

New Sector Conditions for Wind Farms in Wallonia

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The Walloon governmental decree of 26 February 2021 on sector conditions for wind farms with a total capacity of at least 0.5 MW, amending the Walloon governmental decree of 4 July 2002, was published in the Moniteur belge/Belgisch Staatsblad on 27 April and entered into force that same day.

Context

The decree is the result of a lengthy process, which can be summarised as follows:

- On 13 February 2014, the Walloon government adopted a decree on sector conditions relating to wind farms with a total capacity of 0.5 MW or more, amending the Walloon governmental decrees of 4 July 2002.
- On 2 June 2015, the Council of State issued ruling no. 231.425 on an application to set aside the 2014 decree. The Council of State decided to refer a preliminary question to the Court of Justice of the European Union (CJEU) concerning Directive 2001/42, specifically the notion of "plans and programmes" for which an environmental impact assessment is required.
- On 27 October 2016, the Court of Justice rendered a judgment in response to this question (C-290/15, d'Oultremont). The CJEU considered that the sector conditions constituted "plans and programmes" within the meaning of the directive and therefore had to be preceded by an environmental impact assessment ("it should be noted that it is apparent from the actual wording of Article 2(a), first indent, of that directive, [...] that the notion of 'plans and programmes' can cover normative acts adopted by law or regulation").
- On 16 November 2017, the Council of State issued a ruling in light of the abovementioned decision, setting aside the Walloon governmental decree of 13 February 2014 insofar as adoption of the decree had not been preceded by an environmental impact assessment.

However, the Council of State decided to maintain the effects of the decree for a period of three years from notification of the judgment. During this period, the government was able to review the text of the law, which was published on 27 April.

Prior environmental impact assessment

The question obviously arises as to whether the new decree was preceded by an environmental impact assessment.

According to the preamble to the decree, an environmental impact study was carried out and a report was issued on 9 January 2020.

However, the Council of State has noted in this respect that the Walloon law "does not contain a provision ensuring the transposition of Directive 2001/42/EC with a view to applying the regime provided for therein to regulations such as the draft decree".

In other words, there appears to be no legal basis for the environmental impact assessment carried out for the draft decree. In fact, it could be argued that the impact assessment was simply unlawful.

The Council of State therefore recommends, first and foremost, that the Walloon government adopt the necessary provisions so that certain regulatory requirements (falling under the notion of plans and programmes) can be made subject to an environmental impact assessment.

Under these circumstances, more case law can be expected.

Content

The sector conditions are in addition to the general conditions applicable to an environmental permit and the specific conditions applicable to every wind farm.

In particular, the new decree imposes noise standards and aims to better protect wildlife.

With regard to noise, wind farms will have to comply with the limit values set by the WHO (noise below 45 dBA) with a lower threshold at night and for residential areas, rural settlements, agricultural and forestry areas, green spaces, and natural areas and parks.

In addition, the decree reinforces the protection of local residents by imposing a threshold of 43 dBA during so-called transition periods (between 6:00 am and 7:00 am and between 7:00 pm and 10:00 pm on weekdays).

With regard to the protection of fauna (in particular bats), the decree limits nighttime lighting and requires the wind turbines to be shut down when weather conditions are optimal for the flight of all bat species.

It should be noted that the decree contains a section on "[c]ontrol, self-checking and self-monitoring" (Articles 27 to 33), which imposes numerous obligations on operators, including noise curtailment (bridage acoustique), meaning the "voluntary limitation of the rotation speed of the wind turbine, aimed at reducing the noise emitted".

Let's hope that any turbulence caused by this decree remains well below the legality thresholds set by the Council of State, with or without curtailment.

To be continued.

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