

Introduction

Peer-reviewed author version

VANHEUSDEN, Bernard & Squintani, Lorenzo (2016) Introduction. In: Vanheusden, Bernard; Squintani, Lorenzo (Ed.). EU Environmental and Planning Law Aspects of Large-Scale Projects, p. 1-8.

Handle: <http://hdl.handle.net/1942/21155>

INTRODUCTION

Bernard Vanheusden* and Lorenzo Squintani**

Following the patterns initiated by the First European Environmental Law Forum (EELF) Conference held in 2013 in Groningen, which focused on energy transition and energy security, the Second EELF Conference focused on the struggle of balancing economic development with environmental protection. Governments, companies, environmental associations and citizens all over the European Union (EU) are struggling with large scale projects. On the one hand large scale projects can contribute to economic development, on the other hand they often also raise environmental concerns. Because of their size and potential impact, large scale projects usually lead to heavy debates and quickly become of great symbolic value. Consequently, large scale projects are excellent examples of the difficulty to balance economic development with environmental protection.

The types of large scale projects, planned as well as ‘under construction’ in the EU, are very diverse. One can think of all kinds of infrastructure projects (motorways, railways, waterways, stations, ports, airports,...), building projects (offices, housing projects, sports stadiums, redevelopment of brownfields,...), waste projects (incineration, landfill,...), energy projects (electricity and gas networks, wind farms, biogas installations, heat networks, extraction projects,...), climate projects (CDM projects,...), water projects, etc.

In order to promote the legal thinking about all kinds of environmental and planning law aspects of large scale projects, *Hasselt University* and *KU Leuven, Campus Brussels* jointly hosted from 10 to 12 September 2014 the Second EELF Conference, with as central topic “Environmental and Planning Law Aspects of Large Scale Projects”.

This book offers a selection of the contributions presented at the EELF Conference. We would like to thank the anonymous reviewers for their comments on the contributions published in this book.

Following the structure of the conference, the book is subdivided into six main themes:

- General
- Public participation
- Environmental impact assessment
- Water
- Nature
- Land use

A. General¹

In **chapter 1** *Marcin Stoczkiewicz* focuses on environmental aspects of state aid for energy investment projects. The development of large scale energy projects – e.g. power stations, electricity transmission and distribution networks, gas pipelines, storages or terminals – usually

* Associate Professor of Environmental Law, Faculty of Law, Hasselt University (Belgium).

** Assistant Professor of European and Economic Law, Faculty of Law, University of Groningen (Netherlands).

¹ The summaries of the chapters here below are based on the abstracts and the introductions delivered by the authors.

depends on state aid granted for investment by the Member States. The EU state aid regulations are designed to protect competition on the internal market. However, as large scale projects funded by state aid can have a significant impact on the environment, environmental consequences may need to be taken into account during state aid assessment. The key question in this context is whether environmental aspects *must* or *may* be taken into account during the state aid assessment of the economic support for investment in energy projects. To address the question this paper asks: (i) whether environmental consequences must/may be part of an assessment of whether the support measure constitutes State aid according to the meaning of Article 107(1) TFEU; (ii) whether environmental consequences must/may be a part of an assessment of the compatibility of the State aid measure with the internal market.

In **chapter 2** *Delphine Misonne* presents the new 2014 EU Regulation on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach. The new Regulation reflects typical concerns of the Chicago Convention on International Civil Aviation. There is a growing fear that local measures adopted for reducing noise nuisances due to aviation could, in the long run, limit airport capacity and development. The Regulation, as a consequence, proposes a peculiar approach to noise management. *Misonne* discusses whether it shall help or hurdle the action of public authorities, when in charge of protecting the environment.

Ludwig Krämer deals in **chapter 3** with the participation of civil society in large projects in the EU. Large projects, such as for infrastructure, industrial installations, power plants or other purposes, have increased considerably in number in the last decades. The reasons for this development are greater mobility of persons, increased trade, globalisation, more free time and greater welfare. In Europe, the existence and the activities of the EU have largely contributed to this development. In particular, the policy decision in the early 1990s to develop trans-European networks in the area of energy, transport and telecommunication played an important role in this regard. The EU provisions on the Structural Funds provided for specific provisions for “big projects” which were defined as having an investment volume of more than 25 million euro. Other projects to be mentioned are nuclear power plants, military projects, projects for sport events - Olympic games (London 2012, Sochi 2014), motorsport races, international championships - and leisure installations such as Disneyland, Eurovegas, or pleasure parks, festivals and concert halls. *Krämer*’s contribution examines some environmental problems linked to such projects, in particular the transparency in the decision-making and the possibilities for civil society to participate in this process.

Chapter 4 contains a contribution by *Yixin Xu* on the sustainability of Clean Development Mechanism (CDM) projects. The significance of forest ecosystem services for the environment and human health has been increasingly debated by the contemporary international community. For its functions in combating climate change, forestry was incorporated into the United Nations Framework Convention on Climate Change (UNFCCC). However, the sustainability of forest projects hosted in developing countries under the CDM in the Kyoto Protocol to the UNFCCC has been questioned by scholars in terms of biodiversity conservation and poverty alleviation. Therefore, this chapter aims to analyse the sustainability of CDM forest projects with a focus on the regulation for the assessment of sustainability and the incentives of the participants.

B. Public participation

According to *Hendrik Schoukens* in **chapter 5** many politicians believe that environmental law has gone astray by providing the wider public and environmental NGOs with additional procedural environmental rights which could be used to block or at least delay large infrastructure projects. Because of their size and potential environmental impact, large scale projects usually lead to polarized debates and quickly become of great symbolic value. In former days, the lack of substantial participatory rights and the limited access to courts in environmental cases, rendered large infrastructure projects virtually immune from successful legal challenges. At present, however, environmental NGOs and local action groups are increasingly eager to go to court in order to enforce their viewpoints, which leads to an increasing number of deadlock scenarios. One way to avoid deadlock scenarios is to take recourse to legal ratification of development consents. By including development consents in legislative acts, an increasing number of national and European governments, impatient with the many court challenges against large infrastructure projects, tried to bypass the allegedly rigid environmental impact assessment (EIA) rules. The ratification technique has clearly been gaining popularity throughout the past few years. This paper addresses the multitude of thorny legal questions that pop up in the context of legislative validation for large infrastructure projects and unravel the many particularities it might have to confront. In particular, it tries to analyse to what extent the procedural demands enshrined in international and EU environmental law are reconcilable with the parliamentary process.

In **chapter 6** *José Ignacio Cubero Marcos* and *Unai Aberasturi Gorriño* indicate that also in Spain the legislative power authorizes projects and passes plans using the legislative act as an ordinary mechanism. This leads to a lot of controversies about projects or plans passed by law in Spain. In many cases the decisions have been adopted without an effective procedure to guarantee participation of the people concerned, because the legislative procedures do not include stages consisting in consultations or providing information from other administrations involved. As an example, the EIA procedure cannot be followed, which allows the legislative power to elude the analysis of the environmental impacts. Moreover, in Spain the right to appeal legislative acts is restricted, which hampers an effective control of the legislators' decisions on environmental issues. Both the Aarhus Convention and European law could be violated due to the discretionary powers attributed to the legislative power in Spain.

Viviana Molaschi aims in **chapter 7** at giving an overview of the level of public participation in environmental proceedings in Italy, with particular regard to the procedures concerning major works, which generally raise opposition from the communities involved (let us think of the NIMBY and the BANANA syndromes). These conflicts are quite often the effect of a lack of public participation in the decision-making process. One of the most well-known examples is given by the construction of the high speed railway line (known as T.A.V.), to connect Turin and Lyon, which has aroused very strong protests, mostly as a consequence of the so-called DAD approach (*Decide, Announce, Defend*), and are still ongoing. Reflections on participatory guarantees in the environmental field entail the analysis of the implementation in the Italian legal system of the Aarhus Convention, which is a milestone in the evolution of environmental democracy. This paper focuses on participatory rights, and, specifically, on the second pillar, whose implementation in Italy is investigated as to the Environmental Impact Assessment (EIA), especially when major works come into consideration, and the Strategic Environmental Assessment (SEA). The paper also formulates some preliminary considerations on the diffusion in the environmental (and planning) field of the so called "deliberative arenas", a new frontier of public participation in decision-making, analysing some experiences at a regional level.

C. Environmental impact assessment

Cross-border oil and gas pipelines as large-scale projects, which stretch across international borders, have the potential to create substantial environmental risks. *Mehdi Piri* looks in **chapter 8** at the trans-boundary environmental impact assessment in cross-border oil and gas pipelines and what lessons can be learned from the 1991 Espoo Convention and the 2011 EU EIA Directive. The Espoo Convention and the EU EIA Directive contain a few relevant rules concerning trans-boundary EIA, and basically they encompass cross-border pipelines as large-scale projects, which require mandatory EIA. Nevertheless, the Espoo Convention and the EU EIA Directive mainly deal with projects with trans-boundary impacts, while the cross-border pipelines are indeed trans-boundary projects, which may also have trans-boundary impacts. The cross-border nature of such projects creates extra challenges compared with the normal trans-boundary EIA procedure for projects with trans-boundary effects. This issue increases the level of complexity of the trans-boundary EIA procedure. The chapter aims to provide a detailed analysis of the application of the Espoo Convention and the EU EIA Directive to large-scale cross-border projects, in particular cross-border pipelines. The chapter concludes that the Espoo Convention and the EU EIA Directive both are envisaged to deal with projects with trans-boundary impacts and not with trans-boundary projects. Therefore, conducting trans-boundary EIA for trans-boundary projects such as cross-border pipelines under the Espoo Convention and the EU EIA Directive may raise a few but important obstacles.

Chapter 9 explores the role of risk-based approaches to EIA in approving new developments in the marine environment. In particular, *Glen Wright* examines regulatory approaches applied to the United Kingdom's emerging ocean energy industry: the 'Rochdale Envelope' and 'Deploy and Monitor' approaches. This chapter represents the first substantial exposition of these concepts in the academic literature. It is argued that by utilising such approaches, in the context of additional reform and a complementary marine governance framework, EIA can contribute to a supportive regulatory environment that facilitates innovation whilst also protecting the marine environment.

D. Water

David Salm argues in **chapter 10** that the Water Framework Directive (WFD) includes ambitious objectives that most Member States most likely will not meet. Since legislative action is unlikely and environmental goals should not be compromised, a realistic legal interpretation of Article 4 WFD is paramount. On July 1, 2015, the European Court of Justice delivered a judgment concerning some crucial aspects in European water law. This ruling will most likely significantly impair the admission of large scale projects throughout the European Union. Critically evaluating the ECJ's line of argument, *Salm* believes that the intention of European water law is to provide tools for smart governance rather than to make industrial projects virtually impossible.

Also *Lisa Löffler* looks in **chapter 11** at the Water Framework Directive. Coal-fired power plants emit mercury, a heavy metal that is considered persistent, bio-accumulative and acutely toxic to human health, ecosystems, and wildlife. In order to avert the threat of mercury it has been added to the list of priority hazardous substances under Annex X of the WFD in 2001. During implementation of the WFD and its daughter directive, the Directive on Environmental Quality Standards in the field of water policy into national law, controversies about the compatibility of the permission of coal-fired power plants with EU water law intensified. In particular, the Phasing-Out of priority hazardous substances as required under Article 4 (1) a) 4th indent WFD is subject of on-going discussions in legal doctrine and case-law. This

contribution analyses the legal implications of the Phasing-Out requirement. It is argued that Article 4 (1) a) 4th indent WFD is directly applicable in domestic law. In consequence, it prohibits the operation and permission of mercury emitting coal-fired power plants as of 16 December 2028.

One of the overriding problems of the 21st century is that of the protection and the sustainable use of the scarce water resources, which is intensified due to the climate-induced changes on water eco-systems. Population growth, economic activities, such as industry and agriculture that presuppose an increased use of water, and increasing urbanization are, among others, significant drivers for an over-exploitation of the water resources in many regions, which often results in shortages of water availability. *Vicky Karageorgou* indicates in **chapter 12** that in such circumstances, demand-oriented measures are not entirely sufficient. Supply-oriented measures are also considered to be possible solutions to increasing water demand in areas which are not able to live within their ecological limits. Interbasin water transfers (IBTs) are regarded as one of the most prominent supply oriented solutions for coping with the above-described situations. Since the implementation of such projects presupposes large scale and significant interventions, the consequences arising from their realization can be far-reaching not only from an environmental but also from a social and an economic point of view. The main aim of the paper is to answer the central question of whether EU Water Law and EU Environmental Law in general provide either concrete rules or at least certain clear-cut criteria and other relevant instruments for assessing the permissibility of the IBTs as a possible solution for satisfying water demand in water-stressed regions. To this end, the paper also analyses the experience gained through the implementation of certain relevant projects worldwide with a view to demonstrating the various issues triggered by their realization.

E. Nature

The continuing loss of biodiversity is an issue of global concern. Europe's biological diversity, in addition to displaying a number of important ecological characteristics, is testament to the millennial symbiosis between man and his natural environment. In effect, more than on any other continent, human activities have been shaping biodiversity over centuries. Ecosystems were relatively stable until the agricultural and industrial revolutions of the past two centuries. Today, however, biodiversity faces a major crisis at both global and European levels, the implications of which still have not been fully appreciated.

In order to reverse these negative trends, in 1979 the EU enacted the Birds Protection Directive and in 1992 the Habitats Directive. These directives are the cornerstones of EU nature conservation law, aiming at the conservation of the Natura 2000 network, a network of protected sites under these directives, and the protection of species.

Among the different provisions of the Habitats Directive, Article 6 has been giving rise to a steady flow of cases. It requires Member States to protect designated habitats, and provides for specific procedural requirements whenever projects or plans are likely to threaten those protected habitats. In shedding the light on the procedural requirements laid down under Article 6(3) and (4) of the Habitats Directive, a key provision for implementing the EU's system of protecting and preserving biological diversity in the Member States, *Nicolas de Sadeleer* attempts in **chapter 13** to emphasize the extent to which this atypical procedure reinforces the obligations stemming from the EIA and the SEA Directives. In sharp contrast to these two directives, which are entirely dedicated to impact assessments, only two sentences in Article 6(3) of the Habitats Directive relate to the appropriate assessment.

The protection regime for Natura 2000 sites and protected species is not absolute: Member States may, under certain conditions, allow plans or projects that can have an adverse impact on nature. In this case compensatory measures can play an important role on safeguarding the Natura 2000 network and ensuring the survival of the protected species. In **chapter 14** *Geert Van Hoorick* analyses whether taking compensatory measures is always obligatory, and discusses the aim and the characteristics (i.e. the naturalness) of compensatory measures, in relation to other kinds of measures such as mitigation measures, usual nature conservation measures, and former nature development measures, and to the assessment of the adverse impact caused by the plan or project and of the alternative solutions. These issues are discussed in light of the text of the legislation, the guidance and practice of the European Commission, (legal) doctrine and the judgments of the Court of Justice in the Briels case and (to a lesser extent) the Acheloos River case.

F. Land use

Elizabeth Dunn considers in **chapter 15** the nature of land use regulation in England and Wales and the significant role played by the Courts in the context of the increasing influence of European legislation on the planning process. In particular, this article explores the discretion afforded to local decision makers and the extent to which that discretion is respected by the Courts. It looks at the legacy of the Alconbury case from 2001 regarding the compliance of the UK planning system with the European Convention on Human Rights. Consideration is also given to the prevalence of judicial review claims in the context of recent proposals for reform of the system including the new Planning Court for England and Wales.

Finally, in **chapter 16** *Iñaki Lasagabaster* and *María del Carmen Bolaño* look at public participation in the land management law-making process in the Basque Country (Spain), and at what the effects are on soil and other natural resources. Soil provides the main foundation for human activities and it is a matter of transversal nature. It affects a number of issues and regulations such as the ones that govern water, habitats, birds or waste. Despite the progress made by Land Management Law in the Basque Country, the most remarkable obstacle found is that Land Management Law does not apply to some large projects. Although, in reality, those projects have a major effect on land's development. This is the case, for instance, of the High Speed Train Project.

This book ends with a conclusion in which we try to place the findings from the various contributions into the broader perspective of the EU legal framework for achieving (quasi-)sustainability and the legal design of instruments aiming at (quasi-)sustainability. It concludes with making a call for further research on such instruments.

We wish you a pleasant and interesting reading, and we look forward to meeting you at one of the next EELF Conferences.