limits for the permit process**

The governmental investigation referred to above<sup>564</sup> rejected the idea of introducing formal statutory time limits for the permit process, on the ground that it would not benefit the process, but rather risk rushing the reviews in an inappropriate way. Instead, the investigation suggested that the Government should consider introducing processing targets in regulatory letters for the courts and County Administrative Boards. One benefit of introducing time limits in the legislation could be that the permit granting authorities thereby may be required to prioritise the handling of applications relating to renewable energy projects. However, we share the investigation's view that there may be risks connected to rushing the procedures, although it should be noted that the question, whether this risk could reasonably be accepted or not, is not primarily a legal matter to assess.

In any case, it would be important to allocate more financial resources to the County Administrative Boards and the Environmental Courts to enable them to attract more personnel, in particular with relevant technical and other expertise related to renewable energy, to ensure that there are adequate resources available to handle the permit application in a speedy manner.

#### **6) Limiting the municipal veto (wind power)**

In order to obtain an environmental permit for constructing a wind farm in Sweden, approval is also required from the municipality where the installation is planned to be located. This approval has become known as the "municipal veto" rule and is regulated in the Environmental Code. The approval from the municipality is a mandatory requirement, which the permit granting authority must respect.

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<sup>564</sup> Cf. above, Part 4H.I.3).



Normally, a project developer starts a dialogue with the municipality early on in the planning of a project, whereas the formal request for the municipal approval is made by the MPD when the permit application and the EIA for the project are deemed complete and ready for public consultations. It has been established through court practice that the requirement for municipal approval applies not only to original permit applications, but also to permission for changes in the operation. What is deemed especially problematic is that the municipal approval is not regarded as binding according to the principles of public law, leaving it to the municipal council's discretion to change its position during the procedure.

The "veto rule" was introduced in 2009 to protect municipal influence over decision-making concerning wind power installations. The system has since then been criticised to be discriminating against wind power, not technology neutral, etc., in relation to other sources of energy production, thus representing an obstacle for wind power development.

Even though the principle of municipal self-government is an important principle in Sweden for the distribution of power and responsibilities between the Swedish state and the municipalities, we share the opinion that the municipal veto is somewhat in conflict with the principle of technology neutrality, as it may constitute an absolute obstacle towards developing a wind farm. However, it must be emphasised that municipalities have extensive general power and responsibilities to decide on land use within its municipality boundaries through the planning monopoly. Nevertheless, there is no equivalent to a municipal veto for other types of production facilities.

The simplest solution to this obstacle would simply have been to remove the provision in question from the Environmental Code, and to allow wind turbines to be handled like any other production facility.

In 2022, the Government proposed a modified regulation that would have meant that developers had the right to receive an early decision from the municipality and that such decision would be binding for five years. The purpose of the proposal was to make the process more predictable for the developer, so that time and resources are not spent on planning a project that is then stopped by the municipality. The proposal was voted down in the Swedish parliament. In view of this, it is not likely that the question of removal of the provision in question or even a modification of the veto will be raised again in the foreseeable future. In any case, it is not likely that a proposal to completely remove the veto would gain support in the Swedish parliament.

## 7) Weighing of military interests

Since 2017, Swedish armed forces have rejected approximately 9 out of 10 offshore wind farm projects due to national security. Such actions could significantly limit the development of the offshore wind sector in Sweden.

With the current security situation in Europe, it is probably not possible to introduce a regulation with the effect that environmental and climate interests, or electricity supply interests would overrule military interests and national security interests in the permit granting procedures, and it is therefore not reasonable or meaningful to propose such an addition or amendment to the Swedish legislation. However, the proposal contained in RED IV that the Member States should designate suitable areas for production of renewable energy<sup>565</sup> seems to be able to solve at least part of the problems for the developers. It shall be emphasised that the Swedish Government already in February 2022 adopted three marine spatial plans for its territorial waters and Exclusive Economic Zone. The investigations and consultations in connection with the adoption of the plans was done in collaboration between a large number of authorities and other stakeholders, and the plans take into account all various interests, such as environmental interests, military interests, etc. In the marine plan, areas have been pointed out that are considered suitable for energy production (equivalent to approximately 30 TWh production per year). In February 2022, the Government gave a number of authorities (including, *inter alia*, the Swedish Energy Agency, the Swedish TSO, the Swedish Armed Forces, the Swedish Agency for Marine and Water Management and the Swedish Environmental Protection Agency) an additional assignment to jointly point out more offshore areas that are suitable for energy production with the aim to designate areas with a potential equivalent to 90 TWh electricity production.<sup>566</sup> This investigation is intended to form a basis for future amendments of and additions to the marine spatial plans. It can thus be assumed that in the near future it will be more predictable for developers whether the authorities will be positive about a certain offshore location or not.

## 8) Simplifying the consultation procedure with the County Administrative Board (solar plants)

One of the main obstacles when it comes to ground mounted solar farms is that the consultation procedure with the County Administrative Board is unpredictable and the County Administrative Boards in different counties may handle the procedure differently and require various degrees of investigations. The County Administrative

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<sup>565</sup> Cf. Part 3C.III.1).

<sup>566</sup> The Swedish governmental decision M2022/00276.

Board may, in its discretion, request that the applicant produce an EIA. That is not a formal requirement for solar farms under the Environmental Code but is nevertheless something that can be requested. As far as we are aware, the possibility to request an EIA is applied differently in different counties. If an EIA is required, this will lead to that the applicant must consult with parties that can be affected by the solar farm. The process will then be similar to a permit process for activities which are considered environmentally hazardous.

One way to simplify both for the reviewing authorities and for the developers would have been to more in detail regulate which projects require consultation with the County Administrative Board and also in which cases an EIA is required. Such rules could have taken into account both location and size of the project, so that different rules apply to different types of facilities in different locations in Sweden. We assume that the most important question for developers is that they can foresee which investigations and which resources will be required.

#### **9) Reducing uncertainties with regard to alternative locations**

Another more substantive uncertainty for the developers are questions concerning alternative locations. It is not clear how extensive investigations that may be required in each case, i.e. how many alternative locations must be investigated and in which area it is relevant to look for alternative locations in. It is, for example, not clear whether it is sufficient to investigate in the close vicinity or whether the whole county or perhaps the whole bidding area should be subject to the investigation.

Since a developer is in need of land and often only has one possible location, e.g., because the developer owns the land on which the solar park is planned to be built, it is often difficult to describe alternative locations in these types of projects. The solutions discussed above regarding renewable energy being an overriding interest according to the Environmental Code, and the proposal to designate specific areas as suitable for electricity production could perhaps have an impact also when assessing if a developer has met the localisation requirement. Another alternative would have been to stipulate in the environmental code that developers' access to land must be given importance when assessing if the location principle is fulfilled.

#### **10) Obstacles for grid connection and proposed solutions**

The obstacles we have identified regarding grid connections do not concern the administration regarding connection agreements, etc, but instead the problems that arise if extensive reinforcements are required in the underlying grid in order for a new production facility to be connected. This is because larger grid projects often take a long time to complete, partly because the permit procedures often are quite

complex with many opposing interests to consider and thus often take quite a long time. Additionally, decisions are often appealed to courts. But projects also take time because planning, procuring and building new electrical cables, transformer substations and other facilities that may be necessary. Questions about grid expansion are beyond the scope of this study, but it shall be noted that there are provisions in the proposals in RED IV that climate interests should be considered an overriding interest when balancing different interests in individual cases,<sup>567</sup> which could make the permit processes simpler and more predictable for the grid owner.

## II. Proposals France

### 1) Financing of qualified staff, upskilling, and reskilling of permitting authorities

As part of the efforts undertaken by the French Government to speed up the deployment of renewable energies, it has submitted to the Prefects the circular of 16 September 2022 which aims, among others, to recall the objectives of the Government and the President of the Republic in terms of accelerating the deployment of renewable energies, and the major role that is expected from the Prefects and the decentralised services of the State in the short, medium and long term to achieve them, stressing that it is the only lever providing additional carbon-free energy production capacity for the coming winters.

It requested the prefectural services to put in place all the necessary actions to accelerate the instruction of the files being examined, which represented nearly 10 GW of solar and wind projects at the time of issuance of the circular, i.e.:

- An instruction time not exceeding 24 months (18 months for repowering projects);
- Study of timelines and coming up with solutions for projects of more than 5 GW having been instructed for more than 12 months and every third month monitoring by the Directorate General for Energy and Climate ("*Direction Générale de l'Énergie et du Climat*" - DGEC) of the compliance with instruction deadlines;
- No use of consultation bodies that are not legally necessary;
- Only use of the 2020 onshore wind project impact assessment guides;

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<sup>567</sup>Cf. Part 3C.III.1).

- No consultation of non-essential commissions;
- Delivery without delay of permits granted pursuant to a court decision and end to automatic requests for revision by the Ministry of Ecology.

Three months later, in December 2022, there was no impact: 2 GW of onshore wind projects were waiting for the signing of the environmental permit by the competent Prefect and 3 GW were in the instruction process<sup>568</sup>.

According to the French wind energy association FEE, this lack of impact was partly due to a lack of human resources within the decentralized services and partly to the political resistance of some Prefects.

Also, it took some time to put into place the monitoring by the Directorate General for Energy and Climate of the compliance with instruction deadlines, but this monitoring would now be carried out closely. The question is whether the Government would sanction Prefects which would evidently not follow its instructions.

The Government also intended to reinforce the financial means of the decentralised services in charge of the instruction of the permits in the finance bill for the financial year 2023<sup>569</sup>. But the proposed measures have not been adopted in said finance bill.

The implementation of the provisions of Directive (EU) 2023/2413 will require even more financial and human resources at the level of the regional administrations.

In its position paper on the proposal for RED IV, WWF rightly exposes :

***“The key to an efficient permitting process is building operational and technical capacity in the competent authorities”.***

Member States should be required to ensure that the financing of qualified staff, upskilling, and reskilling of their permitting authorities at national, regional, and local level is proportionate to the implementation of the renewable energy targets and the implementation of the updated NECPs<sup>570</sup>.<sup>571</sup> Other public bodies are facing bottlenecks due to understaffing, too, that need to be addressed, including grid operators and regulators and judicial authorities.

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<sup>568</sup> Source: France Energie Eolienne (FEE).

<sup>569</sup> “Statement of reasons” of the bill to accelerate the deployment of renewable energies.

<sup>570</sup> National energy climate plans.

<sup>571</sup> This proposal became part of the final Art. 16, cf. Part 3C.III.2)a)bb)(2)(d).

## 2) Recommendations on go-to-areas

Since 2014, the European Commission has financed over 100 national and regional sea projects that focused on developing capacity for maritime spatial planning, environmental data collection and stakeholder engagement at the Member State and sea basin level. A similar approach could be used to support the identification of “go-to areas” and the processing of permit applications in Member States that have insufficient capacity to deliver on their renewable energy plans within the proposed deadlines<sup>572</sup>.

As also stated in the position paper of WWF, *“it is important to note that **the process of identifying ‘go-to areas’ should not constitute a (de facto or de jure) moratorium on the expansion of renewable energy.** On the contrary, we need to expand renewable energy urgently and Member States should continue to use national/regional best practice permitting procedures pending implementation of the new approach.”*

## 3) The shortening of court procedures

Whereas the proposal of the European Commission for RED IV provides for reduced deadlines for the permit-granting process for plants for the production of energy from renewable sources and co-located energy storage facilities, as well as assets necessary for their connection to the grid,<sup>573</sup> Art. 16(6) RED III does not define any rules for reducing the duration of court procedures but states that *“Member States shall ensure that administrative and judicial appeals in the context of a project for the development of renewable energy production plant or its related grid connection, including those related to environmental aspects shall be subject to the most expeditious administrative and judicial procedure that is available at the relevant national, regional and local level”*.

Since 2018 Administrative Courts of Appeal have original jurisdiction regarding appeals lodged against environmental permits related to onshore wind farms. This removal of a degree of jurisdiction for the litigation related to the environmental permits for onshore wind farms has considerably reduced the length of these procedures, although the duration of litigation remains quite long due to the lack of sufficient financial and human resources.

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<sup>572</sup> WWF Position on the legislative proposal to amend the Renewable Energy Directive as part of ‘RE-PowerEU’, September 2022.

<sup>573</sup> Cf. in particular regarding the trilogue negotiations on the duration of procedures Part 3C.III.2)b) und Part 3C.III.2)c).

This measure could be integrated in the proposals on European level and be applicable not only to appeals lodged against permits for onshore wind but also against permits for other renewable energy production, co-located energy storage facilities and the assets necessary for their connection to the grid.

For permits relating to:

- solar plants with a capacity of 5 MW or more,
- geothermal activities, with the exception of those considered to be “of minimal importance” within the meaning of Article L. 112-2 of the Mining Code,
- hydroelectricity plants with a capacity of 3 MW or more,
- all structures of public electricity transmission and distribution networks required for the connection of the aforementioned plants or activities,

issued between 1 November 2022 and 31 December 2026:

- All appeal periods will be limited to two months and prior informal appeals “*recours gracieux*” will not extend this period.
- Administrative courts will be required to give their decision within ten months. If they fail to do so, the case will automatically be transferred to the administrative court of appeal.
- Administrative courts of appeal will be required to give their decision within 10 months. If they fail to do so, the case will automatically be transferred to the administrative supreme court (“*Conseil d’Etat*”).

As stated in the relevant part of Part 2, in our opinion these measures, apart from being temporary, seem unrealistic unless these courts are very quickly provided with the human resources to enable them to meet the ten-month time limit.

Thus, it would be more efficient to remove the first degree of jurisdiction, like it has been done for the appeals lodged against environmental permits for onshore wind farms.

#### 4) **Proposals for a grid system optimisation<sup>574</sup>**

##### a) **Removal of the limitation of installed capacity in the public electricity distribution network to 17 MW**

The French Energy Code defines the rules for connection and access to the transport and distribution networks. For the distribution network, the connected (therefore injected) power limit is 17 MW. This power threshold also applies to the installed power of the installation. This constraint leads to oversizing the network capacities for the connection of variable renewable production facilities and the producers are not free to be able to seek optimisations for their connection.

When a project exceeds the installed capacity of 17 MW, this leads to:

- requesting two connections rather than just one,
- limiting the power of each wind turbine to comply with this limit<sup>575</sup>.
- Or requesting a connection to the HTB network sometimes for a few more MW, which de-optimises the project with respect to the cost of the grid connection and therefore hinders the achievement of renewable energy targets, as some developers will not be able to pursue the project.

Removing this constraint would allow developers of renewable energy projects to optimise the installed and connected power of their installations, with regard to their production profile, thus making it possible to:

- Minimise grid connection costs,
- Promote the deployment of installations that are more virtuous for the system:
- Wind and photovoltaic hybrid installation with a better charge rate,
- Power generation facilities with storage to minimise energy losses related to limited injection capacity,

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<sup>574</sup> Proposals made by France Energie Eolienne (FEE) within the working group related to grid connection created by the Directorate General for Energy and Climate (DGEC), March 2022.

<sup>575</sup> "Bridage" in French.



- Provide services to the system through storage such as participating in EOD<sup>576</sup>, MA, SSY<sup>577</sup> (...).

#### **aa) Regulatory hurdle**

Article 24 subsection 6 of the decree (*arrêté*) of 9 June 2020<sup>578</sup> relating to the technical design and operating requirements for connection to the electricity networks, provides that: *"No power-generating facility may be connected to a public medium voltage electricity distribution system when its Pinstalled power exceeds 17 MW in the general case or 12 MW when the installation is located in an area of the territory not interconnected to the continental metropolitan network. These power-generating facilities must be connected to a public electricity system with a HTB voltage range within the framework of the requirements specific to this voltage range"*.

This power limit therefore applies to the power of the connection, but also to the power of the installation. Variable renewable power-generating facilities, which only marginally use the last megawatts of injection power, would benefit from being able to exceed this threshold in terms of installed power, without the connected power threshold being modified.

FEE has therefore proposed to amend Article 24 subsection 6 of the decree of 9 June 2020 by replacing the *"Pinstalled power"* by *"Pconnected power"*.

Removing this constraint would make all the more sense as it is already possible to have an installed power greater than that connected power as long as the 17 MW threshold is not exceeded.

#### **bb) Interest for the energy transition**

Beyond the economic and environmental interest of such a measure (reduction in the number of delivery stations), lifting this constraint would help to achieve the objectives of the energy transition, by reducing the connection timelines. This is particularly true in the context of the renewal of power-generating facilities reaching the end of their life: increasing their installed power (thanks to new models of wind

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<sup>576</sup> Energy on Demand.

<sup>577</sup> Stainless steel yarn.

<sup>578</sup> Arrêté du 9 juin 2020 relatif aux prescriptions techniques de conception et de fonctionnement pour le raccordement aux réseaux d'électricité [Order / Decree of 9 June 2020 on technical design and operating requirements for connection to electricity networks].

turbines or photovoltaic panels) while maintaining the same connected power would allow substantial gains in time for repowering operations.

### **cc) Interest for the electric system**

The lifting of this constraint could also be such as to encourage producers to size power-generating facilities that would be more virtuous for balancing the electricity system:

- First of all, it would encourage the development of hybrid “wind + photovoltaic” installations, whose production curves are counter-cyclical (summer/winter – wind/sun).
- Above all, the lifting of this constraint would encourage project developers to couple their facilities to storage devices (batteries – hydrogen) in order to maximise injected production (storage of surplus production and destocking when injection capacity is available).
- Such installations would thus be likely to offer more stable and less random generation for the system, reacting better to market price signals and meeting the balancing needs of the electricity system (smoothing of the production curve and participation in system services).

Although this proposal was made in March 2022 within the working group of the DGEC, it has unfortunately not been taken up among the provisions of the draft of bill to accelerate the deployment of renewable energies, apparently due to a lack of feed-back from the system operators.

Our Spanish colleagues have pointed out that similar measures to the one proposed by FEE have been adopted by Royal Decree-Law 23/2020.

It could thus be interesting to work out a proposal on the European level to optimise the existing grid capacity as well as its extension by allowing the connection to the electric system of installations with a higher installed power than the connected power.

### **b) Increase of the maximum installed capacity beyond the 17 MW limit**

A maximum installed power limit beyond the 17 MW limit could be defined if the need is identified, a limit which could be distinct for hybrid installations depending on their share of wind, photovoltaic and storage power, as the case may be.

### III. Proposals Spain

The legal analysis of the status quo of permit granting procedures in Spain has identified **two main areas where the major obstacles are concentrated**:

- **Procedures for processing and granting permits** before the Public Administrations: relevant bottlenecks have been detected in the **regional and local administrations creating** delays, obstacles, and difficulties in the procedures.
- **Access and grid connection permits** for the discharge of the energy produced: **shortage of grid capacity** and obstacles in the granting of access and grid connection permits are identified.

In the analysis of the status quo it has been outlined that in the last two to three years, and especially during the last year, the Spanish government, as well as a number of regional administrations, have adopted legislation and measures aimed at promoting renewable energies and simplifying the permit granting process, in response to the increase number of applications and investment interest, as a consequence of the current energy transition context and geo-energy crisis.

However, these new measures are not producing, in many cases, the expected acceleration effects, and have also created an increase in social protest against renewable energy projects, especially due to their environmental impact. This is so much the case that some regions have reversed the acceleration, even issuing moratoriums on the granting of permits and licences until there is planning and zoning to order the massive development of RES installations, pacifying the territory.

#### 1) Proposals and possible actions to speed up the processing and issuing of permits by public administrations

##### a) Simplification of procedures.

The elimination of formalities and/or a further reduction of deadlines could be considered contrary to the interested parties' right to a hearing and defence. However, the procedures should be reviewed in a way not to generate duplicities, to avoid repeating formalities in the requests for reports to the bodies concerned. This measure should focus on reusing the information already provided by the promoter, as well as the observations provided by the affected bodies, when there are obvious synergies due to the subject matter to be dealt with and analysed. In this way, the simultaneous processing of permits and licences should be considered, whenever

possible. As the regulator itself has pointed out, for example, the processing of the building permit could incorporate the management of the planning permission.

#### **b) Reduction of asymmetries in information**

In view of the disparity of regulations, interpretative criteria, and procedures between regional and local administrations, it is proposed to improve the information mechanisms and the reduction of interpretative and normative differences. To this end, different proposals are listed below:

- Publication of interpretative and processing guides; criteria for interpretations, etc. accessible by all administrations involved.
- Creation of information points at state and regional level: to manage regulations and procedures specific to each region, allowing better and faster identification of the different procedures and requirements for promoters.
- Strengthening the structures of the administrations.
- Strengthening administrations with specialised human resources.
- Reinforcement of technical resources to increase the efficiency of the human resources already available.
- Creation of common processing offices for several municipalities in a region or province, so that they can collaborate and help each other.

The European Parliament suggested regarding the reformulation of Article 16 of RED II as proposed by the European Commission in the RED IV proposal, to oblige Member States to provide support, including financial and technical, to regional and local authorities to facilitate the permitting process and to ensure the funding necessary to provide qualified personnel. This proposal – although with a different wording – also became part of the final Article 16 RED III.<sup>579</sup>

#### **c) Preventing municipalities to exercise the veto of the precautionary suspension of licences.**

The AACCs with competences in urban planning matters should establish criteria, guidelines and alternative mechanisms to be used as an alternative tool by those

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<sup>579</sup> Cf. Part 3C.III.2)b)aa).

municipalities that intend to resort to the figure of the precautionary suspension of the licenses granting when there are shortcomings in the municipal planning.

**d) Development of a specific procedure for the repowering of installations that considers the particularities of these type of projects.**

Taking into account the lower environmental and territorial impact of developing new projects in locations already used for energy generation, this specific procedure to be developed should be especially simplified, recognising the specific characteristics of this type of project, and differentiating it from the more guarantee-based procedure for processing projects from the outset.

This is in line with Article 16c of the revised Renewable Energy Directive obliging Member States to limit the assessment of impacts resulting from repowering only to potential impacts resulting from the modification or extension of the original project.<sup>580</sup>

Moreover, the development of this specific procedure shall take into account the provisions of Article 5 of Regulation (EU) 2022/2577 establishing a framework for accelerating the deployment of renewable energies (also known as the Emergency Regulation)<sup>581</sup>.

**e) Positive administrative silence**

The procedure should be revised, and the figure of positive administrative silence should be established in those cases in which the administration or competent body does not issue the required response within the given legal timeframe.

This goes along with the European Commission's proposal to introduce within the framework of the proposals for RED IV a new Article 16a to the current RED II on the process for granting permits in renewable acceleration areas. This new provision intends that, after a certain period of time without an express decision, applications are authorised.<sup>582</sup>

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<sup>580</sup> This suggested provision became in the end the new Art. 16c.

<sup>581</sup> Cf. Part 2E.II.4) and Part 3D.II.4)

<sup>582</sup> Cf. Part 3D.I

**f) Adoption of information measures and call for local participation in renewable projects.**

An interesting measure proposed is the adoption of information measures for local authorities, and from local authorities to the local population, on the projects and their direct benefits for the local economy and on the reasons for their implementation in the framework of the economy decarbonisation.

A possible measure to directly involve local population in the projects is to offer local participation in the ownership or financing of part of the projects.

**g) Zoning by technology of areas suitable for developing renewable "go-to areas".**

A good example is the recently published Royal Decree 150/2023 of 28 February 2023, approving the maritime spatial plans for the five Spanish marine districts for the deployment of offshore wind plants in Spain.

This proposal is in accordance with the provisions of the European Commission's proposal for RED IV, which would incorporate a new Article 15b and 15c to the current RED II, which indicates the advisability of designating areas particularly suitable for the production of renewable energy. It should be noted that both, the amendments proposed by the European Parliament and the European Council have pointed out the virtues of proceeding with such zoning, although they raise different aspects to be considered.<sup>583</sup>

**h) Training of professionals in the renewable energy sector**

The achievement of renewable energy commitments requires skilled and qualified professionals throughout the value chain, which is one of the main challenges the energy sector is facing today. It is necessary to increase and improve the training of professionals with expertise in the renewable energy sector.

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<sup>583</sup>Cf. Part 3C.III.2).

i) **Adoption of measures to ensure the enforceability of the rebuttable presumption that renewable energy projects are of overriding public interest<sup>584</sup>**

Information measures should be adopted so that, in the first place, the administrations in charge of administrative procedures are aware of the content of this provision. Likewise, it is particularly important that the administrations themselves generate internal instructions to establish criteria for assessing the appropriate measures for the conservation of species that contribute to maintaining the populations of these species in a favourable state of conservation, with the aim of requiring appropriate measures that enable the conciliation of both interests, the development of renewable energy projects and the protection of species and biodiversity.

2) **Proposals on the acceleration of grid connection**

In Spain, the competence to regulate on access and connection conditions and the granting of the corresponding permits, is exclusively at state level (national), and is shared between the Government and the NRA (CNMC).

The **lack of network capacity** and the new regulation established on **capacity tenders**, as well as the **process of granting network access and connection permits** itself, have emerged as **one of the major obstacles in the procedures** for the implementation of RES projects. There have been substantive acceleration measures already adopted very recently. In addition, the following measures are recommended:

a) **Simplification of the procedure for obtaining access and connection permits for smaller projects**

Currently, the regulation contemplates an abbreviated procedure for very small projects (basically installations for self-consumption of up to 15 kW of power capacity). It is therefore recommended to raise the threshold for small and medium-sized installations to qualify for an abbreviated procedure, with a reduction in processing timeframes.

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<sup>584</sup> In accordance with the provisions of Art. 3 of Council Regulation (EU) 2022/2577 of 22 December 2022 establishing a framework for accelerating the deployment of renewable energies (Emergency Regulation).

## **b) Periodic review of Transmission Grid Planning to expand network capacity at critical points**

This would allow the transmission network and its capacity to be adapted so that RES projects can be implemented, especially considering and in coordination with the identification of optimal zones and "go-to-zones". In Spain a large percentage of RES projects (up to 80%) are connected to the transmission grid opposite to most of European Members States in which renewables are largely connected to the distribution grid (up to 70% as an average at European level).

## **IV. Proposals Germany**

### **1) Preliminary remarks**

In recent months, the German legislator has presented some remarkable proposals for accelerating approval procedures. The aim is to implement projects much faster. The proposals are not limited to projects for the generation of electricity from renewable energy sources but also concern the expansion of the infrastructure, e.g., of the electricity grids. We will not present all amending laws or current legislative projects at this point. We will rather provide a brief overview of the central proposals for speeding up the expansion of renewable energy sources and the associated infrastructure.

Onshore wind energy installations and photovoltaic installations will play a significant role in providing carbon neutral electricity. The expansion of wind and solar energy is expected to triple in the next few years. This will only be possible if corresponding areas are available for generating wind and solar power. Two percent of Germany's land area must be designated for onshore wind energy installations<sup>585</sup>. The corresponding obligation has been gradually increased: by 2026, 1.4% of the country's land area is to be designated; by 2032 it must be 2%. The obligation to designate areas is not the same for all federal states; some federal states must designate a little less than 2% and others a little more than 2% of their land area. Furthermore, the federal states may – to a limited extent – conclude agreements with each other to fulfil the land area requirements. However, failing to comply with these obligations will have a significant consequence for the respective federal states: this means that, wind energy installations may be constructed everywhere outside of the areas subject to a development plan and where there is no existing development. Regulations on the minimum distance from the wind energy

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<sup>585</sup> Wind Area Requirements Act (*Windflächenbedarfsgesetz*) of 20/07/2022, Federal Law Gazette I p. 1353.



installations to an existing development, in particular to a housing development, will then no longer apply. Time-consuming double checks and assessments of projects at the level of spatial planning of the approval procedure are to be largely avoided; a spatial impact assessment must be carried out within a time frame of six months<sup>586</sup>. The approval procedures should become more digitalised than before. The participation particularly in procedures involving public participation has, as a rule, to be carried out digitally; a formal participation procedure would thus only take place in exceptional cases<sup>587</sup>. Ground-mounted PV installations, i.e. photovoltaic installations that are not on buildings or other structural facilities, are admissible in the outlying area under certain conditions: they have to be constructed at a distance of up to 200 metres alongside motorways and certain double-track railways (cf. sec. 35 subs. 1 no. 8 lit. b BauGB).

The statutory species protection assessment is modified for approval procedures. Firstly, special requirements apply to repowering onshore wind energy installations (cf. sec. 45c BNatSchG). Secondly, the statutory species protection assessment for breeding birds at increased risk of collision is now subject to standards that must be observed at the national level (cf. Annex 1 to the BNatSchG); the partially quite different approach of the authorities is thus to change. These changes are accompanied with new species protection programmes for the permanent protection of certain species (cf. sec. 45d BNatSchG).

In addition, the provisions of the Emergency Regulation<sup>588</sup> are implemented in different legislative proposals. The requirements for the environmental impact assessment will be partially readjusted and the authorisation procedure under immission control law will be streamlined concerning deadlines for public participation. Moreover, the repowering of installations will, in principle, be limited to adverse effects caused by the new installation for the electricity generation from renewable sources, and climate protection will be included in the Federal Immission Control Act (*Bundesimmissionsschutzgesetz* – BImSchG) as a new issue to be considered<sup>589</sup>. Furthermore, relief is provided for the expansion of electricity grids at the medium voltage and higher voltage level (from 110 kV) (cf. sec. 43 m Energy Industry Act – [EnWG]).

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<sup>586</sup> Cf. act amending the Federal Spatial Planning Act and other provisions (ROGÄndG) of 22 March 2023, Federal Law Gazette I. p. 88.

<sup>587</sup> Cf. Planning Assurance Act (PlanSiG) of 20/05/2020, Federal Law Gazette I. p. 1041.

<sup>588</sup> COUNCIL REGULATION (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJ EU 29/12/2022, L 335/36.

<sup>589</sup> Draft bill of the Federal Government, Bundesrat Printed Paper 201/23.

Finally, the proceedings before an administrative court are also streamlined and accelerated. Special chambers and senates will be established for planning law procedures; requirements for the procedure, deadlines for submitting comments and preclusion should help conclude legal disputes faster<sup>590</sup>.

## 2) Solar

### a) Optimisation of multiple use

The limited availability of land constitutes an obstacle to an accelerated expansion of solar energy, in particular regarding ground-mounted solar installations. Pursuant to the Renewable Energy Sources Act (*Erneuerbare-Energien-Gesetz – EEG*), electricity from solar energy is only remunerated if the solar installations are constructed and operated on certain site categories. According to the previous versions of the EEG, the land eligible for remuneration included, in particular, areas with an existing load that were fully put to a new use (e.g., solar installations on conversion areas, a corridor alongside motorways and railways or disadvantaged areas). In the more recent EEG versions of 2021 and 2023, delimited areas have already been moderately expanded to include areas on which, in addition to their original purpose, special solar installations can be constructed and operated (e.g., agrivoltaic systems and solar installations on parking lots).

The admissibility of multiple land use or additional use to generate solar energy holds considerable potential for increasing the availability of land. However, with the previous changes to the EEG concerning the delimited areas, this potential is only being exploited to a limited extent. Allowing multiple uses of land eligible for remuneration to a greater extent would significantly increase the availability of land. In this context, a broad interpretation of the term “multiple use” would make sense to exploit additional synergy effects. Along with the agrivoltaic systems already considered in the EEG as special solar installations which must conform to the strict requirements of the Federal Network Agency’s determination in this regard, it makes sense to also include other types of multiple use of agricultural land as eligible land for remuneration. These could include e.g., “extensively used agrivoltaic systems” for which other requirements regarding land management and the maximum number of admissible solar installations apply than for agrivoltaic systems within the meaning of the Federal Network Agency’s determinations. Another approach to multiple uses is “biodiversity PV installations” in which, in addition to operating solar installations, the multiple use is aimed at sustainably enhancing the ecological

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<sup>590</sup> Cf. in detail to the different proposals: Bundesrat Printed Paper 640/22.

condition of the land. Such an ecologically oriented approach to multiple use has already been introduced in the EEG in 2023 with the option of "moorland PV installations".

Irrespectively, other new or existing uses can be combined with the construction and operation of solar installations if the term "multiple use" is interpreted broadly. With regard to synergy effects in the area of grid connection, it makes sense to open up existing sites or sites to be newly designated for wind energy installations for the additional use of solar energy. Due to the technically required distance between individual wind energy installations, large portions of land suitable for wind energy installations are, in many cases, still used for agriculture although there are usually sound preconditions for efficiently connecting solar installations to the grid at these sites. Against this background, multiple land use also within the meaning of a combined use of land for wind and solar energy installations can be promoted. Electricity storage facilities can also be used to optimise feed-in capacities at the grid connection points.

Irrespectively, multiple use may also be considered for land used to operate high-voltage lines or located in their surroundings. With regard to synergy effects in the area of grid connection, it makes sense to open up areas for, in particular, large and very large solar installations, in a yet to be specified corridor alongside high-voltage overhead lines, similar to the "500 metre corridor" alongside motorways and railways. The existing transmission lines can also be used to feed-in electricity from the solar installations.

Such areas can be considered in the determination of "go-to areas".

Another general approach for multiple uses is focused on the solar rooftop requirements at state level. Similar to the mandatory construction of solar installations on new buildings or in case of roof refurbishments, it makes sense to also promote multiple uses for other public or private building projects. Corresponding authorisations in the specialised areas under public law, e.g., road law, railway law or aviation law, can be the basis for requirements under permitting law for the combined use of suitable areas for constructing and operating solar installations in the implementation of such projects.

In addition to the designation of further delimited areas, legal obstacles preventing multiple uses must be eliminated to optimise multiple use cases. Such obstacles are primarily the result of the spatial and regional planning objectives, e.g., due to the definition of exclusive use for certain areas based on priority areas or other objectives. Such obstacles may be removed under spatial planning law, e.g., by derogations regarding the designation of priority areas or the binding effect of objectives.

In the legislative draft amending the Federal Spatial Planning Act, such derogations for solar energy are already implemented with regard to the designation of priority areas with an exclusive effect<sup>591</sup>.

## **b) Public acceptance on municipal level**

An essential obstacle to expanding renewable energy can be the opposition of municipalities and/or its residents a) in the course of the planning approval or permitting procedures or b) by objections or lawsuits, which delay the construction and/or commissioning of renewable energy installations. Such procedures are mainly due to a lack of acceptance at the municipal level. A higher acceptance would probably have a favourable effect on the course of permitting procedures.

Suitable tools for increasing acceptance can be financial or entrepreneurial participations of municipalities with at least indirect benefits for residents as well as direct participations of residents in renewable energy installations. Financial interests in renewable energy installations and financial contributions to municipalities have already been implemented in German law. Section 6 of the EEG allows operators of wind energy installations and ground-mounted solar installations to make a limited amount of legal unilateral financial contributions to municipalities. The Act on the Participation of Citizens and Municipalities in Wind Farms in Mecklenburg-Western Pomerania (*Gesetz über die Beteiligung von Bürgerinnen und Bürgern sowie Gemeinden an Windparks in Mecklenburg-Vorpommern*) provides various options for obligatory participation of citizens and municipalities at the state level, regardless of financial contributions under sec. 6 EEG. However, these participation opportunities are limited to onshore wind energy installations.

Expanding the opportunities for participation holds great potential for increasing acceptance at municipal level. To achieve this, the opportunities for participation under the state law in Mecklenburg-Western Pomerania could be expanded to other energy sources, particularly solar installations, and, secondly, moved to the federal level.

Irrespective of this, there is further potential for improving municipal acceptance which is not yet covered by the existing regulations. A promising approach to increase acceptance would be, for instance, offering regional electricity products through installation operators or third parties acting on their behalf. To implement this approach, it would make sense for the municipalities to be able to demand such

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<sup>591</sup> Cf. sec. 7 subs. 3 sentence 6 draft Federal Spatial Planning Act.

offers at an early stage in the project initiation process and secure them contractually.

Based on the legal situation in Mecklenburg-Western Pomerania, other promising approaches could provide further opportunities for direct financial and/or entrepreneurial participation of municipalities, including their citizens, in renewable energy installations. From a municipal perspective, there is often an interest in direct entrepreneurial participation, in some cases to a significant extent (up to 50 % and more), or in participation of municipal or regional supply companies arranged by the municipalities. In this case, it would also make sense to allow the municipality to demand such participation at an early stage in the project initiation to a legally defined extent and secure it contractually. From a municipal perspective, such required participation can be decisive for or against certain project developers.

The municipalities are responsible for preparing the necessary land use plans for ground-mounted solar installations. The need for the project in terms of urban development is the deciding element for or against preparing land use plans for solar energy. There are significant legal uncertainties in this respect as to whether initiating land use planning, including selecting a developer, should depend on providing the municipality or its citizens with particular opportunities for participation.

Stipulating the above participation opportunities would conflict with the currently applicable prohibition on tying arrangements (*Kopplungsverbot*) under public law. Thus, contracts under public law essentially require an objectively reasonable relationship between service exchange and a factual link of performance and consideration, which would also have to serve the municipality's public task fulfilment. This is to avoid a risk of abuse ("*Ausverkauf von Hoheitsrechten*"). A factual link usually only exists if the consideration serves the same public interest as the legal provisions entitling the municipality to provide the service.

The options for drafting contracts involving municipalities and project developers are like a tightrope walk and largely depend on how the contract is drafted in each individual case. Greater room for participation, especially involving financial means which cannot be used for a specific purpose in the municipalities, could be achieved by making the factual link of consideration more flexible using a sector-specific exemption. However, such an exemption would have to ensure that the increased room for manoeuvre associated with the risk of abuse does not get out of hand.

Furthermore, entrepreneurial, or financial participation of the municipalities could take place on a larger scale if there are no criminal risks for installation operators and municipalities within the framework of sections 331 et seqq. German Criminal Code (*Strafgesetzbuch* — StGB). Considering the current legal situation, a link between

the interests of the private sector and the public sector, particularly municipal interests, can be problematic. This is particularly the case if municipalities demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the discharge of a duty and if there is a connection between the two parties involving an unlawful agreement. Such a broad definition of the offences under criminal law relating to bribery leads to considerable uncertainties in practice and thus to obstacles. The national legislator could address this uncertainty by clarifying that participation opportunities increasing acceptance for municipalities are exempt from the statutory requirements for such offences. Furthermore, the legislator could create a legally regulated procedure for participation similar to the procedure for acquiring third-party funding. Consequently, a restrictive interpretation of the offences is required since the legal interest protected by the offence, i.e., confidence in the reasonableness and non-corruptibility of the decision in the exercise of official duties, does not require protection under criminal law if this procedure is followed.

### **c) Independent procedure for preparing solar development plans**

According to the current legal situation in Germany, in most cases a development plan must be prepared for photovoltaic installations which are not installed and operated on buildings but in an open space. This is particularly true if the site for the planned photovoltaic installations is located in an outlying area, i.e., in an area which is not surrounded by buildings. A development plan is issued by the municipality in the area in which electricity generation from solar energy is planned.

Only specific photovoltaic installations do not require a development plan, i.e., if the installations are located along motorways or certain double-track railways at a distance of 200 m.<sup>592</sup> Such installations are privileged in the outlying area, i.e., they are permitted if other public interests (e.g., nature conservation and landscape management) do not conflict with the project.

But in such cases, two aspects have to be considered. Firstly, a development plan is required if the electricity generated from photovoltaic installations has to be funded under the EEG<sup>593</sup>; this is different in case of tendering<sup>594</sup>. Secondly, the municipalities are in part reluctant or critical of the privileged status: the fact that photovoltaic installations may be constructed and operated without a development plan restricts the municipal planning sovereignty concerning the permitted use of areas in the

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<sup>592</sup> Cf. sec. 35 subs. 1 no. 8 lit. b BauGB.

<sup>593</sup> Cf. *inter alia* sec. 48 subs. 1 no. 3 lit. c EEG.

<sup>594</sup> Cf. sec. 37 subs. 1 no. 2 lit. c EEG.

municipality's territory. A development plan can thus have a positive effect on acceptance.

When a development plan is prepared, it usually includes a special area that specifically permits photovoltaic installations. The procedure for preparing development plans is very formal. Participation of public authorities and the public is an essential part of the process. Such participation is linked to specific deadlines for announcing the display of documents, allowing for submitting comments, considering the comments and, if necessary, displaying the comments once again. There are also formal requirements for considering all relevant aspects, for decision-making, and, if necessary, for the approval and public announcement of the development plan. As a result, it is reasonable to expect that preparing a development plan will take at least 12 months; in many cases, the preparation procedure takes considerably longer.

The potential for accelerating the process could be achieved if a specific procedure for preparing land use plans for photovoltaic installations became standardised. With the help of this specific procedure, participation deadlines could be shortened to a minimum. Instead of 30 days, public authorities and citizens would only have 10 days to inspect the documents before submitting their comments. Arrangements could be made to ensure that, in principle, only one display is carried out, thus avoiding the otherwise commonly early participation of public authorities and the public. In addition, it should be examined whether the repeated participation of public authorities and the public would be restricted to specific, significant plan changes, thus not requiring – as is currently the case – repeated participation for every change in the plan. Alternatively, individual participation within short periods would also be possible. Standardising the participation process could potentially result in an acceleration. Furthermore, the aim should be to reduce the number of resolutions to be passed by the municipality. Experience shows that planning and scheduling of the corresponding meetings within a municipality takes a lot of time.

In the context of an evaluation, it is essential to assess whether or which potential for accelerating the process could be developed and what effect this may have on the acceptance of the projects. If the results are positive, it must be examined whether the shortening of the development plan preparation procedure can or should be extended to include other renewable energy sources or infrastructure required for expanding renewable energy.

### 3) Geothermal

#### a) Simplification is also possible for geothermal projects for heat supply

Sec. 57e Federal Mining Act, newly adopted in 2021,<sup>595</sup> aims to accelerate the approval procedure of geothermal projects. Though, the scope is limited and does not lead to sufficient acceleration for all geothermal projects. From our point of view, it makes sense to build on this existing rule and develop it further. Therefore, we support the proposals of the German Geothermal Association (BVG) to expand the scope of the regulation.<sup>596</sup> This includes two specific points:

Firstly, sec. 57e subs. 5 Federal Mining Act provides decision deadlines for mining authorities. But these deadlines only apply in the case of geothermal projects for power generation and do not apply to geothermal installations serving the heat supply. This is not objectively justified especially as the approval periods do not differ in practice and because geothermal energy has high potential precisely for heat generation and is to be promoted in this regard.<sup>597</sup> Therefore, we propose to extend the scope of decision deadlines to geothermal projects for the purpose of heat supply.

Secondly, sec. 57e subs. 2 and 3 Federal Mining Act establish a "single management body" (*einheitliche Stelle*) to coordinate the approval procedure and to provide a procedure manual. According to sec. 57e subs. 4 Federal Mining Act the mining authorities are obliged to draw up a schedule. The scope of these regulations does not include the exploration stage and the granting of mining permits. Therefore, the new regulation does not lead to a relevant simplification of the entire approval procedure. We propose that these rules must also apply to the entire approval procedure under mining Law.

#### b) Geothermal heat extraction at different levels

The principle of exclusive use (*Ausschließlichkeitsgrundsatz*) applies to permission for exploration and licences for extracting a specific mineral resource. Only permission or license holders are entitled to do so. These mining permits establish an exclusive right. This exclusive right relating to a specific mineral resource, applies within the limits of a field that is the subject of an exploration licence and thus, to a

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<sup>595</sup> Please refer to the explanations in Part 2C.IV.5).

<sup>596</sup> Bundesverband Geothermie *Update Genehmigungsrecht* [Update of the German Geothermal Association (BVG) on the law governing permits] of 23/09/2022, p. 20 et seq.

<sup>597</sup> Federal Ministry for Economic Affairs and Climate Action (BMWK), *Eckpunktepapier für eine Erdwärmekampagne – Geothermie für die Wärmewende* [Key elements paper for a campaign promoting geothermal energy for the heat transition] of 11/11/2022.



certain extent, unlimited in depth<sup>598</sup>. In principle, the entitled person can use the mineral resource at all depths; third parties, however, are excluded from using it within the field. It does not matter whether the different uses may influence or interfere with each other. For example, if an entrepreneur uses a certain approved field for heat supply to a residential area, the BBergG prevents another entrepreneur from operating in this area by extracting geothermal energy at greater depths and, among other things, generating electricity from it. Nevertheless, such an outcome does not seem to be in line with the interests of the two entrepreneurs. Both could use geothermal energy without affecting the other's use of geothermal energy.

One possible solution would be to include a separate regulation in the BBergG. This regulation could specify that geothermal energy extraction by different contractors at different depths is permissible. As a result, the regulation limiting the field that is the subject of an exploration licence could be changed so that the fields are related to specific depth levels.

#### **4) Complying with the standardised duration of procedures**

To accelerate approval procedures, the duration of respective approval procedures must be specified. Corresponding regulations are by no means a new phenomenon. Under the BImSchG, the permitting authorities are obliged to decide on a permit application within seven months in the normal permitting procedure and within three months in the simplified procedure<sup>599</sup>. The deadline may be extended by the authority for an additional three months if necessary due to the difficulty of the examination or reasons attributable to the applicant.

Submitting the complete application documents is decisive for the starting date of the deadlines. Hence, it depends on the assessment of the approval authority whether the application documents are considered complete or whether additional documents are required from the point of view of the approval authority. The applicant's legal options are rather limited at this point in the procedure. The BImSchG does not specify a penalty for exceeding the legal deadline; the regulation is therefore also assessed as "incomplete"<sup>600</sup>. Exceeding the deadline does also not result in a deemed permit taking effect; the legislator did not include such a regulation in the BImSchG, according to which the requested permit is deemed to have been granted. However, this would be a necessary requirement for a deemed permit. The German Administrative Procedures Act provides that a deemed approval can only come into

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<sup>598</sup> Cf. sec. 4 subs. 7 Federal Mining Act (*Bundesberggesetz* — BBergG)

<sup>599</sup> Cf. sec. 10 subs. 6a BImSchG.

<sup>600</sup> Cf. Roßnagel/Hentschel, in: Führ, GK zum BImSchG, sec. 10 marginal no. 435.

effect if this has been (explicitly) regulated by legal provision<sup>601</sup>. Only a few further options are accessible to the applicant for promptly enforcing the claim<sup>602</sup>.

The applicant is left with only two options. The applicant can assert their claim at the administrative courts by filing a lawsuit for the granting of the permit.<sup>603</sup> However, in many cases this is not followed by a noticeable acceleration. The administrative court procedure takes time; in most cases, a first decision cannot be expected until another year has passed. Secondly, in cases where the approval authority is at fault for missing the deadline, a claim for official liability according to sec. 839 German Civil Code, Article. 34 Basic Law can be considered.<sup>604</sup>

Practical solutions would be important here. Current proposals to accelerate the approval procedures are initially setting further or stricter requirements for the duration of the respective approval procedure. Thus, the Emergency Regulation<sup>605</sup> provides that the procedures for authorising solar installations and storage facilities at the same site, including building-integrated solar installations and solar energy installations on roofs, on existing or future artificial structures, with the exception of artificial water surfaces, may not take longer than three months<sup>606</sup>. The procedure for repowering projects should not take longer than six months<sup>607</sup>. Furthermore, the procedure for granting a permit for installing heat pumps with an electrical output of less than 50 MW may not take longer than one month, while the procedure for granting a permit for geothermal heat pumps may not take longer than three months<sup>608</sup>.

The current proposals<sup>609</sup> also set deadlines for the BImSchG procedure.

However, it is not clear what the legal consequences of violating these requirements will be. If the applicant continues to assert their claim by taking legal action at the administrative courts and/or can assert official liability claims, the potential for

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<sup>601</sup> Cf. sec. 42a subsec.1 of the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz - VwVfG*).

<sup>602</sup> Gestefeld, Genehmigungsanspruch und Verfahrensdauer im Immissionsschutzrecht [Permit entitlement and duration of proceedings in immission control law], Diss. 2016.

<sup>603</sup> Cf. Roßnagel/Hentschel, in: Führ, GK zum BImSchG, sec. 10 marginal no. 4365.

<sup>604</sup> Cf. Jarass, BImSchG, 14th ed. 2022, sec. 10 marginal no. 125 with further references.

<sup>605</sup> COUNCIL REGULATION (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJ EU 29/12/2022, L 335/36.

<sup>606</sup> Cf. Art. 4(1) Emergency Regulation.

<sup>607</sup> Cf. Art. 5(1) Emergency Regulation)

<sup>608</sup> Cf. Art. 7(1) Emergency Regulation.

<sup>609</sup> Draft bill of the Federal Government, Bundesrat Printed Paper 201/23.

acceleration that can be expected from the regulations is likely to be questionable. Increasing the administrative courts' involvement in enforcement proceedings increases the workload of the courts and raises concerns about the possibility of more delayed, rather than faster, judicial decisions. When implementing the European requirements on the duration of proceedings, the Member States should consider and decide which alternatives to use to ensure that the deadlines have a genuine impact on accelerating the process. If failure to comply with the deadline is not contested by filing a lawsuit but is brought to a constructive solution using an alternative, such as proceedings before an ombudsman, a heavier workload for the administrative courts could be prevented. In many cases, practical questions are likely to be of relevance (which documents would still have to be provided; are these documents necessary to decide on the application, at which points could obstacles in the procedure be overcome, etc.). The conflict resolution could also be assigned to a project manager.<sup>610</sup> It should be considered if the approval authorities have to determine whether the submitted documents are complete or incomplete within a given amount of time (corresponding deadlines are provided for in the proposals at the EU level for certain areas).<sup>611</sup> Failure to meet the deadline set by the authority (or, if applicable, by the applicant) could result in a legal obligation to pay a certain amount, which in turn would have to be used for climate-protection projects, and thus at least indirectly supporting the desired transformation of the energy supply. The financial burden would drive both parties to finish or confirm completion as soon as possible.

Finally, it has to be assessed, whether, or for which projects, a deemed permit would be appropriate in case of a missed deadline. Even while it is acknowledged that these projects are likely to be affected by non-compliance with the statutory deadlines on rare occasions, this may at least be an approach for projects with a low potential for conflict. Lastly, it is important to consider whether Member States should be obliged to evaluate the cases and reasons for missing deadlines to find targeted solutions for such.

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<sup>610</sup> However, the proposal to add a new sec. 2b in the 9th Federal Immission Control Ordinance (BIm-SchV) does not yet provide for an explicit regulation in this regard, cf. Bundestag Printed Paper. 201/33, p. 6 et seq.

<sup>611</sup> Cf. Art. 16(2) RED III; cf. Part 3C.III.2)b)aa) and Part 3C.III.2)b)bb).

## Part 5 Glossary and list of references

### A. Glossary

#### I. Germany

<b>BauGB</b>	Baugesetzbuch	Federal Building Code
<b>BBergG</b>	Bundesberggesetz	Federal Mining Act
<b>BImSchG</b>	Bundes-Immissionsschutzgesetz	Federal Immission Control Act
<b>BNatSchG</b>	Bundesnaturschutzgesetz	Federal Nature Conservation Act
<b>EEG</b>	Erneuerbare-Energien-Gesetz	Renewable Energy Sources Act
<b>EnWG</b>	Energiewirtschaftsgesetz	Energy Industry Act
<b>LuftVG</b>	Luftverkehrsgesetz	Aviation Act
<b>UmwRG</b>	Umwelt-Rechtsbehelfsgesetz	Environmental Appeals Act
<b>RE</b>	Erneuerbare Energien	Renewable Energy
<b>ROG</b>	Raumordnungsgesetz	Federal Spatial Planning Act
<b>UVPG</b>	Gesetz über die Umweltverträglichkeitsprüfung	Environmental Impact Assessment Act
<b>VwGO</b>	Verwaltungsgerichtsordnung	Code of Administrative Court Procedure
<b>WHG</b>	Wasserhaushaltsgesetz	Federal Water Act
<b>WindBG</b>	Windenergieflächenbedarfsgesetz	Wind Energy Area Act

## II. France

<b>APO</b>	approbation du projet d'ouvrage	approval of the project of work
<b>BT</b>		low voltage
<b>CNDP</b>	Commission nationale du débat public	national commission for public debate
<b>CODERST</b>	Conseil départemental de l'environnement et des risques sanitaires et technologiques	Departmental Committee for the Environment and Health and Technological Risks
<b>CRE</b>	Commission de régulation de l'énergie	energy regulation commission
<b>DTR</b>	Documentation technique de référence	technical reference documentation
<b>DUP</b>	Déclaration d'utilité publique	declaration of public utility
<b>ELD</b>	entreprises locales de distribution	local distribution companies
<b>EPCI</b>	Etablissement public de coopération intercommunale	public institution for inter-municipal cooperation
<b>HTA</b>	Haute Tension A	medium voltage / high voltage A
<b>HTB</b>	Haute Tension B	high voltage and very high voltage
<b>ICPE</b>	Installations classées pour la protection de l'environnement	facilities classified for the protection of the environment
<b>LPEC</b>	Loi de programmation énergie-climat	energy and climate programming bill

<b>PPE</b>	Programmation Pluriannuelle de l'Energie	multiannual program for energy
<b>RMI</b>	gîtes géothermiques de minime importance / GMI	reservoirs of minimal importance
<b>SDDR</b>	Schéma Décennal de Développement du Réseau	ten-year grid development scheme
<b>S3REnR</b>	Schéma régional de raccordement au réseau des énergies renouvelables	local planification documents regarding grid connection works
<b>STEP</b>		<ul style="list-style-type: none"> <li>pumped storage energy transfer stations</li> </ul>
<b>TURPE</b>	Tarif d'Utilisation du Réseau Public d'Electricité	tax for the use of the public electricity network

### III. Spain

<b>AACC</b>		Autonomous Communities
<b>AC</b>		Autonomous Community.
<b>BOE</b>	Boletín Oficial del Estado	Spanish Official Journal
<b>CAA</b>		Construction Administrative Authorisation
<b>CNMC</b>	Comisión Nacional de los Mercados y Competencia	Spanish National Authority for Markets & Competition
<b>DPU</b>		Declaration of Public Utility
<b>DSO</b>		Distribution System Operator
<b>EA</b>		Environmental Assessment
<b>EIA</b>		Environmental Impact Assessment

<b>GSA</b>		General State Administration
<b>MITERD</b>	Ministerio para la Transición Ecológica y el Reto Demográfico	Spanish Ministry for the ecological transition and Demographic Challenge
<b>NRA</b>		National Regulation Authority
<b>OAA</b>		Operational Administrative Authorisation
<b>PAA</b>		Previous Administrative n Authorisation
<b>PV</b>		Photovoltaic
<b>RD</b>		Royal Decree
<b>REE</b>	Red Eléctrica de España	Spanish Transmission System Operator
<b>RES:</b>		Renewable Energy Sources.
<b>TSO</b>		Transmission System Operator

#### IV. Sweden

<b>EIA</b>	Miljökonsekvensbeskrivning	Environmental Impact Assessment
<b>MPD</b>	Miljöprövningsdelegationen	Environmental Permit Office (at the County Administrative Board)
<b>WTG</b>		wind turbine generator
	Miljöbalken	Environmental Code
	Förordning (1998:899) om miljöfarlig verksamhet och hälsoskydd	Regulation on Environmentally Hazardous Activities and health protection

	Miljöprövningsförordningen (2013:251)	Environmental Assessment Ordinance I
	Miljöbedömningsförordningen (2017:966)	Environmental Assessment Ordinance II
	Förordning (2011:1237) om miljöprövningsdelegationer	Environmental Permit Office Regulation
	Artskyddsförordningen (2007:845)	Species Protection Regulation
	Skogsvårdslagen (1979:429)	Forest Protection Act
	Lagen (2010:1011) om brandfarliga och explosiva varor	Combustibles and Explosive Act
	Lagen (1999:381) om åtgärder för att förebygga och begränsa allvarliga kemikalieolyckor	Act on the Prevention and Control of Major Chemical Accidents
	Kulturmiljölagen (1988:950)	Cultural Act
	Plan- och bygglagen (2010:900)	Planning and Building Act
	Plan- och byggförordningen (2011:338)	Planning and Building Regulation
	Ellagen (1997:857)	Electricity Act



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