

Maximilian Roth

Justus Liebig University in Gießen, Germany

e-mail: Maximilian.Roth@recht.uni-giessen.de

HOW THE CONSTRUCTION OF WIND TURBINES CAN BE LEGISLATIVELY CONTROLLED ON THE BASIS OF PUBLIC INTEREST

**– on the constitutionality of the Citizens’ and Municipalities’ Participation
Act in wind farms in Mecklenburg-Western Pomerania and on the concept
of ‘overriding public interest’**

Abstract

In order to implement the energy transition,¹ the Federal Republic of Germany has been relying increasingly on wind energy for several years. Wind farms, both offshore² and onshore,³ play an important role here. Nevertheless, wind energy in Germany

¹ To clarify the term *Energiewende*: ‘The energy transition in Germany means, on the one hand, the move away from fossil fuels, such as coal and lignite (coal phase-out) as well as oil and gas, the use of which leads to an increase in greenhouse gases, towards the use of renewable energies. In Germany, these are now mainly wind and solar ones on the basis of the Renewable Energy Sources Act (EEG). This is accompanied by a move away from the use of nuclear energy. The energy turnaround also includes increasing energy efficiency. The energy turnaround is thus the central instrument for achieving the climate protection goals that go back to the earlier Kyoto Protocols. M. Hakenberg, *Energiewende* (in:) K. Weber, *Rechtswörterbuch*, 29th ed., 2022.

² On the legal framework for investments in offshore wind farms and connection lines, see J. Butler, C. Hinderer, *NVwZ* 2013, 1377.

³ Current view on aspects of accelerating onshore wind energy planning as a ‘booster’ K. J. Grigoleit, J. Engelberg, L. Strothe, M. Klanten, *NVwZ* 2022, 512.

suffers from a problem of acceptance. Local residents are afraid of visual and acoustic emissions, species protection concerns are raised, adverse effects on the landscape are claimed, and there are also fears of decrease in value of the properties.⁴ For this reason, the federal state of Mecklenburg-Western Pomerania has enacted a law⁵ that provides for mandatory participation of citizens and communities in the operating companies of wind turbines (the so-called ‘citizens’ wind farms’⁶). With this law, the federal state shows in an excellent example how state’s influence on the economy and finances can look like in relation to public interests. But this is not the only way the legislator controls these public interest purposes. Recently, it has increasingly been using the ‘overriding public interest’ in legal texts to speed up the construction of wind power plants. These two juxtaposed instruments will be examined in more detail and their suitability will be analysed separately. Finally, the article presents an outlook with a recommendation for action to the federal legislature.

KEYWORDS

increasing acceptance, freedom of occupation, citizen wind farms, energy transition, renewable energies, climate change, entrepreneurial freedom, wind turbines

SŁOWA KLUCZOWE

rosnąca akceptacja, swoboda działalności gospodarczej, obywatelskie farmy wiatrowe, transformacja energetyczna, odnawialne źródła energii, zmiany klimatu, swoboda przedsiębiorczości, turbiny wiatrowe

I. INTRODUCTION

The mandatory participation of the citizens or municipalities, which is also to the detriment of the wind farm operators, leads to a quite significant encroachment on the operators’ freedom of occupation protected under Article 12 para. 1 of the Basic Law (GG),⁷ so a question arises as to whether such participation

⁴ S. Muckel, JA 2022, 875 (875 f.).

⁵ Law on the Participation of Citizens and Municipalities in Wind Farms in Mecklenburg-Vorpommern (Citizens’ and Municipalities’ Participation Act – BüGembeteilG M-V) of 18 May 2016, GVBl. M-V, p. 258.

⁶ On the term in general, see H. Kramer, *Bürgerwindparks*, 2018, p. 42 ff.

⁷ Basic Law for the Federal Republic of Germany, https://www.gesetze-im-internet.de/englisch_gg/.

can be justified under constitutional law and, if so, for what public interest. After the presentation of the Mecklenburg-Western Pomerania law (II.), the decision of the Federal Constitutional Court (BVerfG) on this participation obligation is analysed (III.). Later, the legal phenomenon of ‘overriding public interest’, which has recently emerged in federal legislation, is discussed as a further steering influence on the energy transition (IV.). Finally, the article gives an outlook and recommendations to the federal legislator on both instruments (V.).

II. THE CITIZEN AND MUNICIPAL PARTICIPATION ACT IN MECKLENBURG-WESTERN POMERANIA

For the areas to be dealt with here, the most important provisions are §§ 3, 4, 5 and 10 of the Citizen and Municipal Participation Act of Mecklenburg-Vorpommern (BüGembeteilG M-V). These read as follows:

§ 3 Project Company; Limitation of Liability

(1) The construction and operation of wind energy installations shall be carried out by a project-related company exclusively serving these purposes. The company shall be project-related if it concerns a project. Participation in other companies is only permissible if it is a subordinate auxiliary or ancillary business.⁴ In the case of outsourcing of activities to other companies, the company shall expressly reserve the rights of organization, control, and instruction.

(2) In accordance with its legal form and concrete structure, the company must ensure the liability of the persons entitled to purchase under this Act, limited to the amount of the contribution, in external and internal relations.

(3) The memorandum or articles of association shall be drafted in accordance with the provisions of the municipal constitution for the participation of municipalities, municipal special-purpose associations or municipal undertakings in enterprises and institutions under private law.

§ 4 Obligation to participate and time of participation

(1) The developer shall offer to purchase at least 20 percent of the shares in the company pursuant to § 3. This quota shall be determined by the sum of all contributions to the company. Only shares which fulfil the requirements under section 3 para. 2 shall be counted towards this quota. The obligation pursuant to sentence 1 may be fulfilled by an indirect participation if such participation is equivalent to a direct participation in terms of its rights and is not subject to the scope of application of the *Kapitalanlagegesetzbuch*.

(2) The partnership agreement or the articles of association may not place the offered shares in a worse position than the other shares.

(3) The offer may be made no earlier than two months prior to the planned commissioning of the first wind turbine belonging to the project, provided that the approval within the meaning of section 4 of the Federal Immission Control Act has been obtained, and must have been made by the time the first wind turbine belonging to the project is commissioned. Immediately upon receipt of the immission control permit, the developer shall inform in writing those entitled to purchase pursuant to section 5 para. 2 of the project. If the remuneration for the quantity of electricity generated by wind energy installations pursuant to section 1 subsection (1) is determined by means of a public invitation to tender and if this invitation to tender takes place after receipt of the immission control permit, the developer shall publish the result on the Internet immediately after winning the invitation to tender and shall then, at the latest, fulfil the obligation to provide information incumbent upon it pursuant to sentence 2. Section 7 para. 2 sentence 1 shall apply *mutatis mutandis* to the content of the information, whereby with regard to numbers 5, 6, 9, 11, and 12 the communication of the anticipated data and with regard to numbers 7, 8, and 13 the communication of the developer's own preliminary calculation shall be sufficient.

§ 5 Persons entitled to purchase

(1) All natural persons who, at the time of publication of the offer, have been registered for at least three months with their residence at a distance of no more than 5 kilometers from the erection site or the location of the wind turbine are entitled to purchase within the meaning of § 4.

(2) Furthermore, the municipalities in whose territory the wind turbine is located as well as municipalities whose municipal territory is not more than 5 kilometers away from the location of the wind turbine shall be entitled to purchase.

(3) Instead of a municipality entitled to purchase pursuant to subsection 2, a municipal special-purpose association or an office of which the municipality is a member shall be entitled to purchase if the municipality expressly declares to the developer before the expiry of the subscription period that it waives its right to purchase and, in the case of a waiver in favor of a special-purpose association, the association is not economically active. The same shall apply with regard to a municipal undertaking or a joint municipal undertaking which is in the ownership of the municipality, insofar as it is not economically active.

(4) The distance pursuant to subsection (1) shall be measured between the property line of the registered place of residence of the respective person and the location of the wind energy installation. In the case of a wind farm, the site of

construction or the site of the nearest wind turbine of the project shall be decisive for determining the distance pursuant to paragraphs 1 and 2.

§ 10 Exemption clause

(1) In addition to the offer pursuant to section 4, the developer may offer the persons entitled to purchase an alternative possibility of economic participation, in particular, a reduced local electricity tariff. The offer pursuant to section 4 and the offer pursuant to sentence 1 do not necessarily have to be economically equivalent. (...)

(5) Instead of the offer under section 4, the developer may ensure the economic participation of the municipalities and residents by paying a compensatory levy under section 11 to the municipality or municipalities and offering a savings product under section 12 to the residents. (...)

In brief: According to § 3 of the Act, wind turbines may only be erected and operated in Mecklenburg-Western Pomerania by a ‘project company’ which exclusively serves the generation of wind energy. Pursuant to § 4 para. 1 sentence 1 BüGembeteilG M-V, the developer must offer at least 20% of the shares in the project company to those entitled to purchase them. Persons who live within a distance of no more than five kilometers from the site of the wind farm and those municipalities on whose territory the facility is located or which are located no more than five kilometers from the site are entitled to purchase. Instead, the developer can offer, as ‘economic surrogates’ of a shareholding under company law, the annual payment of a ‘compensatory levy’ to the municipalities entitled to purchase and the purchase of a savings product to the residents. The amount of the levy and the interest on the savings product are based on the income of the project company.⁸

A company that erects and operates wind turbines defended itself against these regulations. The company essentially justified its constitutional complaint on the following grounds: Anyone wishing to erect and operate wind turbines in Mecklenburg-Western Pomerania would be forced to establish an external company for each individual project, even if this did not make sense for tax, personnel, or administrative reasons. This would constitute a disproportionate encroachment on the freedom of occupation under Article 12 para. 1 of the Basic Law.

⁸ Overview S. Muckel, JA 2022, 875 (875).

III. THE DECISION OF THE BVERFG

In its decision of 23 March 2022, the BVerfG ruled that the obligation of residents and municipalities to participate in wind energy companies is constitutional.⁹

1. Features of the judicature

The decision of the BVerfG can be divided – based on the typical examination of a violation of fundamental rights – into the scope of protection of the freedom to exercise an occupation, the obligation to participate as an encroachment on the freedom to exercise an occupation, a focus on legitimate purposes as justification for this encroachment, and proportionality in the narrower sense.¹⁰

a) The operation of wind turbines as a subject of freedom of occupation

The BVerfG first established that the freedom of occupation protected by Article 12 of the Basic Law also includes the freedom to establish and run businesses. This also involves the freedom to organise and contractually structure the entrepreneurial professional activity and to economically exploit the professionally rendered services.¹¹ This statement can also be applied to the operation of wind turbines without any problems.

b) Obligation to establish and participate as encroachments on the freedom of occupation

Next, the BVerfG defines the encroachments on the freedom of occupation by the paragraphs of the Mecklenburg-Western Pomerania Act challenged by the complainant. The obligation of the companies to specially establish holding companies (§§ 3 *et seq.* of the Act) and to offer at least 20% of the shares for purchase to the residents and municipalities entitled to purchase and to offer a savings product to natural persons (§ 4 para. 1 of the Act) are each independent encroachments on the freedom of occupation.¹²

⁹ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861. The court only declared an information obligation under § 10 para. 6 sentence 2 of the Act – which is not relevant here – unconstitutional. For lack of relevance, this will not be discussed in more detail here.

¹⁰ The points of examination of suitability and necessity are not dealt with in detail here. The court's comments on this can be found in paragraphs 109-132.

¹¹ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 43.

¹² Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 49.

c) Legitimate purposes as justification for the interventions

The BVerfG cites five legitimate purposes as justification for the interventions.

aa) Improving the acceptance of wind turbines

The direct purpose of the standard is to improve the acceptance of wind turbines. The court considers the latter to be an independent, constitutionally legitimate purpose. This is shown through the structuring of the developers' obligations by delimiting the circle of residents and municipalities entitled to participate according to a radius of 5 kilometers around the site of the wind turbine at the special visibility of the turbines, which is decisive for acceptance, as it results from the typical nature of the landscape in Mecklenburg-Western Pomerania.¹³

bb) Expansion of wind energy in Mecklenburg-Western Pomerania

The overriding purpose of the law can be derived from the direct purpose of the norm – the general expansion of wind energy plants in Mecklenburg-Western Pomerania.¹⁴

cc) Climate protection requirement, Article 20a GG

In the court's view, the first two purposes served the constitutionally legitimate climate protection requirement under Article 20a of the Basic Law.¹⁵ This is because electricity can be generated from renewable energies, such as wind power, without emitting climate-damaging CO² during the generation process, as is the case with conventional electricity generation through the consumption of fossil fuels. With a reference to the climate protection resolution of 2021,¹⁶ the BVerfG states succinctly that, in addition to measures for energy efficiency and energy saving, any measure aimed at further expanding the use of renewable energies serves to protect the climate, to which the state is obligated under the climate protection requirement of Article 20a of the Basic Law.¹⁷

dd) Duty to protect against the dangers of climate change

In addition, according to the court, again referring to the climate protection decision from 2021, the measures were also to be protected from the dangers of climate change as an expression of the state's duty under Article 2 para. 2 sen-

¹³ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 100.

¹⁴ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 102.

¹⁵ On this in detail G. Britz, NVwZ 2022, 825.

¹⁶ Decision of the Federal Constitutional Court of 24 March 2021, 1 BvR 2656/18, *et al.*, NJW 2021, 1723.

¹⁷ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 104.

tence 1 of the German Constitution (life and health) and Article 14 para. 1 of the German Constitution (property). The promotion of the expansion of wind energy plants thus also served to protect these fundamental rights from the dangers of climate change.¹⁸

ee) Securing the power supply

As a final, constitutionally legitimate purpose, the court recognises the public interest objective of securing the electricity supply. This is served by the increased expansion of electricity generation from renewable energies. At the same time, dependence on energy imports is reduced and self-sufficiency is strengthened.¹⁹ Although the security of energy supply,²⁰ which is stipulated in Article 194 para. 1 TFEU and in § 1 para. 1 of the Energy Industry Act (EnWG),²¹ is not explicitly mentioned in the Basic Law on Energy Security, it is a service that citizens need in order to secure a decent existence.²² In short, energy is like ‘daily bread’.

d) Proportionality in the narrower sense

With regard to proportionality in the narrower sense, i.e., the appropriateness of the challenged regulations, the court has to weigh the degree of encroachment on the freedom of occupation, on the one hand, and the constitutionally legitimate objectives, on the other. The requirement of proportionality in the narrower sense requires that the severity of the legislative restriction of fundamental rights is not disproportionate to the weight and urgency of the reasons justifying it. In doing so, an appropriate balance must be struck between the weight of the encroachment of the regulation and the legislative goal pursued, between individual and general interests.²³

aa) Considerable weight of encroachment to the detriment of the freedom of occupation on the one hand

¹⁸ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 105.

¹⁹ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 para. 106, 108.

²⁰ For a detailed discussion of energy supply security from a legal perspective: M. Ludwigs, NVwZ 2022, 1086.

²¹ Electricity and Gas Supply Act (Energiewirtschaftsgesetz – EnWG) of 7 July 2005, BGBl. I, 1970, last amended by Art. 3 Gesetz zur Beschleunigung von verwaltungsgerichtlichen Verfahren im Infrastrukturbereich of 14 March 2023, BGBl. I No. 71, https://www.gesetze-im-internet.de/enwg_2005/BJNR197010005.html.

²² Decision of the Federal Constitutional Court of 20 March 1984, 1 BvL 28/82, NJW 1984, 1872.

²³ Standing case law of the Federal Constitutional Court; cf. Decision of the Federal Constitutional Court of 17 October 1990, 1 BvR 283/85, NJW 1991, 555; Judgement of the Federal Constitutional Court of 14 July 1999, 1 BvR 2226/94 *et al.*, NJW 2000, 55; Judgment of the Federal Constitutional Court of 17 December 2013, 1 BvR 3139, 3386/08, NVwZ 2014, 211.

The court assumes a ‘considerable’²⁴ encroachment with regard to the entrepreneurial freedom in the form of the obligation to establish each individual wind energy project and the structure of such a project company. This is because the companies cannot carry out such projects through their own company or in any other form of company chosen by them, for example, on the basis of considerations of tax or organisational expediency; they may only participate in other companies within the framework of subordinate auxiliary or ancillary business and must enable participation of the municipalities entitled to purchase in accordance with the municipal law provisions existing for this purpose. In addition, the regulations reduce the return on the professional activities of the project developers. The natural persons and municipalities entitled to purchase must be offered shares in the project company amounting to at least 20% for purchase or, alternatively, as an ‘economic surrogate’, a savings product and payment of a compensatory levy. This leads to a reduction in the prospects of return.²⁵

bb) Considerable public interest objectives on the other hand

On the other hand, according to the BVerfG, public interest objectives of ‘considerable’ weight are also at stake.²⁶ The court thus places the conflicting concerns of freedom of occupation, on the one hand, and climate protection, the protection of fundamental rights against the consequences of climate change and the security of electricity supply, on the other one, on an equal footing.

cc) Reasons for appropriateness

In the opinion of the court, the appropriateness of the participation obligations is supported by the fact that the legislator has not unilaterally given priority to the interest of improving acceptance over the opposing interests of the project developers. The obligation to sell 20% of the shares in the project company is limited to an extent that does not convey a blocking minority so that those entitled to purchase can neither determine the operative business of the project company nor block shareholder decisions.²⁷ Furthermore, according to § 10 para. 5 of the Act, the project developers are free to offer the natural persons entitled to purchase a savings product instead of a participation under company law, in order to be able to avoid the burdens resulting from the shareholder position of a large number of residents.²⁸

²⁴ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 135.

²⁵ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 139.

²⁶ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 140.

²⁷ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 155.

²⁸ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17 NVwZ 2022, 861 marginal no. 155.

The private-benefit character of the measure also relativises the reduction in the return that the project developers have to accept as a result of the participation of the persons entitled to purchase in the distribution of profits or in the projected income of the project company. This is because the statutory objective of improving acceptance in order to create a prerequisite for the increased use of onshore wind energy coincides with the overall interest of the industry of plant operators in an expansion of suitable areas available for the use for the generation of wind energy.²⁹

2. Effects

With this decision, the court has provided a building block for the success of the energy turnaround and for the achievement of the constitutionally required climate protection goals.³⁰ Thus, the Mecklenburg-Western Pomerania law can serve as a model for other federal states. The federal legislature has sometimes remained reticent in this regard. A uniform federal solution seems preferable so that there are no uncoordinated regulations between the federal states, which could in turn inhibit the expansion of wind energy plants. An increase in acceptance through direct participation can also lead to fewer complaints against the construction of wind turbines.

a) Model for other federal states

The court already points out that the law can serve as a model for comparable regulations to ensure citizen and community participation in the expansion of wind energy (for other federal states).³¹ This is because strengthening the ‘diversity of actors’ through locally anchored projects is seen as an essential prerequisite for the successful expansion of onshore wind energy.³²

b) Reaction of the federal legislature before the decision of the BVerfG

Even before the BVerfG decision, the federal legislator had taken a step towards greater financial participation for municipalities and citizens in the vicinity of wind turbines in § 36g and § 36k of the Renewable Energy Sources Act (EEG)³³

²⁹ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 155.

³⁰ W. Köck, ZUR 2022, 412 (428).

³¹ Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 146.

³² BT-Drs. 18/8832, p. 214; Federal Ministry of Economics and Climate Protection, Climate Protection Plan 2050, p. 39.

³³ Act on the Expansion of Renewable Energies (Renewable Energies Act – EEG 2023) of 21 July 2014, Federal Law Gazette I, 1066), last amended by Art. 6 G on the Immediate Improvement of the Framework Conditions for Renewable Energies in Urban Development Law of 4 January 2023, Federal Law Gazette I No. 6, https://www.gesetze-im-internet.de/eeg_2014/.

and created facilitations for citizen energy companies³⁴ (§ 36g EEG 2017), as well as the possibility of voluntary payments by turbine operators to municipalities (§ 36k EEG 2021, now § 6 EEG 2023). However, these regulations remained significantly behind those of the Mecklenburg-Western Pomerania Act.³⁵

c) Uniform federal solution

In the coalition agreement of 2021, the governing parties agreed ‘that municipalities should benefit appropriately financially from wind energy plants on larger open-space solar plants on their territory’.³⁶ This passage could serve as a gateway for a more far-reaching regulation, namely following the model of the Mecklenburg-Western Pomerania law on mandatory participation in all onshore wind energy plants. Admittedly, the law also serves as a model for the remaining federal states. However, different, uncoordinated regulations by the federal government and the states could lead to a situation where states with more far-reaching requirements for financial participation are economically less attractive from the point of view of wind energy companies and thus a nationwide regulation is necessary.³⁷

e) Fewer lawsuits

Legal protection is often sought against the erection of wind turbines, which further delays construction and commissioning. If the project fails, it usually refers to wind farms with several wind turbines, a step towards the energy transition is missed. A positive side effect of participation through citizens’ wind farms could therefore be that the affected citizens file lawsuits against the construction of wind turbines less frequently than is currently the case because they benefit financially from the construction.

3. Summary

The BVerfG found the obligation to participate in wind energy plants to be constitutionally permissible, despite the intensive encroachment on the freedom of occupation, with convincing reasons. In its decision, it appropriately balanced the tension between freedom of occupation and the public interest. At the same time, the court declared the improvement of acceptance for wind turbines and the expansion of wind energy to be constitutionally legitimate goals and purposes. Likewise, it has concretised the climate protection requirement enshrined in Article 20a of the Basic Law as a legitimate purpose of an encroachment on

³⁴ For the legal definition, see § 3 No. 15 EEG 2023.

³⁵ Thus convincingly and with more detailed justification W. Köck, ZUR 2022, 412 (428).

³⁶ Coalition agreement between SPD, Bündnis90/Die Grünen and FDP for the legislative period 2021-2025, p. 58.

³⁷ W. Köck, ZUR 2022, 412 (428).

the freedom of occupation in the present case of the obligation to establish and participate in wind energy plants. The Mecklenburg-Western Pomerania law can therefore rightly be considered a model for other federal states and for the federal government. By increasing acceptance, it represents an important building block in the context of the ongoing energy transition. However, a competitive situation between the individual federal states must be avoided. For this reason, the federal legislature should develop a uniform solution at the federal level and make participation mandatory by law. It is precisely through a uniform federal solution that the legislator prevents different forms of more or less intensive financial participation by municipalities and citizens. From an economic point of view, the latter are also of existential importance for the companies and must not be allowed to deter them from setting up in principle. However, there is not (yet) a uniform (legal) solution at the federal level.³⁸

IV. THE SO-CALLED ‘OVERRIDING PUBLIC INTEREST’ IN ACCELERATING THE EXPANSION OF RENEWABLE ENERGIES

Still, it is not only through financial participation in wind turbines that the legislator is attempting to steer with public interest purposes. In July 2022, German Bundestag passed three laws with which it attempts to accelerate the expansion of renewable energies and especially in the area of wind turbines through the concept of ‘overriding public interest’.

1. For the expansion of renewable energy, § 2 EEG

On the one hand, the federal legislator reworded § 2 EEG. It defined the ‘overriding public interest’ in the use of renewable energies, § 2 sentence 1 EEG.³⁹ By defining renewable energies as being in the overriding public interest and serving public safety, it must result in the particularly high weight of renewable energies being taken into account in the case of balancing. Therefore, according to § 2 sentence 2 EEG, renewable energies must be included as a priority concern in the weighing of protected interests until greenhouse gas neutrality is achieved. In concrete terms, renewable energies should only be given priority over seismological stations, radar installations, water protection areas, the landscape, monument protection or in forestry, immission control, nature conservation, building or road law in exceptional cases. Particularly in external areas under planning law, if

³⁸ On possible options for the federal legislator R. Weidinger, *KlimR* 2022, 212.

³⁹ Art. 1 No. 2 of the Act on Immediate Measures for an Accelerated Expansion of Renewable Energies and Further Measures in the Electricity Sector of 20 July 2022, *Federal Law Gazette I*, 1237.

no exclusion planning has been carried out, the priority of renewable energies must be taken into account when weighing up the protected goods. In this case, public interests can only oppose renewable energies as an essential part of the climate protection requirement if they are legally anchored or legally protected with a constitutional rank comparable to Article 20a GG, or have an equivalent rank.⁴⁰ Viewed as a whole, this legislative determination in the form of the weighing directive (§ 2 sentence 1 EEG) and the weighing requirement (§ 2 sentence 2 EEG) is intended to achieve an accelerated expansion of renewable energies.⁴¹

2. The operation of onshore wind turbines, § 45b para. 8 no. 1 BNatSchG

The legislature also added a new § 45b para. 8 no. 1 to the Federal Nature Conservation Act (BNatSchG)^{42, 43} This is intended to clarify that the operation of onshore wind turbines is in the ‘overriding public interest’ and serves public safety. This provision is directly related to § 45 para. 7 BNatSchG. The latter makes it possible to grant exemptions from the ban on killing and disturbing specially protected animal and plant species. According to the will of the legislator, state authorities must now take this ‘overriding public interest’ into account when weighing it against other legal interests. This is also to be assumed in the present context within the framework of the decision on the existence of an exceptional reason pursuant to Article 45 para. 7 sentence 1 no. 5 BNatSchG.⁴⁴

The background to the regulation was that the prohibitions under species protection law significantly limited the options for the use of wind energy.⁴⁵ Overall, the new regulation should make it easier to grant an exemption under species protection law for the operation of wind turbines in order to accelerate the expansion of wind energy.⁴⁶

3. Offshore wind turbines and offshore connection lines, § 1 para. 3 WindSeeG

Since 1 January 2023, the construction of offshore wind turbines and offshore connection lines has also been subject to a legal standard of ‘overriding public

⁴⁰ BT-Drs. 20/1630, p. 159.

⁴¹ S. Schlacke, H. Wentzien, D. Römling, NVwZ 2022, 1577 (1578).

⁴² Nature Conservation and Landscape Management Act (Bundesnaturschutzgesetz – BNatSchG) of 29 July 2009, BGBl. I, 2542, last amended by Art. 3 Erstes G zur Änd. des Elektro- und ElektronikgeräteG, der EntsorgungsfachbetriebeVO und des BundesnaturschutzG of 8 December 2022, BGBl. I, 2240, https://www.gesetze-im-internet.de/bnat schg_2009/.

⁴³ Art. 1 No. 3 of the Fourth Act to Amend the Federal Nature Conservation Act of 20 July 2022, Federal Law Gazette I, 1362.

⁴⁴ BT-Drs. 20/2354, p. 27.

⁴⁵ German Advisory Council on the Environment (ed.), Klimaschutz braucht Rückenwind: Für einen konsequenten Ausbau der Windenergie an Land, statement February 2022, p. 39.

⁴⁶ BT-Drs. 20/2354, p. 26.

interest’, § 1 para. 3 of the Wind Energy at Sea Act⁴⁷ (WindSeeG).⁴⁸ This clarification is accompanied by the idea that the particularly high weight of renewable energies will be taken into account in the event of a balancing process and that renewable energies will be included as a priority concern in the balancing of protected interests until greenhouse gas neutrality is achieved.⁴⁹

4. Summary

With the concept of the ‘overriding public interest’,⁵⁰ the legislator is attempting to accelerate the expansion of wind energy in the Federal Republic of Germany in several specialised laws. It is doubtful whether the acceleration of the expansion can be achieved by abstract (federal law) amendments to the law alone.⁵¹ For the experience of enforcement to date and the evaluation of case law have shown in practice that the concepts of overriding public interest and the ‘overriding public interest’ used so far have not led to projects for the expansion of renewable energies being given priority in individual cases.⁵² This is because public law is always subject to enforcement by the authorities. In order for it to take effect, it will be important for the authorities to give the new concern of overriding public interest the necessary importance in the approval decisions.⁵³ However, a first step in the right direction has been taken, because by introducing the ‘overriding public interest’, the legislator has narrowed the weighing decisions to be made by the authorities with this new term.⁵⁴ It is to be expected that this term will also be used in further specialised legislation on the expansion of renewable energies or generally to accelerate planning and approval procedures in order to realise political goals of the federal government.⁵⁵

⁴⁷ Act on the Development and Promotion of Wind Energy at Sea (Wind Energy at Sea Act – WindSeeG) of 13 October 2016, Federal Law Gazette I, 2258, 2310, last amended by Art. 10 G on the Introduction of an Electricity Price Brake and on the Amendment of Further Energy Law Provisions of 20 December 2022, Federal Law Gazette I, 2512, <https://www.gesetze-im-internet.de/windseeg/>.

⁴⁸ Art. 1 No. 2 lit. b) of the Second Act amending the Wind Energy at Sea Act and other provisions of 20 July 2022, Federal Law Gazette I, 1325.

⁴⁹ BR-Drs. 163/22, p. 67.

⁵⁰ In § 2 EEG, which covers the use of renewable energy in general, as well as in § 45b para. 8 no. 1 BNatSchG, which refers specifically to onshore wind turbines, and § 1 para. 3 WindSeeG, which refers to offshore wind turbines and offshore connection lines, cf. above.

⁵¹ For more details, see A. Versteyl, K. Marschhäuser, KlimR 2022, 74 (78) on the EU legal requirements that must still be observed.

⁵² This is impressively demonstrated by A. Versteyl, K. Marschhäuser, KlimR 2022, 74 (77).

⁵³ More detailed and with further evidence A. Versteyl, K. Marschhäuser, KlimR 2022, 74 (79).

⁵⁴ I. Gillich, DÖV 2022, 1027 (1031).

⁵⁵ Thus for the construction of LNG terminals, see § 3 sentence 3 LNG Act. On this in detail I. Gillich, DÖV 2022, 1027.

V. OUTLOOK AND RECOMMENDATION

The legislator can control the construction of wind power plants in various ways for reasons of public interest. However, the two instruments presented here require further development in order to ensure the accelerated expansion of wind power plants and their acceptance in the long term. Thus, in consistent implementation of the coalition agreement, the federal government should quickly enact the financial participation obligation in wind turbines, which the Federal Constitutional Court has deemed constitutionally permissible, in a federal law and take the model from Mecklenburg-Western Pomerania as a reference point. Whether this can be expected in the short term, however, seems questionable in view of the politically tense situation of the three coalition partners between SPD, Bündnis90/Die Grünen and FDP. In order to check whether the mere stipulation of the ‘overriding public interest’ leads to an acceleration of the approval procedures, the federal government should evaluate this instrument in a few years on the basis of a legal study.

REFERENCES

- Britz, G., *Klimaschutz in der Rechtsprechung des Bundesverfassungsgerichts*, NVwZ 2022, 825.
- Butler, J., Hinderer, C., *The legal framework for investments in offshore wind farms and connection lines*, NVwZ 2013, 1377.
- Gillich, I., *Das „überragende öffentliche Interesse“ an der beschleunigten Umsetzung industrieller Großprojekte*, DÖV 2022, 1027.
- Grigoleit, K. J., Engelberg, J., Strothe, L., Klanten, M., *Booster für die Windkraft - Aspekte zur Beschleunigung der Windenergieplanung Onshore*, NVwZ 2022, 512.
- Hakenberg, M., *Energiewende* in: Weber (ed.), *Rechtswörterbuch*, 29th ed. 2022.
- Federal Ministry for Economic Affairs and Climate Protection (ed.), *Klimaschutzplan 2050*, 2022.
- SPD/Bündnis90/Die Grünen/FDP, coalition agreement between SPD, Bündnis90/Die Grünen and FDP for the legislative period 2021-2025.
- Köck, W., *Anmerkung zum Beschluss des BVerfG vom 23. März 2022*, ZUR 2022, 412.
- Kramer, H., *Bürgerwindparks*, 2018.
- Ludwigs, M., *Gewährleistung der Energieversorgungssicherheit in Krisenzeiten*, NVwZ 2022, 1086.
- Muckel, S., *Berufsfreiheit: Pflicht der Unternehmen zur Beteiligung von Anwohnern und Gemeinden an Windenergie-Gesellschaften*, JA 2022, 875.
- German Advisory Council on the Environment (ed.), *Klimaschutz braucht Rückenwind: Für einen konsequenten Ausbau der Windenergie an Land*, statement February 2022.

Schlacke, S., Wentzien, H., Römling, D., *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?*, NVwZ 2022, 1577.

Versteyl, A., Marschhäuser, K., „Überragendes öffentliches Interesse“ als Abwägungsbelang zur Beschleunigung von Klimaschutzvorhaben, KlimR 2022, 74.

Weidinger, R., *Bundesverfassungsgericht zur finanziellen Beteiligung an Windkraft*, KlimR 2022, 212.

Case law:

Decision of the Federal Constitutional Court of 20 March 1984, 1 BvL 28/82, NJW 1984, 1872.

Decision of the Federal Constitutional Court of 17 October 1990, 1 BvR 283/85, NJW 1991, 555.

Judgment of the Federal Constitutional Court of 14 July 1999, 1 BvR 2226/94 et al, NJW 2000, 55.

Judgment of the Federal Constitutional Court of 17 December 2013, 1 BvR 3139, 3386/08, NVwZ 2014, 211.

Decision of the Federal Constitutional Court of 24 March 2021, 1 BvR 2656/18, et al, NJW 2021, 1723.

Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861.