

EU ENVIRONMENTAL
AND PLANNING LAW ASPECTS
OF LARGE-SCALE PROJECTS

Edited by
Bernard VANHEUSDEN
Lorenzo SQUINTANI



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:
NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7PP
United Kingdom
Tel: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe and all other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21
Email: mail@intersentia.be

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832
Email: info@isbs.com

EU Environmental and Planning Law Aspects of Large-Scale Projects

© The editors and contributors severally 2016

The editors and contributors have asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as authors of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

Cover image: © hxdyl – Thinkstock

ISBN 978-1-78068-381-2
D/2016/7849/40
NUR 828



British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

CONTENTS

Introduction

Bernard VANHEUSDEN and Lorenzo SQUINTANI 1

PART I. GENERAL

Chapter 1.

Environmental Aspects of State Aid for Energy Investment Projects

Marcin STOCZKIEWICZ 11

1. Introduction 11
 - 1.1. Thematic Context and Scope of Analysis 11
 - 1.2. Key Questions and the Structure of an Analysis 14
2. EU Environmental Policy and State Aid Rules 14
3. ‘Polluter Pays’ and ‘Integration’ as Principles Linking Environmental Objectives with Competition Rules 15
 - 3.1. The ‘Polluter Pays’ Principle and State Aid 16
 - 3.2. Integration Principle and State Aid 17
4. State Aid for Energy Investment Projects in Environment and Energy Guidelines 2014–2020 21
 - 4.1. General Remarks 21
 - 4.2. Positive Integration 21
 - 4.3. Negative Integration 22
5. Conclusions 24

Chapter 2.

The New 2014 Regulation on Noise-Related Restrictions at EU Airports. Help or Hurdle to Noise Management?

Delphine MISONNE 27

1. Introduction 27
2. Current Framework 29
 - 2.1. Influence of ICAO 29
 - 2.2. Balanced Approach 30
 - 2.3. New Avenue for Litigation 31

3.	New Regulation	34
3.1.	<i>Ratio Legis</i>	34
3.2.	Operating Restrictions	35
3.3.	A Process under Close Supervision.....	36
3.3.1.	Notifications.....	37
3.3.2.	Extensive Consultations	38
3.4.	Balanced but also Cost-Effective Approach.....	39
3.5.	Authorities that are Independent from All Stakeholders.....	41
4.	Assessment	42

Chapter 3.

The EU and the Participation of Civil Society in Large Projects

	Ludwig KRÄMER	45
1.	Introduction	45
2.	Large Projects in EU Environmental Law	45
3.	Participation and Consultation.....	47
4.	Participation in EU Large, in Particular Trans-European Projects.....	49
4.1.	Trans-European Energy Projects	50
4.2.	Trans-European Transport Projects	52
4.3.	Concerned Citizens and Trans-European Projects.....	52
4.4.	Ways Ahead	54
5.	Conclusion	56

Chapter 4.

From Host to Investor: Enhancing the Sustainability of CDM Forest Carbon Projects

	Yixin XU.....	57
1.	Introduction	57
2.	Current Regulatory and Private Sustainability Assessment	61
2.1.	Host Countries' Regulatory Sustainability Assessment.....	62
2.1.1.	The Main Project Players and CDM Project Cycle	62
2.1.2.	Regulatory Sustainability Assessment in the National Approval Procedure.....	64
2.1.3.	Problems of Host Countries' Sustainability Assessments ...	66
2.2.	Private Forest Certification Schemes in CDM Forest Projects.....	68
2.2.1.	The Market of Private Forest Certification Schemes.....	69
2.2.2.	Forest Stewardship Council.....	70
2.2.3.	Climate, Community and Biodiversity Standard	71
2.2.4.	Problems of Private Forest Certification Schemes in CDM Forest Projects	72

2.3.	CDM Voluntary Tool for Describing Sustainable Development Co-Benefits	73
3.	Suggestions Proposed by Previous Scholars.	74
3.1.	International versus National Regulatory Approach	74
3.2.	Promoting Incentives for Conserving Forests Ecosystem Services	75
3.3.	<i>Ex-Post</i> Environmental Sustainability Assessment.....	77
3.4.	Increase Local Participation and Power Decentralisation.....	77
4.	Policy Analysis.....	78
5.	Conclusion	82

PART II. PUBLIC PARTICIPATION

Chapter 5.

**Legislative Validation in Times of Environmental Democracy:
Going Beyond the Deadlock or a Road to Nowhere?**

	Hendrik SCHOUKENS	85
1.	Introduction	85
2.	Legislative Validation, EIA and Aarhus: ' <i>Ceci n'est pas une pipe?</i> '.....	89
2.1.	The Basics of EIA in the European Union: the Backbone of Sustainable Spatial Development?	89
2.2.	Access to Justice in Relation to EIA Rules	90
2.3.	The Exemption Offered by Article 1(4) of the EIA Directive	93
3.	Strict Judicial Scrutiny: Aarhus Shows its Teeth to the Walloon Region (in Theory ...).	96
3.1.	The Re-Emergence of Article 1(4) in a Belgian Large Infrastructure Case	96
3.2.	' <i>No pasarán!</i> ' says the Court in Luxembourg and the Belgian Constitutional Court in Brussels	98
3.3.	The Irony of it All?	101
4.	A More Generous Approach: UK Supreme Court Endorses the HS2 Hybrid Bill.....	106
4.1.	A New Twist to a Long-Standing Debate	106
4.2.	UK Supreme Court Opts for a Middle Ground	108
4.3.	Common Sense or Splendid Isolation?	111
5.	Concluding Remarks	115

Chapter 6.

**Controversies about Projects or Plans Passed by Law in Spain.
Environmental Impact Assessment, Right to Take Part and Access to
Justice on Environmental Issues**

José Ignacio CUBERO MARCOS and Unai ABERASTURI GORRIÑO.....	119
1. Introduction	119
2. The Right to Participate on Environmental Matters	121
2.1. Aarhus Convention	121
2.2. European Union Law.....	123
2.3. Spanish Legislation	124
3. The Effects of the Projects and Plans Passed by a Legislative Act Both on the Environmental Impact Assessment and the Strategic Environmental Assessment	125
3.1. The Foundation of the Environmental Impact Assessment	126
3.2. Adequate Procedure to Participate and Coordinate Public Authorities	128
3.2.1. The European Union Case Law's Approach	128
3.2.2. Objections to the CJEU's Case Law: the Right to Participate in the EIA and the Strategic Environmental Assessment	130
3.3. Single Legislative Acts and EIA Legislation	131
3.3.1. Single Legislative Acts: Concept and Characteristics	131
3.3.2. The Recent Jurisprudence of the Spanish Constitutional Court	133
3.3.3. Some Critical Observations Related to Participation and the Procedure.	135
4. Access to Justice on Environmental Matters	137
4.1. The Right to Appeal.....	137
4.2. The Single Legislative Acts and the Right to Access to Justice on Environmental Issues	139
5. Conclusions.....	141

Chapter 7.

**The Implementation of the Second Pillar of the Aarhus Convention
in Italy: The Need for Reform and for Introduction of the So-Called
'Deliberative Arenas'**

Viviana MOLASCHI	143
1. Preliminary Remarks on the Scope of the Article: Public Participation in the Environmental Field.....	143
1.1. The Interest in Studying 'Deliberative Arenas'.....	146
2. The Aarhus Convention: a Brief Outline.....	148

3.	The Implementation of the Second Pillar of the Aarhus Convention in the Italian Environmental Code: the Regulation of the ‘Ordinary’ EIA and the Sea	149
4.	Public Participation in the ‘Special’ EIA Concerning Major Works.	154
5.	The Example of the Law of Tuscany n. 46 of 2013 on Regional Public Debate and Promotion of Participation in the Elaboration of Regional and Local Policies	156
6.	Conclusions: Participatory Gaps and Criticalities of Italian Environmental Legislation: the Need for Reform and for Introduction of Deliberative Arenas	161

PART III. ENVIRONMENTAL IMPACT ASSESSMENT

Chapter 8.

Trans-Boundary Environmental Impact Assessment in Cross-Border Oil and Gas Pipelines: What Lessons Can Be Learned from the Espoo Convention and the EU EIA Directive

	Mehdi Piri DAMAGH	169
1.	Introduction	169
2.	The Current Legal Framework of Trans-Boundary EIA for Cross-Border Pipelines in the EU	174
	2.1. The Espoo Convention	174
	2.2. The EU EIA Directive	175
	2.3. The TEN-E Regulation	177
3.	An Analysis of Applying Trans-Boundary EIA to Cross-Border Pipelines	178
	3.1. A Critique: Challenges of Applying Trans-Boundary EIA to the Cross-Border Pipelines, the Case Study of the Nord Stream Gas Pipeline	179
	3.2. Applying the Espoo Convention and EU EIA Directive in the Context of Such Challenges	183
	3.2.1. The Assessment of Alternatives	184
	3.2.2. Trans-Boundary EIA in Cases Involving Non-EU Member States and Countries that are not Parties to the Espoo Convention	185
	3.2.3. Complying with National EIA Requirements	186
	3.2.4. The Overall Assessment of the Project	187
4.	Conclusions	187

Chapter 9.

**Environmental Impact Assessment to Support Marine Innovation:
The ‘Rochdale Envelope’ and ‘Deploy & Monitor’ in the UK’s Ocean
Energy Industry**

Glen WRIGHT	189
1. Environmental Impact Assessment for Ocean Energy	190
1.1. Case Study: Marine Current Turbines, Northern Ireland.....	193
2. Issues with EIA for Ocean Energy Projects	194
3. Introducing Risk into the Regulatory Framework.....	195
4. Case Study: the UK.....	197
4.1. Rochdale Envelope.....	198
4.2. Deploy & Monitor.....	203
5. Challenges.....	208
6. Future Development.....	210
7. Conclusion	212

PART IV. WATER

Chapter 10.

The Case for Smart Governance in European Water Law

David SALM.....	215
1. Introduction	215
2. The Water Framework Directive’s Regime.....	217
2.1. Historical Overview.....	217
2.2. River Basin Districts	219
2.3. River Basin Management Plans and Programmes of Measures. . .	219
2.4. The Prohibition of Deterioration	220
2.5. The Imperative of Improving.....	221
2.6. Interim Findings.....	223
3. The <i>Weservertiefung</i> Case.....	224
3.1. The <i>Bundesverwaltungsgericht</i> ’s Questions to the ECJ.....	224
3.2. Advocate General <i>Jääskinen</i> ’s Opinion.....	225
3.2.1. Article 4 WFD as a Self-Executing Norm	226
3.2.2. The Interpretation of ‘Deterioration’ and ‘Good Status’....	227
3.3. The ECJ’s Judgment	230
3.4. Consequences for Large-Scale Industrial Projects	231
4. The Case for Smart Governance	233

Chapter 11.**Coal-Fired Power Plants under EU Water Law: The Phasing-Out Requirement of Priority Hazardous Substances – An Obstacle to the Permission of Coal-Fired Power Plants?**

Lisa LÖFFLER.....	237
1. Introduction.....	237
2. Facts and Figures Concerning Coal-Fired Power Plants.....	238
3. The Phasing-Out requirement of Mercury and its Different Interpretation.....	239
3.1. The Phasing-Out Requirement under EU Water Law.....	241
3.2. The Time Frame for the Implementation of the Phasing-Out Requirement.....	241
3.3. The Legal Effect of the Phasing-Out Requirement.....	244
3.3.1. Arguments Against Direct Legal Effect.....	244
3.3.2. Arguments in Favour of a Direct Legal Effect.....	245
4. Summary.....	247

Chapter 12.**The Permissibility of Projects for Interbasin Water Transfer under the Prism of the EU Water and Environmental Legislation**

Vasiliki (Vicky) KARAGEORGOU.....	249
1. Introduction.....	249
2. Lessons Learned by the Implementation of the IBTs Worldwide.....	251
2.1. Brief Analysis of the Schemes.....	251
2.2. Remarks Concerning the Implications of IBTs.....	254
3. Assessing the IBTs under the Prism of the New Regulatory Concepts in Water and Environmental Law, with Emphasis on the Developments at EU Level.....	256
3.1. The ‘Paradigm Shift’ in Water Law and its Relevance for Assessing IBTs.....	256
3.2. The Relevant Principles, Criteria and Instruments for Assessing IBTs under the EU Water and Environmental Law.....	259
3.2.1. The Critical Principles and Rules in EU Water Law.....	259
3.2.2. The Critical Principles and Instruments in EU Environmental Law.....	263
4. The Case of Acheloos under the Prism of its Legal and Governance Perspectives.....	264
4.1. Background Information for the Acheloos Diversion Scheme....	264
4.2. The Jurisprudence of the Council of State before the Request for a Preliminary Ruling.....	265
4.3. The CJEU Ruling in the <i>Acheloos</i> Case.....	268

4.4. The Decision of the Council of State after the CJEU Ruling.....	273
5. Concluding Remarks	275

PART V. NATURE

Chapter 13.

Assessment and Authorisation of Plans and Projects Having a Significant Impact on Natura 2000 Sites

Nicolas DE SADELEER	281
1. Introduction	281
2. Appropriate Impact Assessment (Article 6(3) First Phrase)	286
2.1. Introductory Comments	286
2.2. Which Plans and which Projects are Subject to an AIA?.....	286
2.2.1. Broad Interpretation of the Concepts	286
2.2.2. Projects and Plans that Are Likely to Have a Significant Impact	288
2.2.3. Screening: Prior Assessment of the Plan or Project's Significance	291
2.2.4. Advantages and Drawbacks of Screening Methods.....	292
2.2.5. Splitting of Plans and Projects.....	294
2.3. Content of the AIA.....	295
2.3.1. Background Against which the Appropriate Assessment Must Be Carried Out	295
2.3.2. Soundness of the Appropriate Assessment	295
2.3.3. Best Scientific Knowledge in the Field	296
2.3.4. Material Range of Effects	298
2.3.5. Uncertain Effects	299
2.3.6. Geographical Range of Effects	300
2.3.7. Concluding Remarks.....	300
3. Substantive Decision Criterion (Article 6(3) Second Phrase)	300
3.1. Introductory Comments.....	300
3.2. Impact of Article 6(3) of the Habitats Directive on National Procedural Law	301
3.2.1. Express Authorisation.....	301
3.2.2. Stage at which Formal Consent Must Be Granted to the Developer	302
3.2.3. Circumventing Formal Administrative Consent by Legislative Acts	302
3.3. Plan and Project that can be Authorised in as Much as it Will not Affect Site's Integrity	303
3.3.1. No Adverse Effects on Site's Integrity	303
3.3.2. Precautionary Decision-Making	305

3.3.3. Participatory Decision-Making	307
3.3.4. Statement of Reasons	307
4. Derogatory Regime (Article 6(4))	308
4.1. Introductory Comments.....	308
4.1.1. Derogation Mechanism Following Negative Findings in Assessment	308
4.1.2. First Condition: Absence of Alternative Solutions	309
4.1.3. Second Condition: Weighing Interests.....	310
4.1.3.1. Non-Priority Habitats and Species.....	311
4.1.3.2. Priority Habitats and Species.....	311
4.1.3.3. Derogations Interpreted in the Light of the Objective of Sustainable Development.....	312
4.1.3.4. Procedural Requirements	314
4.1.4. Mitigation Measures	314
4.1.5. Compensatory Measures	315
5. AIA, EIA, and SEA: How to Square the Circle?	315
6. Conclusions.....	318

Chapter 14.

Compensatory Measures for Large-Scale Projects in European Nature Conservation Law after the *Briels* Case

Geert VAN HOORICK.....	321
1. Introduction	321
2. Text of Article 6(4) of the Habitats Directive.....	322
3. Compensatory vs. Mitigation Measures – the <i>Briels</i> Case.....	323
4. Compensatory Measures vs. Usual Nature Conservation Measures. ...	326
5. Compensation Beforehand; Compensation vs. Nature Development Measures and Habitat Banking.....	327
6. Biological Integrity vs. Man-Made Nature – the <i>Acheloos River</i> Case ..	328
7. Conclusions.....	330

PART VI. LAND USE

Chapter 15.

Land Use Regulation in the UK and the Role of the Court

Elizabeth DUNN.....	335
1. Introduction	335
2. Overview of Planning in England and Wales	336
3. Principles of High Court Challenges.....	338
3.1. How Do High Court Challenges Work?.....	340
3.2. Permission	341

3.3.	Remedies.....	341
3.4.	Separation of Powers in England and Wales and the Rule of Law.....	342
4.	The European Convention on Human Rights and High Court Challenges.....	343
4.1.	<i>Alconbury</i> and the Right to a Fair and Public Hearing.....	343
4.2.	The Role of Democratic Accountability.....	344
4.3.	The Scope of Judicial Review – What is ‘Full Jurisdiction’?.....	346
4.4.	Access to a Fair and Public Hearing Post- <i>Alconbury</i>	348
4.4.1.	Separation of Powers.....	348
4.4.2.	Planning Act 2008 Challenges.....	349
5.	Developments in Judicial Review and European Influence.....	349
5.1.	Standing.....	350
5.2.	European Mandatory Requirements.....	351
5.3.	Aarhus Convention.....	353
5.3.1.	Time Limits for Judicial Review.....	353
5.3.2.	Costs.....	354
5.4.	Social Influences.....	356
6.	Reform of the Judicial Review Process and the New Planning Court ..	357
6.1.	Origins.....	357
6.2.	Reforms.....	359
6.2.1.	The Criminal Justice and Courts Act 2015 (CJCA).....	359
6.2.1.1.	Making a Challenge.....	359
6.2.1.2.	Financing a Challenge.....	359
6.2.1.3.	Determining a Challenge.....	360
6.2.2.	The Introduction of the Planning Court.....	361
6.2.2.1.	‘Significant Cases’ and Target Timescales.....	362
6.2.2.2.	New Case Management Powers.....	363
7.	Conclusion.....	364

Chapter 16.

**Public Participation in Land Management Law-Making Process in the
Basque Country: Effects on Soil and Other Natural Resources**

Iñaki LASAGABASTER and María del Carmen BOLAÑO..... 367

1.	Introduction.....	367
2.	Clarification of the Meaning of Land Management.....	369
3.	Land Management in the Basque Country.....	371
3.1.	Guidelines for Land Management.....	372
3.1.1.	Specific Analysis of the Land Use Matrix.....	373
3.2.	Land District Plans.....	376
3.3.	Land Sector Plans.....	377

4.	Practical Analysis of the Land Management Set in the Basque Legal Instruments	377
4.1.	Energy Policy and Wind Farms	377
4.2.	Policy on Large Projects and the Trade Act.....	379
4.3.	Construction of Golf Courses.....	380
4.4.	Privatisation of Urban Planning as a Public Service.....	381
5.	Urban and Territory Plans: Participation and Information	382
6.	Conclusion	382

Conclusion.

Reconciling Conflicting Values: A Call For Research on Instruments to Achieve Quasi-Sustainability

Lorenzo SQUINTANI and Bernard VANHEUSDEN.....	385
-----------------------------------------------	-----