

Eva-Maria Thierjung

Universität Greifswald, Germany

e-mail: eva-maria.thierjung@uni-greifswald.de

ORCID: 0000-0002-8818-8516

THE LEGAL CONCEPT OF ‘(OVERRIDING) PUBLIC INTEREST’ AS AN INDICATOR FOR CHANGING PREMISES IN GERMAN ENERGY LAW WITH REFERENCES TO THE EUROPEAN LEVEL FOCUSING ON RECENT DEVELOPMENTS

Abstract

The aim of this article is to highlight the close correlation between the government’s regulatory ambitions and the use of the value-based term ‘public interest’ in the field of energy law, which is particularly shaped by political considerations. Special emphasis will be placed on the recent reforms in Germany and at the European level in the field of renewable energy (RE) in the electricity sector. These reforms, driven by the significant geopolitical changes since February 2022, aim to accelerate the deployment of renewable energy sources (RES), in particular, the construction and operation of energy plants using renewable energy sources and the related grid infrastructure. To achieve this goal, (selected) RES projects are recognised (presumably) as being of public interest and by these means given priority.

KEYWORDS

electricity, RES, (overriding) public interest, paradigm shift

SŁOWA KLUCZOWE

energia elektryczna, OZE, (nadrzędny) interes publiczny, zmiana paradygmatu

I. INTRODUCTION

Since the Russian war of aggression against Ukraine, the accelerated RES deployment is no longer perceived solely as one of climate policy but rather as an imperative necessity of security policy that ensures an affordable and reliable energy supply.¹ This change in perception is reflected in the law itself: § 2 Sentence 1 of the Renewable Energy Sources Act (EEG)² now states that the construction and operation of RES plants and related ancillary facilities serve the overriding public interest and public safety. § 2 Sentence 2 of the EEG provides a directive for balancing interests in favour of an absolute priority weighting.³ These national developments run parallel with those at the European level, where a similar provision has been established with Art. 3 of Council Regulation (EU) 2022/2577.⁴ Thus, the construction and operation of RES plants and infrastructure, necessary to integrate the ‘green’ electricity generated therein, are now brought into the focus of the state and EU action. In consequence, the scope and instruments of the intervention were expanded, or rather deepened. As far as the original goal of the EEG was to increase the share of RES,⁵ as quantified in legally prescribed trajectories (§§ 4 and 4a EEG), and to integrate these energies into the market – mainly through state subsidy systems – with the start of the *Energiewende*⁶, elements of network

¹ G. Hermes, *Die Systementwicklungsplanung – Instrument zur klimagerechten Transformation des Energiesystems*, EnWZ 2022, p. 99; also, German government refers to RE as ‘freedom energies’ (Federal Government, ‘Modernisierungspaket für Klimaschutz und Planungsbeschleunigung’, 28 March 2023, available online: https://www.spd.de/fileadmin/Dokumente/Beschluesse/20230328_Koalitionsausschuss.pdf).

² German: *Gesetz für den Ausbau erneuerbarer Energien* (Erneuerbare-Energien-Gesetz), Act of 21 July 2014 (Federal Law Gazette: BGBl. I p. 1066), last amended by Art. 4 of the Act of 3 July 2023 (Federal Law Gazette: BGBl. 2023 I No. 176) – EEG 2023.

³ S. Schlacke, H. Wentzien, D. Römling, *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?*, NVwZ 2022, p. 1578 *et seq.*

⁴ OJ L 335, 29 December 2022, pp. 36–44.

⁵ Cf. § 1 EEG in the version applicable before 1 January 2021 (Act of 21 July 2014, Federal Law Gazette: BGBl. I p. 1066, last amended by Art. 8 of the Act of 8 August 2020, Federal Law Gazette: BGBl. I p. 1728 – EEG 2017).

⁶ The term *Energiewende* describes the paradigm shift in German energy policy, characterized primarily by two elements: the accelerated departure from fossil fuels and the exit from nuclear energy (M. Ludwigs, *Die Energiewende im Zeichen des Europa- und Verfassungsrechts*, RW 2014, p. 254 *et seq.*). The latter aspect sets it apart from the so-called ‘green transition’ (European Commission, The European Green Deal, 2019, COM[2019] 640 final 2019, p. 16).

infrastructure planning were gradually introduced⁷ to meet the increased demand for network capacity and network transport.⁸ Still, the legal regime governing the planning and realization of these projects is primarily the spatial and planning law.⁹ However at present, the EEG, which – along with the Energy Industry Act (EnWG¹⁰) – is the second national core energy law, and the European emergency regulation¹¹, both also contain substantive law provisions which give priority for the RES projects – although, in the case of regulation, only for the selected ones – not only in the planning but also in the permit-granting process. The enforcement tool is the declaration that these projects are such of an overriding public interest, in the case of Art. 3 Regulation (EU) 2022/2577, by use of a rebuttable presumption.¹² These provisions address RES plants and the related grid infrastructure as well as storage assets,¹³ not (primarily) the grid itself.¹⁴

These illustrated developments indicate a paradigm shift.¹⁵ In the specific sense of the terminus, to a change in the fundamental legal framework for deci-

⁷ Reference is made here to the introduction of the Power Grid Expansion Act (German: *Gesetz zum Ausbau von Energieleitungen* [Energieleitungsausbaugesetz – EnLAG], Act of 21 August 2009, Federal Law Gazette: BGBl. I p. 2870, last amended by Art. 3 (3) of the Act of 2 June 2021, Federal Law Gazette: BGBl. I p. 1295), the Grid Expansion Acceleration Act (German: *Netzausbaubeschleunigungsgesetz Übertragungsnetz* – NABEG), Art. 1 of the Act of 28 July 2011, Federal Law Gazette: BGBl. I p. 1690, last amended by Art. 7 of the Act of 22 March 2023, Federal Law Gazette: BGBl. 2023 I No. 8) and the Federal Requirements Plan Act (German: *Gesetz über den Bundesbedarfsplan* [Bundesbedarfsplangesetz – BBPIG]), Art. 1 of the Act of 23 July 2013, Federal Law Gazette: BGBl. I p. 2543; 2014 I p. 148, 271, last amended by Art. 5 of the Act of 22 May 2023, Federal Law Gazette: BGBl. 2023 I No. 133.

⁸ J. Senders, N. Wegner, *Die Bedarfsplanung von Energieinfrastrukturen*, EnWZ 2021, p. 243.

⁹ For an overview of indirect spatial control approaches of the EEG through the design of funding rules, see A. Grüner, F. Salier, *Das EEG als Instrument des Bundes zur räumlichen Steuerung der erneuerbaren Energien – zugleich ein Beitrag zur Diskussion um eine Energiefachplanung*, ZNER 2016, p. 122 *et seq.*, however, with regard to the EEG in the respective version as valid before September 2016.

¹⁰ German: *Gesetz über die Elektrizitäts- und Gasversorgung* (Energiewirtschaftsgesetz), Art. 1 of the Act of 7 July 2005 (Federal Law Gazette: BGBl. I p. 1970; 3621), last amended by Art. 9 of the Act of 26 July 2023 (Federal Law Gazette: BGBl. 2023 I No. 202).

¹¹ Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJ L 335 from 29 December 2022, pp. 36–44.

¹² Cf. recital (4, 8) Council Regulation (EU) 2022/2577.

¹³ On the national level, this is done via § 11c EnWG.

¹⁴ Art. 3 Council Regulation (EU) 2022/2577 covers also – unlike § 2 EEG – the related grid itself. But, according to the results of the latest coalition committee, such prioritizing regulations are also to be developed for selected infrastructure projects in the road and rail sectors (cf. Federal Government, ‘Modernisierungspaket für Klimaschutz und Planungsbeschleunigung’, 28 March 2023 pp. 4–5; available online: https://www.spd.de/fileadmin/Dokumente/Beschluesse/20230328_Koalitionsausschuss.pdf).

¹⁵ S. Schlacke, H. Wentzien, D. Römeling acknowledge these developments in the context measures accelerating the planning and permit-granting process (S. Schlacke, H. Wentzien, D. Römeling, *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?*, NVwZ 2022, p. 1586).

sions in individual cases concerning the construction of RES plants and related infrastructure, and also in its general meaning, to a shift in fundamental value judgments.¹⁶ This insight is primarily indicated by the use of the term ‘public interest’ imbued with new content; the evidence that the concept of what constitutes the ‘common good’ has changed, at least for the decision-making majority. This article aims to examine this connection more closely, assessing to what extent these indices can be verified, focusing on the German legal system with reference to European law and with a particular emphasis on recent reforms.

II. THE LEGAL CONCEPT OF ‘OVERRIDING PUBLIC INTEREST’

Firstly, a definition of the terminology used to discuss this topic is necessary, as there is a great deal of linguistic diversity in this context. The term ‘public interest’ is regularly equated with the ‘common good’, the ‘welfare of the community’, the ‘public welfare’, the ‘general welfare’ and the ‘interests of the public’.¹⁷ Herein also, these terms are used synonymously.

The notion of ‘public interest’, as defined above, does not represent a pre-determined quantity but rather a value decision established by the group of stakeholders responsible for the respective decision-making process through the application of the majority principle.¹⁸ Accordingly, there is no independent state interest but rather a variable concept of values formed by the general public,¹⁹ whose definition is of crucial importance to political currents^{20,21} The subject of these decisions is the determination of tasks whose fulfilment has been deemed desirable by the responsible parties through compliance with the predetermined decision-making process, or in other words, the determination of ‘public tasks’. The concepts of ‘public task’ and ‘public interest’ are therefore interchangeable.²²

¹⁶ Comprehensive on the notion of ‘paradigm’ and ‘paradigm shift’ as established by T. S. Kuhn G. Anand, E.C. Larson, J. T. Mahoney, *Thomas Kuhn on Paradigms*, Production and Operations Management 29 (7), p. 1650 *et seq.*

¹⁷ F. Ossenbühl, *Umweltschutz und Gemeinwohl in der Rechtsordnung*, (in:) Bitburger Gespräche, Jahrbuch 1983, München 1983, p. 6 *et seq.*; R. Viotto, *Das öffentliche Interesse*, Baden-Baden: 2009, p. 22 *et seq.*; an alternative view has presumably Koltsoff, who defines the notion of the common good separately from the one of public task, referring only in the context of the last one to the public interest (L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, pp. 41–43).

¹⁸ R. Viotto, *Das öffentliche Interesse*, Baden-Baden: 2009, p. 230 *et seq.*

¹⁹ R. Viotto, *Das öffentliche Interesse*, Baden-Baden: 2009, p. 20 *et seq.*

²⁰ Reference here is made to state-theoretical approaches such as liberalism, conservatism, etc.

²¹ R. Viotto, *Das öffentliche Interesse*, Baden-Baden: 2009, p. 137.

²² Similar to L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 40.

The fulfilment of these responsibilities is not restricted to the state alone, nor does the state hold a monopoly over them.²³ Rather, it is the role of the legislature to distribute their execution between the state and private entities,²⁴ subject to constitutional constraints.²⁵

This state-theoretical background is a crucial factor in shaping the legal concept of the ‘public interest’, because ‘legal considerations on the subject of the common good [cannot] [...] do without thematizing the fundamental concepts of state and society’.²⁶ The legal concept of the ‘public interest’ is an indeterminate legal notion which requires continual redefinition. It is primarily found in the realm of public law as a regulatory matter, for example, in the Federal Immission Control Act.²⁷

III. THE CONCEPT OF THE ‘PUBLIC INTEREST’ IN THE ENERGY SECTOR

1. ENERGY SUPPLY AS A PUBLIC TASK WITH INTERNAL POLARITIES

Energy supply constitutes a public task and, therefore, is a matter of public interest. The various facets of this interest can be deduced from § 1 (1) of the Energy Industry Act. Supply security, price affordability, consumer-friendliness, environmental responsibility, efficiency, and now also greenhouse gas neutrality are goals which are to be achieved through the supply of electricity to the general public. These concrete legal specifications sometimes conflict with each other

²³ C. Theobald, (in:) *Energierecht*, C. Theobald, J. Kühling (ed.), 119th Edition, February 2023, München: 2023, EnWG § 1 Marginal No. 15.

²⁴ L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 40.

²⁵ I. Gillich, *Das „überragende öffentliche Interesse“ an der beschleunigten Umsetzung industrieller Großprojekte*, DÖV 2022, p. 1033 (own translation).

²⁶ R. Viotto, *Das öffentliche Interesse*, Baden-Baden: 2009, p. 137. In this context, it is sometimes argued that the definition of the common good can simply be achieved through the interplay of all three branches of government; the legislature can solely establish an abstract and general framework that is filled with substance only through the application of norms (executive) and norm concretization (judiciary) (I. Gillich, *Das „überragende öffentliche Interesse“ an der beschleunigten Umsetzung industrieller Großprojekte*, DÖV 2022, p. 1032).

²⁷ § 21 (1) No. 4 Federal Immission Control Act (German: *Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge* [Bundes-Immissionsschutzgesetz]) revised by Resolution of 17 May 2013, Federal Law Gazette: BGBl. I p. 1274, BGBl. 2021 I p. 123; last amended by Art. 11 of the Act from 26 July 2023, Federal Law Gazette: BGBl. 2023 I p. 202.

and require a case-by-case weighing against one another, to be ultimately reconciled through a practical concordance.²⁸ These internal tensions manifest themselves primarily in spatial conflicts,²⁹ which due to their complexity and intensity, require legislative guidelines. Lately, especially the new regulations aiming to accelerate the deployment of RES were discussed in light of their relationship to species protection and the realignment of these two public policy issues.³⁰ However, regularly these are polarities between the individual components of the common good ‘energy supply’,³¹ often in the form of ecological internal conflicts within the environmental protection interest itself.³²

2. GOVERNMENT INTERVENTION IN THE ENERGY SECTOR

Against the backdrop of energy supply as part of public welfare, the state has always been involved in energy policy. However, its role and instruments employed have changed over time, depending on the premises pursued. The first paradigm shift occurred in 1998 with the opening of monopolistic network structures in the gas and electricity sectors, which were meant to create competition in areas where it was considered economically sensible. No interventions were made where the continuation of the monopoly was still regarded as the most efficient organizational form due to cost structure. Thus, areas, where market failure was identified, became the subject of state regulation,³³ with central instruments for their remediation being primarily unbundling, cost and tariff regulation, as well as regulated network access, supplemented by market entry controls (approval requirements for starting a network operation), network connection obligations and the basic supply obligations.³⁴ Since then, the new regulatory law that has emerged in this context primarily assumes the task of creating competitive and

²⁸ L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 75.

²⁹ In this sense for the network infrastructure, see also J. Senders, N. Wegner, *Die Bedarfsplanung von Infrastrukturen*, EnWZ 2021, p. 243.

³⁰ So, e.g., A. Leisner-Egensperger on the topic of wind energy (A. Leisner-Egensperger, *Artenrechtliche Ausnahme für Windenergieanlagen. Zur Klärung des Verhältnisses von Artenschutz und Klimaschutz*, NVwZ 2022, p. 745).

³¹ F. Ossenbühl, *Umweltschutz und Gemeinwohl in der Rechtsordnung*, (in:) Bitburger Gespräche, Jahrbuch 1983, München 1983, pp. 10–11.

³² Comprehensive on the different components of environmental law (S. Schlacke, *Umweltrecht*, 8th Edition, Baden-Baden: 2021, § 2).

³³ The term ‘state regulation’ is here used with the notion of a structure-oriented, goal-achieving formula of action that is oriented towards a specific objective in the respective sector (L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 44).

³⁴ L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 47.

promotive structures, which can also be associated with other public interest objectives, as long as they are achieved through market-based means rather than regulatory measures.³⁵ It is not a core area of government regulation and, according to the guiding principles of network regulation, not a government task³⁶ to design a competitively organized³⁷ power generating ‘market’ and plant construction. Here, the decisive regime is the spatial planning law and sectoral legislation.³⁸ In particular, there is still no codified demand planning at the power generation level.³⁹ Network optimisation, network reinforcement, and network expansion are the responsibility of the network operators,⁴⁰ mainly controlled by the obligation to expand the network in a demand-oriented manner, limited by the economic unreasonableness threshold.⁴¹ In 2009, the second ‘fundamental turn’⁴² in German energy policy occurred. The so-called *Energiewende* consisted of two pillars: the departure from nuclear power and the massive shift towards electricity production from renewable energies.⁴³ This ‘second’ shift,⁴⁴ originally motivated primarily by climate policy, has since experienced numerous positive legal concretisations – most notably in energy law⁴⁵ – such as the inclusion of greenhouse gas neutrality in the purpose of the EnWG and, particularly, in the reformed provisions of §§1, 1a, 2 EEG. In the course thereof, it became necessary to expand and strengthen renewable energy facilities and networks to an extent that could not be achieved

³⁵ J. Säcker, *Das Verhältnis von Wettbewerbs- und Regulierungsrecht*, EnWZ 2015, p. 534.

³⁶ Cf. § 11 (1) EnWG; F. Gärditz, W. Kahl, (in:) *Umweltrecht*, W. Kahl, F. Gärditz (ed.) 12th Edition, München: 2021, § 6 Marginal No. 88.

³⁷ L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 134.

³⁸ L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 135.

³⁹ L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 134; for a more comprehensive view on the problems of infrastructure planning in the context of the energy transition see Franzius, *Infrastrukturen zwischen Regulierung und Planung*, EnWZ 2022, p. 302 *et seq.*

⁴⁰ Cf. § 12 (1) EnWG; on the dispute as to whether the concept of grid expansion also covers quantitative expansion see C. König, (in:) *Berliner Kommentar zum Energierecht*, J. Säcker, J. Steffens (ed.), Volume 8, 5th Edition, Frankfurt am Main: 2022, § 12 EEG Marginal No. 34 *et seq.*

⁴¹ §§ 11 (1) Sentence 1, 12 (3) EnWG.

⁴² J. Säcker, (in:) *Berliner Kommentar zum Energierecht*, J. Säcker (ed.), Volume 1, 4th Edition Frankfurt am Main: 2018, Chapter 1 A, Marginal No. 1 (own translation).

⁴³ For a more comprehensive view on the specific concept of the German *Energiewende* see M. Ludwigs, *Die Energiewende im Zeichen des Europa- und Verfassungsrechts*, RW 2014, p. 254 *et seq.*

⁴⁴ In this sense, also J. Säcker, (in:) *Berliner Kommentar zum Energierecht*, J. Säcker (ed.), Volume 1, 4th Edition, Frankfurt am Main: 2019, Chapter 1 A., Marginal No. 3 (own translation).

⁴⁵ The integrative, cross-sectoral legal Act in German in terms of climate protection is the Federal Climate Change Act (German: *Bundes-Klimaschutzgesetz* - KSG), Art. 1 of the Act of 12 December 2019 (Federal Law Gazette: BGBl. I p. 2513), last amended by Art. 1 of the Act of 18 August 2021 (Federal Law Gazette: BGBl. I p. 3905).

within the existing system focused on short-term stability. A significant change with the *Energiewende* was that new objectives focused on transformation were added alongside the previously pursued regulatory ones. Initially, these did not affect the grid stability and, therefore, did not immediately generate a need for network expansion. At the same time, there were no relevant significant economic incentives within the established system for the mostly private market-oriented actors to expand the network for future challenges or to change the existing supply structures on a large scale and at a fast pace. As a consequence, an expansion gap arose with regard to RES facilities and infrastructure construction in pursuit of the goals of the *Energiewende*. The change in the supply structures has significantly contributed to the problem of increased demand for network infrastructure. The energy transition has led to a greater spatial divergence between generation and consumption,⁴⁶ as the expansion of renewable energy facilities has primarily occurred in the most profitable regions due to the fiction of a bottleneck-free market area without context to other infrastructures. Regulatory law, understood as the ‘legal implementation of the insights of network economics’,⁴⁷ created to promote competition in parts of the energy supply, did not provide the necessary instruments to adequately meet these challenges. Correspondingly, legal regulations outside of regulatory law have been created, in particular, certain projects were normatively declared as ‘overriding public interest’ and ‘in the interest of public safety’, namely in § 1 (2) Sentence 3 EnLAG, § 1 Sentence 3 NABEG and §1 (1) Sentence 2 of the BBPlG. Recently, § 3 Sentence 3 of the LNG Acceleration Act (LNG-G)⁴⁸ was added.

3. THE ‘OVERRIDING PUBLIC INTEREST’ AS A GOVERNMENT INSTRUMENT

a) Existing Regulations

Initially, in 2009, the Energy Networks Expansion Act was enacted, which classified the expansion of some high-voltage power lines as urgently needed and affirmed their necessity, even before the initiation of a planning permitting pro-

⁴⁶ J. Senders, N. Wegner, *Die Bedarfsplanung von Energieinfrastrukturen*, EnWZ 2021, p. 243.

⁴⁷ J. Säcker, *Das Verhältnis von Wettbewerbs- und Regulierungsrecht*, EnWZ 2015, p. 534 (own translation).

⁴⁸ German: *Gesetz zur Beschleunigung des Einsatzes verflüssigten Erdgases* (LNG-Beschleunigungsgesetz), Act of 24 May 2022 (Federal Law Gazette: BGBl. I p. 802), last amended by Art. 1 of the Act of 12 July 2023, Federal Law Gazette: BGBl. 2023 I No. 184; on the constitutionality of this law, see I. Gillich, *Das “überragende öffentliche Interesse” an der beschleunigten Umsetzung industrieller Großprojekte*, DÖV 2022, p. 1029 *et seq.*

cedure (German: *Planfeststellungsverfahren*).⁴⁹ The basis for the selection of the lines was primarily the 'dena-Netzstudie-I'⁵⁰ and the guidelines for the Trans-European Energy Networks (TEN-E) of the EU,⁵¹ both of which are based on private planning.⁵² After that, in 2011, primarily in response to the needs of the *Energiewende*,⁵³ the Grid Expansion Acceleration Act came into force. In this legal act, the law regarding the planning and permit-granting process is regulated in one legal act at the federal level – the NABEG. It regulates the federal planning and planning approval procedure for transmission line corridors. This law also does not represent statutory but a positive legal codification of private planning. The NABEG serves the purpose of the realisation of network expansion projects based on the federal demand plan, which is based on the confirmed network development plan of the transmission system operators^{54,55} Finally, in 2013, the BBPIG came into force. It legally institutionalises the Federal Requirement Plan and establishes the energy-economic necessity, as well as the urgent need for the projects listed therein to ensure a safe and reliable grid operation.

These regulations reflect the division of tasks and responsibilities between the state and private entities. Operation and expansion of the energy supply network are the 'tasks of the network operators'⁵⁶ and are also financed by them, while the state withdraws to its responsibility for ensuring availability as a fallback responsibility.⁵⁷ Although the Federal Network Agency (BNetzA) now has ultimate decision-making authority, conceptually, it is only assigned ex-post con-

⁴⁹ L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 192.

⁵⁰ dena-Netzstudie – Energiewirtschaftliche Planung für die Netzintegration von Windenergie in Deutschland an Land und Offshore bis zum Jahr 2020 of 24 February 2005, accessible online: <https://www.dena.de/newsroom/publikationsdetailansicht/pub/studie-dena-netzstudie-i/>.

⁵¹ Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC, OJ L 262, 22 September 2006, pp. 1–23.

⁵² L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 192.

⁵³ For a more comprehensive view on the subject of the state's guarantee responsibility concerning energy supply see M. Schiller, *Staatliche Gewährleistungsverantwortung und Sicherstellung von Anschluss und Versorgung im Bereich der Energiewirtschaft*, Baden-Baden: 2012. This responsibility is characterised above all by regulatory responsibility (M. Schiller, *Staatliche Gewährleistungsverantwortung und Sicherstellung von Anschluss und Versorgung im Bereich der Energiewirtschaft*, Baden-Baden: 2012, p. 126).

⁵⁴ Cf. § 1 (1) Sentence 1 BBPIG in conjunction with § 12e (1, 4) EnWG.

⁵⁵ L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 192 *et seq.*

⁵⁶ Cf. Heading of Section 1.1 in Part 3 of the EnWG as well as §11 (1) EnWG (own translation).

⁵⁷ Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, pp. 124–125.

trol.⁵⁸ Materially, the regulations address the discrepancy between the economic concept of demand⁵⁹ and the notion of demand in terms of public services, which is not (only) the result of market-based considerations but also the ones concerning normative goals.⁶⁰ The desired acceleration effect should be achieved – next to other measures⁶¹ – by simplifying issuing exemption decisions under nature conservation law, in particular under §§ 34 (3), 45 (7) Sentence 1 No. 5 Federal Nature Conservation Act (BNatSchG)⁶², in regards to the respective power line projects on a case-by-case basis.⁶³ This shifts the burden of justification carried by the authorities in charge to the case scenario where such a project is to be denied due to conflicting interests.⁶⁴ In this way, the approval level is also addressed but only in the special regime of the planning approval procedure which has been established for these projects.

b) Recent Reforms

The Russian attack on Ukraine in February 2022 gave a ‘dramatic urgency’⁶⁵ to the systemic restructuring of the energy supply, to which the German legisla-

⁵⁸ J. Senders, N. Wegner, *Die Bedarfsplanung von Energieinfrastrukturen*, EnWZ 2021, p. 246.

⁵⁹ This describes ‘a need endowed with purchasing power that appears on the market as a request for an economic good’ (Köck, [in:] *Das Instrument der Bedarfsplanung - Rechtliche Möglichkeiten für und verfahrensrechtliche Anforderungen an ein Instrument für mehr Umweltschutz*, W. Köck, J. Bovet, H. Fischer, G. Ludwig, S. Möckel, K. Faßbender, UVA Texte 55/2017, p. 64 [own translation]).

⁶⁰ J. Senders, N. Wegner, *Die Bedarfsplanung von Energieinfrastrukturen*, EnWZ 2021, p. 244.

⁶¹ The EnLAG aimed to achieve acceleration through statutory planning requirements primarily by the means of legally establishing the need for planning, which is an essential requirement if seeking for an approval for the realization of the projects governed there; in other words, the burden of proof that would normally apply to the authorities in this context was meant to be eliminated (for the presumption of the urgent necessity of line development projects set out in this legal act cf. U. Prall, W. Ewer, [in:] *Umweltrecht*, H. Koch, E. Hofmann, M. Reese [ed.], 5th Edition, München: 2018, § 9 Marginal No. 151). In contrast, with the NABEG the approval regime for some chosen extra-high voltage lines was changed as a whole (M. Appel, [in:] *Berliner Kommentar zum Energierecht*, J. Säcker [ed.], Volume 1, 4th Edition, Frankfurt am Main: 2019, NABEG, foreword, Marginal No. 1).

⁶² German: *Gesetz über Naturschutz und Landschaftspflege* (Bundesnaturschutzgesetz), Art. 1 of the Act of 29 July 2009 (Federal Law Gazette: BGBl. I p. 2542), last amended by Art. 3 of the Act of 8 December 2022 (Federal Law Gazette: BGBl. I p. 2240).

⁶³ This rationale underpins all three regulations (A. Versteyl, K. Marschhäuser, *Überragendes öffentliches Interesse als Abwägungsbelang zur Beschleunigung von Klimaschutzvorhaben*, KlimR 2022, p.75); cf. for § 1 (1) Sentence 3 NABEG Wiesendahl, (in:) *Energierecht*, C. Theobald, J. Kühling (ed.), 119th Edition, February 2023, München 2023, § 1 NABEG Marginal No. 19-20.

⁶⁴ M. Appel, (in:) *Berliner Kommentar zum Energierecht*, J. Säcker (ed.) Volume 1, 4th Edition, Frankfurt am Main: 2019, § 1 NABEG Marginal No. 16.

⁶⁵ G. Hermes, *Die Systementwicklungsplanung – Instrument zur klimagerechten Transformation des Energierechts*, EnWZ 2022, p. 99 (own translation).

ture responded primarily by enacting the so-called *Sofortmaßnahmen-Novelle*⁶⁶.⁶⁷ This omnibus act (German: *Artikelgesetz*) has realigned German energy law, which is reflected, in particular, in the Renewable Energy Sources Act, which now aims not only to promote the expansion of renewable energy but to transform the power supply system to a sustainable and greenhouse gas-neutral one that is completely based on renewable energy sources.⁶⁸ Consequently, § 2 EEG has been revised, which now in Sentence 1 contains a directive with a positive pre-setting (German: *positive Abwägungsdirektive*) that aims to give greater enforceability to projects subject to official balancing processes.⁶⁹ While the chosen formulation is not new, as it draws inspiration from § 1 (2) Sentence 3 EnLAG, § 1 Sentence 3 NABEG, and § 1 (1) Sentence 2 BBPlG and the acceleration instrument – easing the burden of argumentation – is already known, what is exceptional is the substantive legal approach of general scope that will have an impact on all relevant administrative discretionary decisions in the specialized legal field.⁷⁰ In addition, § 2 Sentence 2 EEG has been established as a norm with a qualitative difference from the previous ones. It creates a weighting requirement that establishes a rule presumption with absolute weighting priority for the admissibility of renewable energy plants in individual cases when balancing legal interests; nevertheless including the possibility to allow sufficiently weighty conflicting interests to prevail, albeit only in atypical cases.⁷¹ This technology-neutral acceleration element is reinforced especially for wind energy by technology-specific regulations which repeat and reinforce the preadjustment of § 2 EEG for the granting of permits for wind energy installations,⁷² namely §§ 1 (3) Wind Energy at Sea Act (Wind-SeeG)⁷³ and 45b (8) No. 1 BNatSchG.

⁶⁶ Act on Immediate Measures for the Accelerated Expansion of Renewable Energies and Further Measures in the Power Sector (German: *Gesetz zu Sofortmaßnahmen für einen beschleunigten Ausbau der erneuerbaren Energien und weiteren Maßnahmen im Stromsektor*) of 20 July 2022, Federal Law Gazette: BGBl. I p. 1237, 2023 I No. 87, last amended by Art. 2 of the Act of 19 December 2022, Federal Law Gazette: BGBl. I p. 2479.

⁶⁷ § 3 LNG-G is not discussed here, as it does not concern the electricity sector but the one of (natural) gas (N. Kämper, [in:] *BeckOK VwVfG*, J. Bader, M. Ronellenfisch [ed.], 60th Edition, München: 2023, § 72 VwVfG Marginal No. 31h).

⁶⁸ § 1 (1) EEG.

⁶⁹ S. Schlacke, H. Wentzien, D. Römling, *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?*, NVwZ 2022, p.1578.

⁷⁰ S. Schlacke, H. Wentzien, D. Römling, *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?*, NVwZ 2022, p.1586.

⁷¹ S. Schlacke, H. Wentzien, D. Römling, *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?*, NVwZ 2022, p.1578.

⁷² For storage assets cf. § 11c EnWG.

⁷³ German: *Gesetz zur Entwicklung und Förderung der Windenergie auf See* (Windenergie-auf-See-Gesetz), Art. 2 of the Act of 13 October 2016 (Federal Law Gazette: BGBl. I p. 2258, 2310), last amended by Art. 14 of the Act of 22 March 2023 (Federal Law Gazette: BGBl. 2023 I No. 88).

At the European level, Art. 3 Sentence 1 Regulation (EU) 2022/2577 establishes that the planning, construction, and operation of facilities and installations for the generation of energy from renewable sources, as well as their grid connection, the relevant grid itself, and the storage assets shall be presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in individual cases. This rebuttable presumption,⁷⁴ the scope of which is limited to four exhaustively listed balancing decisions in European environmental and biodiversity law,⁷⁵ was introduced in December 2022. Additionally, paragraph 2 of the Article requires prioritization of RES projects that have been recognized as serving the public interest in the case-by-case weighing of legal interests. In substance, Art. 3 of Regulation (EU) 2022/2577 anticipates planned Art. 16d of RED IV-E⁷⁶ and already gives effect to its regulatory content before the enactment of the legal act.⁷⁷

c) Interim Conclusion

The scope of state control over the energy sector has gradually expanded,⁷⁸ parallel to the implementation of the political concept of the energy transition. Initially, limited to traditional regulatory tasks, carried out by the BNetzA, which is independent of state directives, at least in its core area of network tariff setting and access regulation, state control has expanded to cover parts of network planning and now passed through the decision-making level of planning and permit-granting processes of renewable energy facilities, related infrastructure, and storage. This is consistent insofar as this high zoning is accompanied by a decision on the content of the public interest, which accordingly requires a majority decision by society as a whole, and thus, a parliamentary act.⁷⁹ At the same

⁷⁴ Cf. recital (4, 6) Council Regulation (EU) 2022/2577.

⁷⁵ Namely, when balancing legal interests in the individual case for the purposes of Art. 6 (4) and Art. 16 (1) lit. c of the Habitats Directive (OJ L 206, 22 July 1992, pp. 7–50), Art. 4 (7) Water Framework Directive (OJ L 327, 22 December 2000, pp. 1–73) and Art. 9 (1) lit. a Birds Directive (OJ L 20, 26 January 2010, pp. 7–25).

⁷⁶ 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 from 18 May 2022, COM(2022) 222 final.

⁷⁷ On the general function of the Council Regulation (EU) 2022/2577 as a ‘bridge’ cf. S. Schlacke, E. Thierjung, *Krisenbewältigung durch EU-Ratsverordnung zur Beschleunigung des Ausbaus erneuerbarer Energien: Überbrückung durch Notfallrecht*, EnK-Aktuell 2023, 01011.

⁷⁸ Thus, with regard to the EnLAG, de Witt speaks of the first step on the way to transforming energy law towards governmental control of transmission grids (S. de Witt, [in:] *NABEG*, S. de Witt, F. Scheuten [ed.], München: 2013, EnLAG § 1 Marginal No. 1).

⁷⁹ In this context, Gillich speaks of a graded responsibility for concretization, which is characterized to a considerable extent by the legislature’s competence to elevate certain goods to the rank of public interests through its own balancing decision (I. Gillich, *Das „überragende öffentliche Interesse“ an der beschleunigten Umsetzung industrieller Großprojekte*, DÖV 2022, p. 1033).

time, however, there is an expansion or deepening of the state’s access to energy-economic structures, although, partially for a limited period of time,⁸⁰ outside of market-economy incentive instruments with the use of relative consideration directives at the project approval level.

IV. CONCLUSION

Against the background of multiple crises, a change in values has recently taken place in European and national energy policy, at least at the level of legislative power. The expansion of possibilities for using renewable energies is now qualified as a public interest in order to achieve the overriding target of transforming the energy system. At the same time, this public interest was given priority over others (§ 2 EEG, Art. 3 Regulation (EU) 2022/2577).⁸¹ Thus, on the one hand, the relevant regulations are a positive legal concretisation of a political value decision; on the other hand, they are coincidentally an instrument for its implementation.⁸² Its first practical results can already be identified.⁸³

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⁸⁰ In the case of § 2 Sentence 2 EGG, the temporal restriction is obtained by the condition that the priority position only exists until electricity generation in the federal territory is almost greenhouse gas neutral. At European level, the application of Art. 3 of the Regulation (EU) 2022/2577 is initially limited to 18 months (Art. 10 (2) Council Regulation (EU) 2022/2577).

⁸¹ The limit of this prerogative of assessment is laid down in the constitution (I. Gillich, *Das “überragende öffentliche Interesse” an der beschleunigten Umsetzung industrieller Großprojekte*, DÖV 2022, p. 1033).

⁸² On the concept of ‘public interest’ as means of legal control R. Uerpmann, *Das öffentliche Interesse: Seine Bedeutung als Tatbestandsmerkmal und als dogmatischer Begriff*, Tübingen: 1999, p. 321 *et seq.*

⁸³ So, cf., e.g., the ruling of the Higher Administrative Court for the State of Mecklenburg-Western Pomerania from 23 February 2023 (5 K 171/22) or the ruling of the Higher Administrative Court of North Rhine-Westphalia from 27 October 2022 (22 D 363/21.AK).

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