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Introduction

David Langlet

Welcome to the thirty-third regular issue of the Nordic Environmental Law Journal. While the latest issue, published in September 2024, was a special issue on rights of nature, this is again a regular issue of the journal. This time it comprises four articles, dealing with a range of topical issues, some centred on a specific national context while others address issues of a wider European nature.

In “Will European biodiversity be sacrificed on the Green Transition altar...? – Perspectives on habitats and species protection in times of energy crises”, Jan Darpö asks what impact new EU legislation on energy efficiency and renewables can be expected to have on biodiversity protection. He looks more specifically at how the revised version of the Renewables Directive (2018/2001) – the “RED III” – squares with requirements for good governance under EU environmental law. Among his conclusions is that some of the new provisions are unlikely to go well with national permit regimes for renewables, both with respect to biodiversity protection and in terms of their impact on the effectiveness of the permit procedures.

In the second article, “Vern av marin natur eller vern av aktiviteter? Et lite ambisiøst norsk lovforslag om vern av marin natur” [Protection of the marine environment or protection of activities? An unambitious Norwegian bill on the protection of the marine environment] Lena Schøning analyses a proposed Norwegian act on marine protected areas. Her assessment concerns both the act’s ability to meet the protection targets of the Kunming-Montreal Global Biodiversity Framework, as well as the act’s legal effects on existing and future activities in Norwegian marine areas. In most parts, Schøning finds, the proposal is not fit to achieve the protection targets and will rather protect existing activities than the marine environment.

In “Planeringens roll för lokaliseringen av ny vindkraft i Sverige” [The role of planning for the location of new wind power in Sweden] Aron Westholm draws on a survey of Swedish wind power developers to assess what role the national planning system, according to which areas may be designated as being of national interest for different uses, plays for the location of new wind farms. Interestingly, developers do not find the designation of an area as being of national interest for wind power to be an important factor for the location for new wind power. While discussing reasons for this, and what it means for the planning system of the Swedish environmental code, he identifies a need for further and more in-depth studies on the role of planning for wind power development in Sweden.

The fourth article is entitled “The role of the voluntary carbon market in achieving national climate targets in Europe: A case for systems thinking”. In it Hrafnhildur Bragadóttir is inspired by systems thinking in her analysis of the relationship between national and corporate climate target frameworks in Europe. More specifically Bragadóttir looks at potential effects of linking the carbon markets used by companies to meet their voluntary commitments to national climate commitments under EU law and the Paris Agreement. Without regulatory reform, she sees a real risk that reliance on voluntary carbon market activities to advance national climate targets could undermine climate objectives, particularly due to risks of double claiming and non-additionality.

Will European biodiversity be sacrificed on the Green Transition altar...?

– Perspectives on habitats and species protection in times of energy crises

Jan Darpo*

Abstract

This article concerns the new legislation on energy efficiency and deployment of renewables, and its presumed consequences for biodiversity issues in Europe. The overriding question is how key components of the revised version of the Renewables Directive (2018/2001) – the “RED III” – will function together with some of the basic requirements for good governance in decision-making under EU environmental law. Most importantly, the new legislation contains planning instruments, requirements on the national decision-making processes such as time limits, and a declaration that renewables are of overriding public interest in serving public health and safety when balancing them against nature conservation interests.

The author’s conclusion is that the reform contains pros and cons: On the one hand, planning is an instrument well suited for resolving conflicts concerning widespread land-use activities such as renewable energy installations. Planning may also provide for a more comprehensive approach to biodiversity issues in this context. On the other hand, the reform is one sided in focusing on the lessening of administrative burdens. It is shown why some of the provisions will function less well within the national permit regimes on renewables, concerning biodiversity issues as well as in relation to the effectiveness of the procedure as such. It also remains to be seen how the national courts and the CJEU will deal with the problems related to conflicts created by the introduction of new provisions in existing legislation while at the same time leaving that legislation intact.

Keywords: Renewable energy, EU Renewable Directive, RED III, environmental decision-making, renewable acceleration areas, planning, permit procedure, time limits, overriding public interest, public health and safety, biodiversity, species protection, nature conservation

1. Introduction

This contribution concerns the new legislation on energy efficiency and deployment of renewables, and its presumed consequences for biodiversity issues in Europe. The overriding question is how key components in the coming legislation will function together with some of

the basic requirements for good governance in decision-making in the field of EU environmental law. The point of departure is the revised version of the *EU Renewables Directive (2018/2001)*, the so-called *RED III*¹ from 2023. The discussion will also include some comparisons with other coming pieces of legislation on renewables un-

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¹ I use the term “RED III” for the revised Directive (2018/2001) on the promotion of the use of energy from renewable sources, as amended by Regulation (EU) 2022/759 of December 2021 and Directive 2023/2413 of October 2023. For the consolidated version, see; Consolidated TEXT: 32018L2001 – EN – 20.11.2023 (europa.eu).

der the Green Transition.² As for the encounter with environmental law, the focus of this paper is on the obligations regarding nature conservation and species protection under the Birds Directive (2009/147) and the Habitats Directive (92/43).³ Although existing permitting proce-

² https://reform-support.ec.europa.eu/what-we-do/green-transition_en.

³ Valuable contributions to the discussion about RED III and EUs biodiversity obligations can be found in Tegner Anker, H & Egelund Olsen, B: *EU Species Protection Law and Wind Energy: Current Challenges and Danish Experiences* (European Energy and Environmental Law Review, February 2023, pp. 36–47), Malafry, M: *Renewable energy Activities – Overriding the interests of biodiversity?* (In *Hållbarhet ur ett rättsligt perspektiv*, de Lege, Yearbook 2022 of the Faculty of Law, Uppsala Universitet. Iustus 2023), Jendroska, J Anapyaova, A: *Towards a green energy transition: REPower Directive vs Environmental Acqis?* Environmental Law Network International (ELNI) 2023 pp. 1–5 and Montini, M: *Addressing the conflicts between climate-related renewable energy goals and environmental protection interests under the RED Directive* (European Law Open (2024), pp. 209–219 Cambridge University Press). Further, there are also quite a few scholarly contributions on RED III within the discourse of Energy law, out of which *Seeking to deliver renewable energy infrastructure within a ‘incomplete and vague’ legal framework* (Carbon and Climate Law review (CCLR) 2022 pp. 192–204) and *Climate, Energy – and Environment? Reconciliation of EU environmental law with the implementation realities of EU climate law* (Climate Law 2022 pp. 242–272), both by Alison Hardiman, can be mentioned. Even though legal scholars within this discourse tackle the true conflict between climate and biodiversity, it is challenging to discuss these matters from their perspective, as the opposing interests to renewables commonly are described as “barriers” only, according to which the permit bodies and courts take excessive account of “local flora and fauna” as well of the interests of nearby communities. As for the environmental issues, I have never come across a case where such local impacts on flora and fauna have been decisive, at least not concerning the application of the EU Nature Directives. Concerning the opposition from local communities, the overarching theme in the Energy law discourse seems to be the need for lessening of the requirements for public participation and access to justice according to Aarhus. Strangely enough, these ideas seem only to apply to the public concerned, never to the operators. Here, I draw my line for discussion as I regard the principle of judicial protection as one of the key pillars of environmental democracy within the EU which may not be questioned.

dures for wind farms will be used as illustrative examples, drawing from the Swedish experience, the discussion will be held at a general level for the European reader.⁴

2. REPowerEU Plan

The REPowerEU Plan was launched in May 2022 in response to Russia’s invasion of Ukraine and the resulting energy crises in Europe.⁵ The aim of the plan is to save energy, to accelerate the transition towards a fossil-free society, and to diversify EUs energy supplies. The first step in lawmaking of relevance for environmental permitting procedures came with the so-called Emergency Regulation (EU) 2022/2577.⁶ In order to mitigate the effects of the energy crisis, this legislation established temporary rules to accelerate the permit-granting processes for the production of energy from renewable energy sources, as well as for grid and infrastructure projects that are needed to integrate renewable energy into the electricity system. The Emergency Regulation introduced most of the key components recurring in RED III, such as acceleration areas for renewables, timelines for the permitting processes, positive silence rules⁷ and a presumption

⁴ Those who are interested in environmental permitting procedures in the Nordic countries may find some information in Darpö, J: *Nordic Environmental Permitting Processes – results from a comparative study of environmental law and processes in Denmark, Norway, Iceland, Sweden, and Finland*. Nordic Council of Ministers (Nordiska rådet) 2023-07-03.

⁵ REPowerEU (europa.eu).

⁶ Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy.

⁷ Or “tacit agreements” or “deemed approval”. The opposite is “negative silence” rules – also called “implied dismissals” or “deemed refusals” – which can be found in Article 10(6) of the EC Merger Regulation 139/2004. In the field of environmental law, Article 8(3) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, states that the failure of the institution to reply within the prescribed time limit shall be considered as a negative re-

that renewable energy projects are of “overriding public interest”. Becoming directly applicable in the Member States from 30 December 2022, it was meant to expire on 30 June 2024 when it was supposed to be replaced by RED III. However, after a short evaluation by the Commission,⁸ most articles were prolonged for an additional year to make the transition seamless and more structured for the Member States.⁹

The revision of the Renewables Directive (2018/2001, RED) was finally decided in October 2023 (Directive 2023/2413). In it, the scope of Directive 2018/2001 is expanded, and the demand sectors are covered more comprehensively. Targets for the share of renewables are set for industry, transport, heating and cooling, as well as for buildings. The mandatory sustainability criteria concerning forest biomass are further specified in line with the principle of sustainable forest management. RED III includes provisions to streamline procedures for the permitting of renewable energy projects through spatial planning, simplification and shortening of time frames. Parts of the new provisions were to be implemented in the Member States by 1 July 2024, while another 18 months may be used for others. An important step in the implementation of RED III is the requirement for the Member States to set up and report to the Commission National Energy and Climate Plans (NECP). In the NECP, each Member State is obliged to show its proposals on how to contribute to the fulfilment of the 42,5% tar-

ply and entitle the applicant to institute court proceedings and/or make a complaint to the Ombudsman. Such negative silence rules have also taken root in Member State laws and are today quite common (see opinion by Advocate General Wahl in C-58/13 and C-59/13 *Torresi* (2014), at para 70).

⁸ 8f706e90-9a36-4d01-aac8-846cbd3d9d60_en (europa.eu).

⁹ Council Regulation (EU) 2024/223 of 22 December 2023 amending Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy.

get for the share of renewable energy in the EUs overall energy consumption by 2030.

There are obviously many more initiatives from the EU to further the Green Transition that may have an impact on environmental issues raised in different permit regimes under EU law. The *Critical Raw Materials Act* (CRMA) aims at ensuring access to a secure, diversified, affordable and sustainable supply of critical raw materials in the EU.¹⁰ In addition, the Net Zero Industry Act (NZIA) sets up the goal to make the EU home to clean technologies and to facilitate progress towards a strong domestic manufacturing capacity of those technologies.¹¹ Both these Regulations contain solutions similar to the Emergency Regulation and RED III, such as designating strategic projects, planning, and setting time limits for the permit-granting procedure. It is also worth mentioning the *European Wind Power Action Plan*, launched by the Commission in October 2023.¹² Although the proposals here align with the general trends in the above-mentioned legislation, they are mostly of a “softer” nature, such as guidelines, common digital tools, initiatives for the exchange of “best practices”, recommendations on how to improve auction designs, and financial measures. Even so, they are helpful in understanding the direction of the EU’s commitment to the achievement of climate

¹⁰ Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020.

¹¹ Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe’s net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724.

¹² COM(2023) 669 final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *European Wind Power Action Plan*. Brussels 24.10.2023.

neutrality and to the fulfilment of its international obligation to maintain and improve biodiversity in nature.

3. The rules for permit-granting procedures in RED III

An overview of the new regime

To begin with, RED III gives a more comprehensive definition of “renewable energy” compared with its predecessors. According to Article 2(1), the definition covers energy from renewable non-fossil sources, that is, wind, solar and geothermal energy, osmotic energy, ambient energy, tidal, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas.¹³ New concepts introduced with the 2023 reform are defined, such as “renewables acceleration area”, meaning a specific area on land, inland waters or sea designated as particularly suitable for the installation of renewable energy plants (Article 1(9a)). Interestingly, a definition of “permit-granting procedures” is lacking from the catalogue in Article 2. Instead it is given in Article 16(1):¹⁴

The permit-granting procedure shall cover all relevant administrative permits to build, repower and operate renewable energy plants, including those combining different renewable energy sources, heat pumps, and co-located energy storage, including power and thermal facilities, as well as assets necessary for the connection of such plants, heat pumps and storage to the grid, and to integrate renewable energy into heating and cooling networks, including grid-connection permits and, where required, environ-

mental assessments. The permit-granting procedure shall comprise all administrative stages from the acknowledgment of the completeness of the permit application in accordance with paragraph 2 to the notification of the final decision on the outcome of the permit-granting procedure by the relevant competent authority or authorities.

Article 3(4a) of RED III requires Member States to establish a framework enabling the deployment of renewable electricity to a level that is consistent with the set national contribution and the indicative trajectories referred to in RED III. That framework is intended in particular to tackle remaining barriers to a high level of renewable electricity supply, including those related to permit-granting procedures, and the development of the necessary transmission, distribution and storage infrastructure.

Rules on administrative procedures and environmental permitting are given in twelve new provisions in Articles 15, 15b–15e and 16–16f. First, it is stated that the Member States shall ensure that the national rules concerning the authorisation, certification and licensing procedures applied to plants and transmission for renewables are proportionate and necessary and contribute to the implementation of the energy efficiency first principle. Administrative procedures shall be streamlined and expedited at the appropriate level and given predictable time frames. Rules on the procedure are required to be objective, transparent, proportionate, and non-discriminatory (Article 15).

According to Article 15b, by 21 May 2025, Member States shall carry out a coordinated mapping for the deployment of renewable energy in their territory to identify the potential of land and water areas for the installation of renewable energy plants and their infrastructures necessary to meet their national contributions

¹³ One may note that nuclear power is not covered in this definition, although it is still mentioned as a net-zero technology in the NZIA.

¹⁴ The wording of Article 16(1) of RED III mirrors the definition in Article 2(1) of the Emergency Regulation (EU) 2022/2577.

towards the overall EU renewable energy target for 2030.

Renewable Acceleration Areas and Dedicated Infrastructure Areas

Renewable Acceleration Areas are regulated in Article 15c, which requires Member States to adopt one or more plans for renewable energy sources where the deployment is not expected to cause significant environmental impact. Biomass and hydropower may be excluded. Priority is to be given to artificial and built surfaces and their direct surroundings, whereas Natura 2000 sites, national nature reserves and major migratory routes for birds and mammals must be avoided. Appropriate rules on effective mitigation measures to avoid adverse environmental impacts are required to be adopted for the installations and their connection to the electric grid. When this is not possible, measures to reduce such impact are required to be prescribed to ensure compliance with Articles 6(2) and 12(1) of the Habitats Directive (92/43), Article 5 of the Birds Directive (2009/147) and Article 4(1), point (a)(i) of the Framework Water Directive (2000/60).

These rules for mitigation must be targeted to the specificities of each renewable acceleration area and type of renewables. Compliance with the prescribed measures creates a presumption that the projects in the acceleration areas are not in breach of the nature conservation or species protection obligations in those directives. New mitigation technologies and measures may be tested for a limited period if closely monitored, and appropriate steps have to be taken if those measures prove to be ineffective. Before the adoption of a renewable acceleration area, a Strategic Impact Assessment is required to be undertaken according to Directive 2001/42, and, if the plan is likely to have a significant effect on a Natura 2000 site, an Appropriate Impact As-

essment (AIA) must be undertaken according to Article 6(3) of the Habitats Directive (92/43).

The acceleration areas must undergo periodic review, particularly in the context of the updating of the National Energy and Climate Plans (NECP) every ten years (Article 15c). Similar provisions are given in Article 15e for areas with grid and storage infrastructure necessary to integrate renewables into the electric system (“dedicated infrastructure areas”), which aim to support and complement the renewable acceleration areas. Finally, according to Article 15d, public participation must be ensured in line with Article 6 in the SEA Directive (2001/42).

Main principles and organisation of the procedure

Article 16 of RED III contains rules on the organisation and main principles of the permit-granting procedure. These provisions apply both inside and outside the renewable acceleration areas. As noted, the procedure is intended to cover all relevant administrative permits to build and operate renewable energy plants and their connection to the grid, including environmental assessments. The procedure must comprise all administrative stages from the acknowledgement of a complete application to the final decision. A decision on whether an application is complete or not shall be issued by the competent authority within 30 days if the project will be performed in a acceleration area, or within 45 days in other cases. When an application is not complete, the competent authority must request the applicant to submit the missing information without undue delay.

Member States are also required to appoint one or more contact points whose task is to inform and guide the applicant throughout the procedure and ensure that the deadlines are met. Applications may be submitted in digital form. An applicant shall not be required to con-

tact more than one contact point during the entire procedure. Further, Member States shall ensure that those concerned in a permit procedure have easy access to alternative dispute resolution mechanisms. All appeals are to be handled in the most expeditious manner possible.

Still another provision of general applicability is given in Article 16f, which states that, from 21 February 2024 until climate neutrality is achieved, Member States shall ensure that, in the permit-granting procedure, renewables shall be presumed to have overriding public interest and to serve public health and safety when balancing different interests according to Article 9(1) of the Birds Directive (2009/147), Articles 6(4) and 16(1) of the Habitats Directive (92/43), as well as Article 4(7) of the Framework Water Directive (2000/60).

Permit-granting procedure within renewable acceleration areas

The permit procedure for projects within renewable acceleration areas is regulated in Article 16a. To begin with, time limits are stated: the procedure as a whole for the permitting of renewables on land may not exceed 12 months, and may not exceed 24 months for off-shore projects. Under extraordinary circumstances those deadlines may be extended by up to 6 additional months. For the repowering of renewable energy plants and their grid connection, the time limit is six months.

As already noted, projects within acceleration areas are presumed to not cause any significant effect to the environment according to Article 4(2) in the EIA Directive (2011/92) or Article 6(3) of the Habitats Directive (92/43). Therefore, if the project complies with the requirement for mitigation measures in Article 15c, it is exempted from carrying out an Environmental Impact Assessment (EIA) and an Appropriate Impact Assessment (AIA) according to those directives.

Even so, the competent authority must undertake a screening process to clarify if the project is likely to give rise to significant unforeseen adverse effects that were not identified in the SEA for the plan. For this evaluation, the project developer is to provide information about the mitigation measures for the project, and the screening process must be concluded within 45 days. If the competent authority has not decided on the matter within that deadline, the project is authorized from the environmental perspective without any express decision (a so-called “positive silence rule”). In contrast, if the authority finds that the project may give rise to significant unforeseen adverse effects to the environment that cannot be mitigated with the measures prescribed in the renewable acceleration area, an EIA/AIA is required to be performed within 6 months. However, Member States may exempt wind and solar projects from such assessments under the condition that the operator adopts proportionate mitigation measures, or alternatively, undertakes or pays for compensating programs.

Permit-granting procedure outside renewable acceleration areas

The rules of procedure are somewhat different outside the renewable acceleration areas (Article 16b). First, different time limits apply: 2 years for the granting of a permit for renewables on land, 3 years for off-shore projects. When an EIA is required, it is to be carried out in a single procedure in which all relevant assessments are combined. The competent authority must issue an opinion on the scope and detail of the EIA, and the scope may not be subsequently extended. If the permit conditions for the project contain necessary mitigation measures, any killing or disturbances of the species protected under Article 5 of the Birds Directive (2009/147) and Article 16(1) of the Habitats Directive (92/43) shall be treated as not being deliberate.

Repowering

“Repowering” is defined in Article 2(10) as

“renewing power plants that produce renewable energy, including the full or partial replacement of installations or operation systems and equipment for the purposes of replacing capacity or increasing the efficiency or capacity of the installation.”

Shorter time-limits apply to those projects. In addition, there is also a limitation to the requirements under the EIA Directive (2011/92) for the repowering of a renewable energy plant. Both the screening and the assessment are limited to the potential impacts from the change or extension, compared with those of the original project (Article 16c).

4. Analysis and discussion

Introduction

In this section, I will analyse and discuss the main issues in RED III concerning the environmental permitting procedure. However, this analysis is a preliminary one, limited to highlighting some points for further discussion, as we are only in the beginning stage of the implementation of RED III in the Member States.

The general discourse

For obvious reasons, the preambles of the Emergency Regulation (EU) 2022/2577 and the Directive 2023/2413 are largely coloured by the energy crises in Europe after Russia’s invasion of Ukraine and the subsequent shortage in energy supply. In addition comes the general drive in the EU for green transition towards climate neutrality by 2050. Thus, the discourse is in line with many of the legislative initiatives from the EU institutions since the beginning of 2022. On top of this comes the fact that growing concerns about the high dependency of countries outside

of the EU on vital resources have created a kind of “green nationalism”, especially pointing at unfair competition from China. From a Scandinavian perspective, it is important to understand this emergency context, as most of our countries do not have any shortage of energy supply. This is especially true when it comes to Sweden and Norway. We are in the lead concerning the share of renewables in the energy mix, with Sweden in the top of EU27 with 66%, while both Iceland and Norway are above 70%.¹⁵ Sweden is also the leading exporter of electricity to Europe at a level of over 33 terawatt-hours per year.¹⁶ Against this backdrop, the analysis in this text may suffer from a certain lack of understanding of the European energy crises, as the public debate on these issues in Sweden has mainly focused on the high electricity prices resulting from the improved connection with the European continent through the Baltic cables (we are thus “importing their prices”). But even with this caveat, some remarks may be noted on the discourse in the preambles of the Emergency Regulation and RED III.

To begin with, there can be no doubt that the text is formulated mainly by the DG Energy and that the general direction here is “full speed ahead” for industrial development. Electrification and the increase of energy production is the overarching theme, and very little text is spent on energy saving. This is somewhat surprising, as the revised Energy Efficiency Directive (2023/1791) significantly raises the EUs ambition in this respect, including a binding goal to which the Member States are expected to contribute.¹⁷

¹⁵ European Environment Agency: Share of renewable energy sources, by country. Statistics (updated) 2024-09-20; <https://www.eea.europa.eu/en/analysis/maps-and-charts/countries-breakdown-actual-res-progress-15>.

¹⁶ <https://www.statista.com/statistics/1405405/net-electricity-exports-europe-by-country/>.

¹⁷ Energy efficiency directive – European Commission (europa.eu).

How each country will fulfil this duty is expected to be clarified in the Member States' reports of their final updated National Energy and Climate Plan (NECP), which were due on 30 June 2024. So far, it is too early to draw clear conclusions from this reporting.¹⁸

Surely, the new legislation on renewables brings some welcome news, such as requirements for integrated permit procedures, contact points in order to advise applicants and decision-making bodies, and time limits for different stages of the permit-granting process. At the same time, however, the package is based on a quite one-sided approach where only energy concerns are visible and regulations are characterized as "administrative burdens". When environmental protection concerns are mentioned, it is merely done by a general reference to the "no-harm principle". The general point of departure seems to be the assumption that the Union, simply by reducing greenhouse gas emissions by way of renewable energy, also can tackle challenges related to the environment, such as the loss of biodiversity. There is little thought on how this will be performed, while at the same time it is repeatedly emphasised in the preamble that environmental assessments must be made simpler and faster. Consequently, the precautionary principle is not mentioned at all in the preambles of the Emergency Regulation or Directive 2023/2413.

Another point of departure for the legislation is that permit procedures must be made swifter. This is repeated many times in the ar-

gumentation and made clear in preambular point 20 of Directive 2023/2413 (*italics added*):

Lengthy administrative permit-granting procedures are *one of the key barriers to investment* in renewable energy projects and their related infrastructure. Those barriers include the complexity of the applicable rules for site selection and administrative authorisations for such projects, the complexity and duration of the assessment of the environmental impact of such projects, and related energy networks, grid-connection problems, constraints on adapting technology specifications during the permit-granting procedure, and staffing problems of the permit-granting authorities or grid operators. In order to accelerate the pace of deployment of such projects it is necessary to adopt rules which would simplify and shorten permit-granting procedures, taking into account the broad public acceptance of the deployment of renewable energy.

Even though I have a general knowledge about environmental protection systems in the EU, I really cannot say if this is a valid description of the permit-granting procedures in the Member States of the EU. However, statements like this are often based on different consultants' reports and, in my experience, such reports differ quite substantially in quality. For example, in a report from the RES Simplify project in 2023, it was reported that Sweden was one of the Member States where bureaucratic barriers pose major challenges to wind power development, that permits are granted at a very low rate and that permit procedures may take as long as ten years, both on land and at sea.¹⁹ These statements are quite surprising and one may wonder why the authors did not undertake basic fact checking.

¹⁸ On that date, only four Member States had reported their NCP. As of December 2024, the number has risen to 14 Member States, but – according to the Swedish expert Magnus Nilsson – the reports are too vague to say anything without thorough analysis; https://commission.europa.eu/energy-climate-change-environment/implementation-eu-countries/energy-and-climate-governance-and-reporting/national-energy-and-climate-plans_en#national-energy-and-climate-plans-2021-2030.

¹⁹ SE_SWD_2023_627_en.pdf (europa.eu).

In reality, the Swedish wind power industry is a success story with few comparisons; in 2023, wind power production amounted to 34 terawatt-hours and 20% of the total electricity production. This is an increase of more than 20% per year every year since 2021. For two years in a row, Swedish wind farms stand for 2% of the world's electricity production from wind power. According to the official statistics, the permit-granting time in the Swedish Regional Licensing Boards is 349 days (median value). Moreover, the granting rate is about 80%.²⁰ According to our research, the permitting procedure as such does not pose any barrier, as the main obstacle has been local resistance and the so-called "municipal veto".²¹ It is true, however, that the development of wind energy located in the sea has been very slow in Swedish waters as compared with our neighbours. However, this cannot be explained by so-called "bureaucratic barriers", as resistance from the Armed Forces is the major reason for denying permits at sea. On closer scrutiny, the "facts" presented in the RES Simplify report were provided by the Swedish wind industry, well-known for its relentless campaigning and imaginative use of statistics. Thus, if industry is the main provider of facts to these reports, I suggest caution concerning any general statement about slow environmental procedures as a barrier to the Green Transition.

²⁰ See SOU 2022:33 *Om prövning och omprövning – en del av den gröna omställningen*, part 3 about "myths and trues", also the Government's Proposition 2023/24:152, part 4.2. Both documents are unfortunately available only in Swedish.

²¹ See Darpö, J: *Should locals have a say when it's blowing? The influence of municipalities in permit procedures for wind-power installations in Sweden and Norway*. *Nordic Environmental Law Journal* 2020:1, pp. 59–79.

Renewable Acceleration Areas

RED III introduces a system with binding plans on the regional or national level by way of "renewable acceleration areas". As noted, the Member States are obliged to designate at least one such plan for one or more renewable energy techniques and their connection systems on land and/or sea. The acceleration areas are required to be "sufficiently homogenous" and the deployment of renewables here are expected not to entail significant environmental impact. The plans for the adoption of an acceleration area is subject to an environmental assessment according to the SEA Directive (2001/42), and, if they are likely to have a significant impact on Natura 2000 sites, to an appropriate assessment according to Article 6(3) of the Habitats Directive (92/43). Appropriate rules must be established for effective mitigation measures that will be adopted as parts of the permits for the renewable plants and their connection facilities in order to avoid or reduce such impact. Only when the installation is "highly likely" to give rise to significant unforeseen adverse effects that were not identified in the SEA, may additional investigations, assessments or mitigation measures be required. If the permit body in this situation decides that an EIA or an AIA is required, this assessment and procedure must be undertaken within six months.

First, a general remark on this. Modern wind farms and their connection to the grid are major industrial installations, commonly covering hundreds of hectares of land or sea. Like all widespread and "area-consuming" activities, they are best regulated by means of planning ahead for the solving of conflicts between different interests. From a nature conservation perspective, planning may also provide for a population-based approach to species protection on a larger scale. Thus, if properly performed and detailed, an early environmental assessment and

consultation with the public concerned according to the SEA Directive may well be a suitable tool for a proactive handling of the conflict between wind energy and biodiversity. There are lessons to be learned about such good examples from planning for wind farming from different places in Europe, for example, in Flanders.²²

Planning, SEA and EIA

Against this backdrop, I do not think that one can object to a planning instrument such as renewable acceleration areas as a matter of principle. Instead, concerns can be raised about the lofty legislation and the weak quality control in RED III. The most important question here concerns the safeguarding of a thorough investigation in line with the precautionary principle as regards the impacts on Natura 2000 and strictly protected species and their habitats. These worries are fortified by the arguments in the preamble that the legislation allows for “simplified assessments”. The regulation seems to make it possible for a Member State to introduce one single acceleration area for the whole country or a large region, covering all kinds of renewables and their connections to the grid. Surely, such an application would be considered quite extreme, as the RED III states that the acceleration areas should be homogeneous, and the projects should not be expected to have significant effects on the environment. But even so, we know little today about how this instrument will play out in practical terms. There is, however, reason to believe that a SEA for a vast area with a variety of activities cannot serve as an effective means for fulfilling the EUs biodiversity obligations.

In practical terms, it may not be feasible to prescribe effective mitigation measures as early as in the planning phase of such an all-compassing renewable acceleration area.

Further, the “highly likely” formula places the burden of proof on the authorities and the public to show the necessity of further investigations and environmental assessments when an application for a project permit is submitted within an acceleration area. There is no exception to this rule, so that it will apply even if the project is applied for years after the initial SEA was performed. Learning from the experience of environmental cases in courts, this standard may be a trigger point for conflict. In virtually all environmental cases there are objections about the need for, the quality and the scope of the EIA. It is no wonder that EIA Directive (2011/92) is the single piece of legislation – together with the Habitats Directive (92/43) and the Birds Directive (2009/147) – that has created the biggest part of today’s great body of case-law in environmental matters from the EU Court of Justice (CJEU).²³ In situations in which the permit-granting authority ignores objections from the public about the inadequacy of an SEA, this may even prove to be something that complicates and delays the procedure, if the appeal body or court finds the objections to be well-founded and remands the application to be considered anew. Not least, the tight time frames for the procedure and the existence of a positive silence rule in this context may prove to be counter-productive, as the authority’s attitude on the matter will not be known at the outset. In this context, it also may be noted that it is only when the permit author-

²² See Backes, C & Ackerboom, S: *Renewable energy projects and species protection. A comparison into the application of the EU species protection regulation with respect to renewable energy projects in the Netherlands, United Kingdom, Belgium, Denmark and Germany* (Utrecht Centre for Water, Oceans and Sustainability Law, 2018).

²³ Focus on Environmental Impact Assessment (EIA) (era-comm.eu) If I am not mistaken about the Eurlex statistics, both the EIA Directive (85/337 and 2011/92) and the Habitats Directive (92/43) count for more than 160 cases each in the CJEU, while the Birds Directive (79/409 and 2009/147) counts for almost 150.

ity posits that an additional EIA is needed that the decision is required to be published.

Exemption possibilities

Another concern may be raised about the exemption possibilities. According to Article 16(a)(5), the Member States may exclude wind projects from “such assessments”, in my understanding referring to an updated EIA in the above-described situation. The only precondition for this is that the exclusion is based on “justified circumstances”, including those needed for achieving the climate and energy targets. This may of course be interpreted by governments where the industry has a strong voice as the main way to escape the otherwise-applicable biodiversity obligations. If an exemption applies, the operator is admittedly obliged to undertake proportionate mitigation measures or to contribute financially to a protection programme in order to ensure the conservation status of the species affected. However, this kind of legal construct is full of pitfalls, of which a few can be mentioned here. To begin with, the assessment of what are “justified circumstances” leaves it open for the national governments to include just about anything. And how can “proportionate mitigation measures” be evaluated when no investigation or assessment has been undertaken of the protected interest that is at risk. The same can be said about the effectiveness of any compensation schemes, which according to experience can be complicated enough to establish even if one knows what kinds of risks have to be dealt with. How will it be possible to design such programmes when knowledge about the damage to be avoided is meagre?²⁴

²⁴ In this context it should be noted that the CJEU repeatedly has stated that a precondition for making derogations according to Article 6(4) of the Habitats Directive is that an AIA has been performed showing what risks are at hand and how they can be dealt with, see

Decision-making outside renewable acceleration areas

Another peculiarity in RED III concerns the processing of EIAs for projects outside acceleration areas. According to Article 16(b)(2), if an EIA is required, it is to be carried out in a single procedure that combines all relevant assessments for the project. Further, before the investigations are begun, the competent authority is obliged to issue an opinion on the scope and the level of detail of the information to be included in the EIA report. This opinion is binding in that the scope of the report cannot be extended subsequently. In my view, such a “preclusion” raises questions. Even though the provision reflects a common critique from industry about “excessive demands on investigations”, the authors clearly have not considered the effects on environmental procedure. First, the provision is unclear as the preclusion only limits “the scope” of the report, and not its “level of detail”. Second and more important, it is common knowledge that EIAs are normally substantially amended during the consultation phase of the permit procedure. Other branches of administration, as well as the concerned public, often have valuable comments on the investigations and assessments to be performed. If the scoping decision must be taken before that phase and perhaps even when there is not a draft report, we will see a lot of deficient EIAs. The effect of that on the protection of biodiversity is obvious. Also, the preclusion cannot be upheld during the appeal procedure as the EIA Directive (2011/92) has not been changed as regards the demands on the re-

C-239/04 *Commission v Portugal* (2006) para 35, C-182/10 *Solvay* (2012) paras 73–74, C-521/12 *Briels* (2014) para 35, joined cases C-387/15 and C-388/15 *Orleans* (2016) para 61, C-167/17 *Sweetman* (2018) para 35, see also *Managing Natura 2000 sites. The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC* (Commission Notice C(2018) 7621 final, Brussels, 21.11.2018), section 5.2.

port.²⁵ In this context, one must remember that most – if not nearly all – permit decisions on renewables are challenged by way of appeal. This in turn means that at the end of the day, many permits will either be quashed or the cases remanded by the appeal body or court back to the administration with instructions on how the EIA must be amended. In this way, the RED III preclusion provision may be a recipe for delaying and prolonging the permit procedures, which is quite the opposite of the intent of the reform.

Repowering

The new rules on “repowering” are scattered in several provisions. Different time frames are given for repowering projects in renewable acceleration areas, outside those areas, and for those which do not result in an increase of the capacity of the power plants by more than 15%. The most important rule about application for the repowering of a renewable energy plant is given in Article 16c(2), stating that if the project is subject to a screening process according to Article 16a(4), the determination of the need for a new EIA shall be limited to the potential impacts of only the change or extension as such.

In my view, this statement is not easy to understand or implement. The definition of “repowering” is very broad in RED III. For example, it seems to cover the total replacement of all wind turbines in a given area. As the first wind parks in Europe have operated for 20 years and their production capacity is rather limited, we are dealing with a rapid development in technology. In those days, wind turbines on land commonly did not exceed 150 meters in total height, as compared with today’s installations at almost 300 meters. In this situation, it is not easy to say what is the “change or expansion”.

The new location of wind turbines in a development area may also be quite different, as the modern parks contain fewer but larger turbines. In consequence, the environmental impact is different, and can be higher depending upon the area’s sensitivity. Even so, Article 16a(4) may be interpreted so as to allow in a renewable acceleration area the expansion of the projects therein, including the “highly likely” criteria for an EIA. This provision in turn can be understood in two contrasting ways. The first one restricts the use of acceleration areas, as such a plan may only cover homogenous areas where no significant impact is expected to arise, not only for the foreseeable projects, but also for their expansion through repowering. The other interpretation makes room for an even more expansive application with acceleration areas covering vast areas with different renewable energy plants and their connections, where even a total new design of the installations is allowed without an EIA. This latter understanding is of course rather extreme, but in my view it is not unrealistic in the current discourse of “green nationalism”. It may also find some support in the statements about “simplified assessments” in the preamble of Directive 2023/2413.²⁶

One final concern should be noted about repowering. The underlying idea behind limiting the assessment of environmental impacts from the repowering of an installation is that the operator and the supervisory authorities have been informed and updated on the impacts from the existing source. The monitoring and reporting requirements may differ from one country to another, but as for Sweden, it is simply not happening. Public schemes for the control and monitoring of the state of the environment covering larger areas rarely include impacts to specific species. As for the operator’s

²⁵ Articles 3 and 5 together with Annex IV of the EIA Directive (2001/92).

²⁶ See for example preambular points 39, 40 and 44.

responsibility to monitor the environmental effects of the permitted activity, it covers subsequent effects to the species investigated in the EIA report only when that reporting requirement has been clearly stated in the conditions. Such conditions in permits for wind farms are rare, at least when it comes to long-term effects. Consequently, when a permit-holder applies for an expansion or change in an activity, there is little or no knowledge about what has happened since the first permit application and EIA were discussed. However, this is not a phenomenon restricted to renewable energy installations, but is an issue for all activities with such an impact. Further, it goes without saying that knowledge about the cumulative effects on the environment from renewables and their connections to the grid, forestry, roads, mines, and other such operations is non-existing. If the situation is similar in other countries, this is something that needs to be considered when discussing “administrative barriers” to the repowering of renewables. In this context, it may be noted that this relaxed attitude to the following up of long-term effects on protected habitats and species is not in line with EU nature protection directives.

Time limits

RED III introduces strict time frames for permit procedures. As a general rule, an application must be confirmed or dismissed by the permit authority within 30 days if the project is located in a renewable acceleration area, and within 45 days in other cases. The time frame for the permit procedure within an acceleration area is 12 months if the project is on land, 24 months at sea, and 6 months for repowering. Outside those areas, it is 24 months on land, 36 months at sea and 12 months for repowering. In all cases, the time frame for the permit procedure may be extended by 6 more months if this can be duly

justified on the grounds of “extraordinary circumstances”.

To begin with, these time frames may seem short as the permit procedure includes all relevant assessments and evaluations for the project (Article 16(1)). However, as the counting of time starts when the application is complete and ends when the permit authority issues the final decision, the time frames will probably not pose a great challenge to most Member States, at least not for those with an integrated environmental procedure. As for the systems where many separate permits are required for a renewable energy project, the time frames may seem tight and will probably require a certain integration. In my view, this is a positive development from an environmental perspective. On the other hand, it should also be noted that a developer is not always willing – and sometimes is not even able – to apply at the outset for all permits for a project. This may for example be the case concerning the building of a wind park and its subsequent connection to the electric grid. It is reasonable to believe that in those cases, the attitude of the developer remains decisive. However, the time limit for accepting the application may prove counterproductive. It is a common feature in environmental procedure that the project developer – intentionally or not – submits an application which has some or even many flaws. The idea behind this is to cause the permit authority to issue an order for amendments to the application, which of course is very informative and has a guiding effect on the proceedings to follow. A tight time frame for confirming an application may therefore encourage the authority to dismiss the application right away without any such order. Alternatively, it may lead the permit authority to accept an inadequate application which is ultimately quashed on appeal. It is hard to see how any of these results would be beneficial, either for the project developer or

for the deployment of renewables. In addition, some of the other time frames seem very short. It goes beyond my understanding how an EIA or an AIA covering the impacts on species during different seasons of the year could possibly be performed with investigations and hearings concluding within six months, which is the rule if the authority finds the “highly likely” criterion to apply in a renewable acceleration area.

Tight time frames may therefore trigger another adaptation of the national permit systems that may not have been foreseen by the EU legislator, at least in those legal systems where the EIA procedure is integrated into the permit procedure. As the time frames cover all stages of the decision-making, they may create a certain incentive for the Member States to separate the EIA procedure – which often is very time-consuming when it comes to larger and more controversial activities – from the actual permit procedure. There is nothing in the legislation that prohibits such a “Finnish solution”, namely, that there is a general requirement for an EIA for all major activities in a certain area – say a harbour – which is evaluated and confirmed by a competent body of administration separate from the permit authority.²⁷ Using this “confirmed” EIA, the project developer may thereafter apply for all permits needed for the operation, at which time the permit authority is able to restrict its evaluation of the EIA to the question of whether it suffices for the project at stake. Most importantly, this evaluation may be limited to whether there is a need for an updating of the original EIA or not. Also in this respect, there are pros and cons with the tight time frames for the environmental procedure, so that the effectiveness of this solution remains debatable.

Still another question on time frames concerns the role of the courts. According to Article

16(8), the time frames in RED III do not apply to “judicial appeals and remedies” or to any “other proceedings before a court or tribunal”. In Sweden however, it is the environmental courts which issue integrated environmental permits for large scale industrial installations and water operations. This solution is unusual within the EU and quite odd, as seen in the case *Djurgården-Lilla Värtan* from 2009 (C-263/08). Here, the CJEU struggled to understand that Swedish environmental courts are permit-issuing bodies in the first instance, finally stating that they did so “exercising administrative powers”.²⁸ It remains to be seen whether this system will survive the demands for time frames in the environmental procedure and other requirements of EU law. Even though Sweden is alone in the EU having courts with jurisdiction to issue environmental permits in the first instance, other national courts may have similar functions for parts of what are regarded as “all relevant permits” according to Article 16(1). Especially concerning access to land and water, compensation and similar matters, this may be a more common solution in several Member States. As courts cannot be ordered by the administration to undertake a certain action in individual cases, such decision-making must be removed from the permitting procedure time frames. Alternatively, all such decision-making and its associated time frames would have to be transferred to the administrative level.

Overriding public interest presumption and “deliberate” killings/disturbances criterion

Two of the main features of RED III directly target the interpretation of the nature directives of EU law. Both have general applicability, covering projects inside and outside renewable acceleration areas. First, according to Article 16f, renewables are presumed to have overriding

²⁷ See (footnote 5), section 2.3 and 3.

²⁸ C-263/08 *Djurgården-Lilla Värtan* (2009) para 37.

public interest in serving public health and safety when balancing different interests under the Birds Directive (2009/147), the Habitats Directive (92/43), and the Water Framework Directive (2000/60). Further, when appropriate mitigation measures have been prescribed for a renewable energy project, killings and disturbances of species resulting from the permitted activity are regarded as not being “deliberate”. In this respect, the provisions differ somewhat for permits inside (Article 15c) and outside (Article 16b) the acceleration areas, but the essence is the same. Such killings and disturbances will consequently not be in breach of either Article 5 of the Birds Directive (2009/147) or Article 12 of the Habitats Directive (92/43). Also, when mitigation measures have not been widely tested, they may be used in pilot projects for a limited period of time. In any event, according to both Articles under RED III, the Member States are obliged to undertake appropriate monitoring of the effects on the species and must prescribe further measures if required.

These features of the reformed RED III have been welcomed with enthusiasm and great expectations from the wind industry and other elements of the renewable business sector.²⁹ However, I am not convinced that new rules will have any substantial effect on the application of the species protection provisions in the three directives. To begin with, it is worth noticing that none of the three directives has been changed. Concerning the overriding public interest rule, it is admittedly difficult to assess how it will play out in the water regime, as Article 4(7) of the Water Framework Directive (2000/60) is a rule about the balancing of different interests. However, as for the derogation rules in the EU nature direc-

tives, it certainly does not suffice that an activity is of overriding public interest, as both Article 9(1) of the Birds Directive (2009/147) and Articles 6(4) and 16(1) of the Habitats Directive (92/43) combine this criterion with a requirement that there be no alternatives. As for the Habitats Directive, the derogation ground is applicable only when there are “imperative reasons” of overriding public interest, an additional requirement lacking in Article 16f. Further, Article 16(1) of RED III adds that the derogation may not be detrimental to the maintenance of the population’s favourable conservation status, something that also is implicit in the two other derogation grounds. As noted, many renewable energy projects, and especially wind farms, are widespread activities, where alternative locations often are available. In national case-law, windfarms therefore are rarely approved in areas where they cause any substantial harm to species, even if there is an important public interest such as energy supply in the region. One can expect that the courts will be even more sceptical in situations in which the environmental impacts of the project have been poorly investigated. An exception may however be made for certain locations at sea which are hard to replace with others; the overriding public interest rule for renewables may therefore be more decisive in those areas. Further, Article 16f states that all renewables are presumed to be of overriding public interest. Even though the provision thus is applicable to all such installations – even very small ones without any real consequence – we may assume that the courts will in many cases simply rebut the presumption in line with existing case-law on the matter. This remains however to be seen.³⁰

²⁹ WindEurope: Overriding public interest is essential to the expansion of renewables (2022-10-14); “Overriding public interest” is essential to the expansion of renewables | WindEurope.

³⁰ Melina Malafry gives a thorough analysis of the issues related to the application of this provision in relation to the nature directives in the article mentioned in footnote 4, see section 5.3.3 (p. 176 ff.).

Something similar can be said about the “deliberate” criterion, at least concerning wind energy projects. In my view, the rules in Article 15c and 16b align with how most Member States handle this criterion in the permitting of wind farms.³¹ As for the protection of birds, certain locations of wind turbines are not accepted due to their proximity to the nests, flight routes or foraging areas of those species that are regarded as sensitive in this respect, such as birds of prey, other slow-flying species, forest hens and certain waterfowl. In some parts of Europe, instruments such as DT Bird are used to detect nearby birds and activate warning sounds or the stoppage of the turbine in case of a collision risk.³² For the protection of bats, a common condition is to prescribe the use of Batmode techniques, that is to close down the turbine during sunset and sunrise during the summer and at certain wind conditions and temperatures. The idea of using these mitigation measures is to avoid coming into a derogation scenario, as the rules on this in the EU nature directives are strict and not really relevant for widespread activities such as wind energy projects. Against this backdrop, I would argue that the rules on deliberate killings and disturbances of species merely codify what is already in place in most Member States.

It must also be mentioned that there are also aspects of RED III which are positive for species protection. Most importantly, in several places it is emphasised that the control and monitoring of the effects of the renewable installations are crucial for the application of the new rules. In sum therefore, one may argue that the provisions

about overriding public interest and deliberate killings/disturbances will not be detrimental to the protection of European biodiversity.

Public participation and access to justice

The new system of renewable acceleration areas in RED III also raises important questions concerning public participation and the principle of legal protection under EU law. Point 30 in the Preamble of Directive 2023/2413 states that Member States should take appropriate steps to promote participation in order to increase the public acceptance of renewable energy projects. The Preamble also notes that the Aarhus Convention remains applicable in the EU. Preamble point 20 of RED III states that broad public acceptance of the deployment of renewable energy should be taken into account when adopting rules for simplifying and shortening permit-granting procedures. This is developed in Article 15d of RED III, where it is made clear that public participation regarding the plans designating acceleration areas shall be both direct and indirect in line with the consultation order in Article 6 of the SEA Directive (2011/42). This requires that a draft of the plan to be adopted and the environmental report shall be made available for the public at an early stage in the decision-making process in order to afford an effective opportunity within appropriate time frames for the public to express opinions. The public is defined in line with the Aarhus Convention and the Public Participation Directive (2003/35), namely those who are affected by or have an interest in the decision-making, including their organizations, such as environmental NGOs.

All this seems to be fine from a public participation aspect, but how will it play out in practice? To begin with, individuals who might be affected by projects within a renewable acceleration area will have the opportunity to participate in the decision-making process by way of

³¹ According to the study performed by Backes & Ackerboom (see footnote 23, this technique was applied everywhere except for The Netherlands.

³² Rydell, J & Ottvall, R & Pettersson, S & Green, M: *The effects of wind power on birds and bats – an updated synthesis report 2017*. Vindval report 6791, December 2017; FULL-TEXT01.pdf (diva-portal.org).

making addresses to the authorities and taking part in hearings and other proceedings. In this context, it should be emphasised that the case-law of the CJEU remains relevant regarding the requirements for such participation to be effective.³³ However, access to justice to challenge an adopted plan will rarely be afforded, as those having an interest or enjoying a right seldom can be defined as early as this stage. They will instead be left to appeal the permit for the project after a process where the time frames have been short and most important parameters such as the location of the project have already been set. This may prove challenging.³⁴

The situation for the ENGOs is different. To begin with, the organizations will have the same opportunities as individuals to participate in the decision-making procedure. As for access to justice, they are in a better position. A decision to adopt an acceleration area clearly concerns environmental matters and will be regarded as appealable under the principle of legal protection in EU law, as the plan has a binding effect on subsequent permits.³⁵ But even if standing most

likely is not a problem in the Member States, the question arises about what can actually be challenged in this stage of the decision-making. Clear conflicts with other interests will of course be justiciable, as well as grossly insufficient conditions on mitigation measures and very poor investigations and assessments. But many parameters need to be seen in their actual context in order to evaluate the project's impact on protected interests such as those of species. It remains to be seen what the substantive outcome of such a legal action would be.

And yet, there is an "elephant in the room" and that is the Sami people, being the only indigenous people on the European continent.³⁶ Their land- and cultural rights are protected by an array of international and European instruments, such as the UN Convention on Civil and Political Rights (ICCPR), the UN Convention on anti-discrimination (ICERD), and the European Convention on Human Rights and Freedoms (ECHR). The Sami reside in the northern parts of Scandinavia and Karelia, that is in Norway,³⁷ Sweden, Finland and Russia, all countries bound by these international obligations. The Sami's traditional enterprise of reindeer herding is heavily impacted by modern developments such as mining, roads and railroads, forestry, tourism, and – not least – wind farms. In recent years the treatment of the Sami people has raised international attention, and criticism from different committees under such agreements has been common.³⁸ Several Sami villages have also been

³³ See for example C-826/18 *LB and others* (2021) para 43 and C-280/18 *Flausch* (2019) paras 45–54 about the information duty towards the public concerned, and C-474/10 *Seaport* (2011) para 46 about the requirement that sufficient time to evaluate the envisaged plan or programme and the environmental report shall be afforded.

³⁴ For an illustrating example, see the case *Karin Andersson v. Sweden* in the European Court of Human Rights (ECtHR 2014, case No. 29878/09).

³⁵ In order to illustrate the development in EU law on the principle of legal protection in environmental matters, compare the old case C-236/92 *Comitato* (1994) on waste plans and the newly decided C-873/19 *Umwelthilfe v DE* (2022) and the case-law mentioned therein, see also Darpö, J: *Can nature get it right? A study on the Rights of Nature in the European context*. Report to the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, Brussels 2021-03-01, section 4; CAN NATURE GET IT RIGHT? A Study on Rights of Nature in the European Context | Think Tank | European Parliament (europa.eu).

³⁶ Of course, indigenous peoples reside in other places subject to some level of European governance, such as Greenland and the French "départements d'outre-mer", for example, French Guiana in South America.

³⁷ As noted, Norway is a party to the joint European energy market and bound to the EU legislation through the EEA agreement.

³⁸ In the beginning of 2024, the Advisory Committee under the Framework Convention for the Protection of National Minorities issued its 5th report on Sweden, criti-

successful in their actions in courts, at least in Sweden and Norway. The Norwegian Supreme Court in 2021 quashed the permits for Europe's two largest wind farms (already in operation) with reference to breaches of Sami cultural rights under Article 27 ICCPR.³⁹ In Sweden, the Supreme Court declared that certain legislation on hunting infringes upon the Sami land-use rights and therefore is illegal. The court further declared that the Indigenous and Tribal Peoples' Convention from 1989 (the so-called ILO 169) is an international standard to be respected by Sweden, even though the country has not ratified this instrument.⁴⁰

Very little of this is visible in the EU legislation under the Green Transition. In RED III, the Sami people are not even mentioned. The Critical Raw Materials Act (Regulation 2024/1252, CRMA) contains an obligation about meaningful consultation with local communities – including indigenous peoples – in line with Union legislation and international standards (Preamble points 17 and 20, Articles 6 and 7)). To that end, a plan for such consultation must be provided, including proposed measures dedicated to the prevention and minimisation of adverse effects on these interests. These are rather vague requirements and it remains to be seen if they have impact on the national permit decision-making processes. The EU Parliament voted for a strengthening of that requirement to include the principle of Free Prior and Informed Consent, but this reference disappeared during the trilogue. Apparently, the Swedish and Finnish

cizing the Government for its failure to afford the Sami people influence over industrial developments in the reindeer herding areas; 1680ae851a (coe.int).

³⁹ The Fosen judgement; Licences for wind power development on Fosen ruled invalid as the construction violates Sami reindeer herders' right to enjoy their own culture (domstol.no).

⁴⁰ The Girjas judgement; The "Girjas" case – press release – The Supreme Court (domstol.se).

governments have not been too keen on defending Sami rights in the EU negotiations. Unfortunately, this is typical of the political attitude towards the solving of conflicts of interest concerning the Green Transition. Another apparent example concerns local opposition to wind farms – quite strong in many Member States – which is equally invisible in the new legislation. Experiences from both Norway and Sweden show that one cannot neglect the role of the municipalities when it comes to local acceptance of this type of development.⁴¹ This political abdication is worrying as it leaves it to the courts to step in to resolve such conflicts on a case-by-case basis. This in turn, is a sure recipe for the fuelling of the conflicts, which is what we need the least in times of energy crises. Or to phrase it more eloquently in Franz Timmermann's words: "*If the transition will not be just, there will be no transition*".

Systemic issues

Finally, the European energy crises have triggered quite a few questions of a more systemic nature on the encounter between the interests of green transition and those of environmental protection. One obvious example is the sharply increased use of the derogation ground for "exceptional cases" in Article 2(4) of the EIA Directive (2011/92).⁴² The strong drive for centralisation and streamlining of national permit pro-

⁴¹ See Darpö; *Should locals have a say when it's blowing?* mentioned in footnote 22, also Gulbrandsen, L & Jackson Inderberg, TH & Jevnaker, T: *Is political steering gone with the wind? Administrative power and wind energy licensing practises in Norway*. Energy Research and Social Science 74 (March 2021).

⁴² Between May 2017 and November 2021, one such notification was made to the Commission. Thereafter, between August 2022 and August 2024, 41 notifications have been made from different Member States, mostly covering LNG terminals and pipelines, natural gas pipelines and irrigation projects; <https://circabc.europa.eu/ui/group/26370f9e-245c-4c09-8a75-68655a74875b/library/7da90f54-cc36-44b4-8c78-d2435f1d44c8/details>.

cedures is another. The increased use in recent years of EU regulations instead of directives in this field of law also raises interesting questions. On the one hand, EU regulations are directly applicable and therefore are a more efficient means for the introduction of new legislation in the Member States. On the other, there is also a tendency to formulate provisions in new regulations more vaguely than in directives, leaving it open for Member States to apply a national understanding of the common rules. The Emergency Regulation (EU) 2022/2577 is a showcase in this respect. Also, there is an ongoing debate on competence concerning the adoption of the Regulation. It is questioned whether Article 122 TFEU can be used as legal basis for this kind of regulation, but also whether the legislation is not in breach of Articles 191 and 194 TFEU.⁴³ As the legal basis for Directive 2023/2413 is Articles 114, 192 and 194, these issues are not directly applicable to RED III. But as for the content of the reformed directive and its relation to the requirements in existing environmental law, such as the nature directives, several questions remain. Can one really introduce a refreshed understanding of existing legislation and new provisions in EU law without also changing those provisions that are impacted, and how does this harmonise with the existing understanding in the case-law of the CJEU? This is a valid question concerning some provisions in RED III, such as the preclusion provision compared with Article 5(2) of the EIA Directive (2011/92). How this conflict plays out will be interesting to follow, but as I said in the introduction, for now we have to wait until we

⁴³ T-534/23 *Föreningen Svenskt Landskapsskydd and Others v Council* and T-535/23 *CEE Bankwatch Network and Ökobüro v Council*, for a general introduction to this discussion, see Helle Tegner Anker (University of Copenhagen); *EU competence and the energy crises*. Environmental Law Lectures Series, Maastricht University 2023-05-04; Environmental Law Lecture Series by Prof. Helle Tegner Anker – YouTube.

have seen more of the implementation of RED III in the Member States and the subsequent case-law from the national courts and the CJEU.

5. Concluding remarks

As almost always, there are pros and cons to the introduction of any new regulation on environmental issues. On the one hand, planning is an instrument well suited for widespread land-use activities such as renewable energy installations. In this respect, RED III is a step in the right direction towards an effective resolution of the conflicts of interest that come with the development of renewable energy sources. Planning may also provide for a more comprehensive approach to biodiversity issues in this context. Some of the new provisions for streamlining the permit procedures are also welcome and will contribute to the Green Transition in Europe. On the other hand, RED III is to a certain extent coloured by haste and a too close relationship between the legislator and those who are expected to be regulated. Simply by taking for granted the background description provided by industry, the approach of the reform in some aspects has become one sided. This is the background to why some of the provisions will function less well within the national permit regimes on renewables, not only concerning biodiversity issues but also in relation to the effectiveness of the procedure as such. These problems are not confined to the renewable acceleration areas, but will certainly also occur in the ordinary permit procedure. The combination of short limits counted from when the application is regarded by the permit bodies to be “complete” and the requirement to give the public concerned “early and effective opportunities to participate” in the environmental decision-making procedures according to the EIA Directive may prove especially challenging. Also the level of detail of the new rules may be problematic when the new rules

are to be implemented into existing procedural orders in the Member States. In my view, a little more systematic and procedural analysis and a little less superficial policymaking would have made a difference in this respect. Even so, I am not overly concerned about the outcome of RED III in those Member States with legislators loyal to the EU system as a whole, including our international obligations to biodiversity and access to justice. More troublesome is how this new pack-

age will play out in the Member States where what one may call “climate nationalism” has a strong voice. One may reasonably fear that the focus in the implementation in those countries will be on “full speed ahead” with any kind of development and the lessening of any kind of administrative burdens. If that will be the case, the reform may be characterised as the sacrificing of biodiversity on the Green Transition altar.

Vern av marin natur eller vern av aktiviteter? Et lite ambisiøst norsk lovforslag om vern av marin natur

Lena Schøning*

Sammendrag

Artikkelen analyserer to spørsmål til et nytt norsk lovforslag om vern av marin natur. Det første spørsmålet er om lovforslaget er egnet til å nå vernemålene i Naturavtalen. Spørsmålet favner over hva disse vernemålene innebærer for Norge, samt målenes politiske eller rettslige karakter, herunder om de er omfattet av folkerettslige plikter til å etablere verneområder og ivareta og beskytte det marine miljøet. Det andre spørsmålet er hvilken rettslig betydning lovforslaget har for eksisterende og fremtidige aktiviteter. Analysen viser at lovforslaget ikke artikulere norske myndigheters plikt til å etablere verneområder. Lovforslaget er langt på vei ikke egnet til å nå vernemålene i Naturavtalen, som ikke bare er av politisk karakter, men også særlig relevante i tolkningen av de folkerettslige forpliktelsene. Lovforslaget innebærer i realiteten et vern av eksisterende aktiviteter heller enn marin natur, og pålegger ingen plikter på forvaltning av fremtidige aktiviteter utover de som finnes i eksisterende regelverk. Lovforslaget reflekterer med dette et lite ambisiøst lovforslag på marin naturs vegne.

Abstract

This paper analyses two questions concerning a recently proposed Norwegian act on marine protected areas. The first question is whether the proposal meets the protection targets of the Kunming-Montreal Global Biodiversity Framework, what these targets mean for Norway, and the targets political and legal nature (including whether the targets are part of the international legal obligations to establish protected areas and preserve and protect the marine environment). The second question is legal effects of the proposal for existing and future activities. The analysis finds that the proposal mostly is not fit to achieve the protection targets of the Kunming-Montreal Global Biodiversity Framework, which are not only of a political nature, but particularly relevant to the interpretation of the international legal obligations. The proposed act rather protects existing activities than the marine environment and imposes no duties on management of future activities less those that already exist. The proposed act reflects low ambitions on behalf of the marine environment.

Stikkord: miljørett, marine verneområder, internasjonale miljørettslige forpliktelser, Naturavtalen, konvensjonen om biologisk mangfold, havrettskonvensjonen, marine protected areas, Kunming-Montreal Global Biodiversity Framework

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1. Innledning

På forsommeren 2024 sendte den norske regjeringen ut på høring et forslag til en ny lov om vern av marin natur utenfor territorialfarvannet.¹

¹ Regjeringen, «Høring av ny lov om vern av marin natur utenfor territorialfarvannet», 2024, <https://www.regjeringen.no/no/dokumenter/horing-av-ny-lov->

Lovforslaget har til formål «å bevare marin natur utenfor territorialfarvannet gjennom langsiktig, effektivt og representativt vern (...)».² Territorialfarvannet er et begrep som i norsk rett brukes om de indre farvann og sjøterritoriet,³ som i henhold til havrettskonvensjonen er områder underlagt kyststatens suverenitet.⁴ Territorialfarvannet strekker seg 12 nautiske mil ut i havet fra grunnlinjene, som går ved lavvannslinja langs kysten.⁵ Naturmangfoldloven gir adgang til opprettelse av marine verneområder, men bestemmelsens stedlige virkeområde er i sjø begrenset til territorialfarvannet.⁶ Eksisterende lovgivning gir dermed ikke hjemmel for å etablere verneområder i de enorme havområdene Norge har jurisdiksjon over utover territorialfarvannet (heretter norske havområder), herunder de 200 nautiske mils økonomiske sonene.⁷

Den manglende hjemmelen for vern innebærer riktignok ikke at det ikke finnes begrensninger på aktiviteter av miljøhensyn utenfor territorialfarvannet. Begrensningene i eksisterende regelverk finnes i det enkelte sektorregelverk. F.eks. er det i havområdet rundt Svalbard opp-

rettet områder med begrensninger for fiske,⁸ regulert i fiskerilovgivning. Et annet eksempel er havforvaltningsplanenes rammer for hvilke områder det kan forekomme petroleumsvirksomhet.⁹ Det nye lovforslaget har i alle tilfelle til hensikt å etablere rettslig grunnlag for vern av norske havområder på tvers av sektorene.

Lovforslaget vil inngå i en norsk miljørettslig kontekst som tar sitt utgangspunkt i en grunnlovsbestemmelse som pålegger norske myndigheter bl.a. å ivareta «en natur der produksjonsevne og mangfold bevares» og at «(n)aturens ressurser skal disponeres ut fra en langsiktig og allsidig betraktning».¹⁰ Den nevnte naturmangfoldloven (som gir hjemmel for å etablere verneområder på norsk jord og i norsk territorialfarvann) krever at norske myndigheter skal ta ulike miljøhensyn i offentlig beslutningstaking, men til havs gjelder bare noen av disse hensynene og i alle tilfelle gjelder de bare «så langt de passer».¹¹ Norge har ikke en planleggingslov til havs,¹² kun havforvaltningsplaner hjemlet i ved-

om-vern-av-marin-natur-utenfor-territorialfarvannet/id3038669/?expand=horingsnotater (lest 7. september 2024).

² Forslag til lov om vern av marin natur utenfor territorialfarvannet § 1. Lovforslaget er tilgjengelig på nettsiden angitt i note 1.

³ Som definert i lov 27. juni 2003 nr. 57 om Norges territorialfarvann og tilstøtende sone § 1.

⁴ United Nations Convention on the Law of the Sea, vedtatt 10. desember 1982, i kraft 16. november 1994, 1833 UNTS 397 (havrettskonvensjonen).

⁵ Havrettskonvensjonen art. 5.

⁶ Lov 19. juni 2009 nr. 100 om forvaltning av naturens mangfold (naturmangfoldloven) § 39 jf. § 2. Norske lover publiseres på nettsiden www.lovdatabasen.no.

⁷ Statenes jurisdiksjon over økonomisk sone følger av havrettskonvensjonen art. 56 og er i norsk rett regulert i lov 17. desember 1976 nr. 91 om Norges økonomiske sone med tilhørende forskrifter. Artikkelen problematiserer ikke hvor langt Norges jurisdiksjon strekker seg.

⁸ Forskrift 1. juli 2011 nr. 755 om regulering av fiske for å beskytte sårbare marine økosystemer, som endret ved forskrift 29. mars 2019 nr. 416. Disse tiltakene er beskrevet i følgende artikkel som også gir kart over områdene: Jørgensen, L. L., Bakke, G., & Hoel, A. H. (2020). Responding to global warming: New fisheries management measures in the Arctic. *Progress in Oceanography*, 188, 102423. <https://doi.org/10.1016/j.pocean.2020.102423>.

⁹ F.eks. Meld. St. 10 (2010–2011) om oppdatering av forvaltningsplanen for det marine miljø i Barentshavet og havområdene utenfor Lofoten, pkt. 7.3 Nye rammer for petroleumsvirksomhet i Barentshavet – Lofoten.

¹⁰ Kongeriket Norges Grunnlov § 112 (3) jf. § 112(1). Norsk høyesterett uttaler i sak HR-2020-2472-P at bestemmelsen ikke verner mot handlinger og virkninger utenfor kongeriket, som kan forstås som utenfor territorialfarvannet. For denne artikkelens formål legges til grunn at Grunnloven § 112 rekker like langt som norske myndigheters kompetanse. Dette poenget utvikles nærmere i et manuskript under arbeid.

¹¹ Naturmangfoldloven §§ 7-12, jf. § 2 (3).

¹² Lov 27. juni 2008 nr. 71 om planlegging og byggesaksbehandling (plan- og bygningsloven) gjelder bare inntil én nautisk mil utenfor grunnlinjene.

tak fra det norske Storting.¹³ Annet sentralt lovverk som påvirker havmiljøet vil være lover som er målrettet mot særskilte miljøpåvirkninger, så som klimaloven og forurensningsloven.¹⁴ Norsk miljørett er dessuten under stor påvirkning fra EU gjennom EØS-avtalen,¹⁵ men for noen direktiver som kun gjelder til havs er det uenighet mellom EU og Norge i om disse faller innunder avtalens virkeområde.¹⁶

Internasjonal miljørett påvirker også norsk miljørett. I forbindelse med at lovforslaget ble sendt på høring på forsommeren 2024, uttalte Norges klima- og miljøminister Andreas Bjelland Eriksen at «[d]en nye loven vil bli et viktig virkemiddel for å oppfylle de internasjonale målene i Naturavtalen».¹⁷ De internasjonale målene i Naturavtalen er, som artikkelen vil komme nærmere inn på, tre kvantitative mål om vern av natur herunder målet om å verne «30 % innen 2030». Det har vært en diskusjon i Norge mellom Regjering og på Stortinget om Naturavtalens vernemål og hvilke ambisjoner Norge har i den forbindelse.¹⁸ Denne artikkelen undersøker

hva vernemålene i Naturavtalen innebærer for Norge, deres rettslige karakter dvs. om de kan sies å være del av en rettslig plikt påhvilende myndighetene og om det er noe hold i den siterete påstand fra ministeren, dvs. om lovforslaget er egnet til å nå målene i Naturavtalen. Artikkelen analyserer også hvilken rettslig betydning lovforslaget har for eksisterende og fremtidige maritime aktiviteter, dvs. hva vernet etter lovforslaget nærmere innebærer.

Som bakgrunn for et lovforslag som skal verne marin natur kan det være nyttig med en kort orientering om miljøstatus for de aktuelle havområdene og det globale havet de inngår i. I havforvaltningsplanene beskriver regjeringen at Nordsjøen og Skagerrak er betydelig påvirket av klimaendringer og menneskeskapte aktiviteter (fiskeri, transport, kloakk og avløp, landbruk, olje og gass og landbasert industri).¹⁹ For Barentshavet er klimaendringer en viktig påvirkningsfaktor, og fiskeri en annen, som sammen med transport og olje og gass er identifisert som de sektorene med størst påvirkning. Påvirkninger fra akvakultur, kystinfrastruktur, avløp og landbruk er også til stede.²⁰ For Norskehavet er også klimaendringer og fiskeri de viktigste påvirkningsfaktorene, mens påvirkning fra petroleumsvirksomhet, skipstrafikk, industri, avløpsrensaneanlegg og fiskeoppdrett også er nevnt.²¹ Norges havområder er en del av og står i et avhengighetsforhold til det globale havet, som er helt sentralt for grunnleggende prosesser for vår eksistens, ved å produsere oksygen, absorbere varme og CO₂, holde på vannreserver og som kilde til mat. De globale prosessene tåler begrenset med menneskelig påvirkning (f.eks. klima og havforsuring).²² Menneskelig påvirkning på

¹³ Meld. St. 21 (2023–2024) Helhetlige forvaltningsplaner for de norske havområdene — Barentshavet og havområdene utenfor Lofoten, Norskehavet, og Nordsjøen og Skagerrak (havforvaltningsplanene).

¹⁴ Lov 16. juni 2017 nr. 60 om klimamål og lov 13. mars 1981 nr. 6 om forurensninger og om avfall.

¹⁵ Vedlagt og gjennomført i norsk lov ved lov 27. november nr. 109 om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v.

¹⁶ Johansen, E. (2018). The EU Influence on Norwegian Domestic Legislation for the Protection of the Arctic Marine Environment. *The International Journal of Marine and Coastal Law*, 33(2), 415–435. <https://doi.org/10.1163/15718085-13320006>.

¹⁷ Regjeringen, «Høring av ny lov om vern av havområder», nyhetsmelding, 2024 <https://www.regjeringen.no/no/aktuelt/horing-marin-natur/id3040167/> (lest 7. september 2024).

¹⁸ Se f.eks. Stortinget, «Skriftlig spørsmål fra Sofie Marhaug (R) til klima- og miljøministeren», 2024, <https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=96069> (lest 7. september 2024).

¹⁹ Havforvaltningsplanene s. 8 og s. 37.

²⁰ Havforvaltningsplanene s. 21.

²¹ Havforvaltningsplanene s. 30 og s. 44.

²² Se f.eks. forskning om planetens tåleevne, Rockstrom, J. mfl. (2009). *Planetary Boundaries: Exploring the Safe*

havet skjer også langt på vei på global skala, f.eks. ved at ressursuthenting, produksjonsfasiliteter og forbruk ofte forekommer på forskjellige kontinenter, som også resulterer i energi- og ressurskrevende transportbehov.²³ Rapporter fra bl.a. FNs naturpanel (IPBES) rangerer de viktigste driverne for det globale havets negative tilstandsutvikling å være fiskeri, økt arealbruk, klimaendringer, forurensning og invaderende arter.²⁴ I lys av disse driverne kan verneområder både være et virkemiddel for å begrense fiskeriaktivitet, hindre økt arealbruk og bekjempe klimaendringer. Havforvaltningsplanenes beskrivelse av påvirkninger i norske havområder peker også hen mot annen maritim aktivitet som det kan være nyttig å begrense ved vern. Vern er dermed et relevant og aktuelt virkemiddel for å bøte på de negative påvirkningene som allerede er en realitet og et problem, samt forhindre ytterligere forverring.

Den globale konteksten norske havområder inngår i speiler også det rettslige og politiske landskapet, i det vern av norske havområder ikke et nasjonalt anliggende alene, men må hensynta internasjonale forpliktelser for ivareta-

se av miljøet.²⁵ Analysen her vil fokusere på to plikter etter internasjonal rett: Plikten til å etablere verneområder etter konvensjonen om biodiversitet samt plikten til å bevare og beskytte havmiljøet i havrettskonvensjonen.²⁶ Disse pliktene er en del av de rettslige rammene for Norges forvaltning av areal og aktiviteter, og kan også ha betydning for den rettslige statusen til forpliktelser i Naturavtalen, som vil bli nærmere analysert i pkt. 2.2.

De rettslige pliktene utledes etter rettsdogmatisk metode som vil si normformulering og -subsumsjon i henhold til anerkjente prinsipper for rettskilders relevans og vekt,²⁷ i henhold til metoden det aktuelle rettssystemet gir anvisning på. Internasjonale rettslige forpliktelser, herunder hvorvidt Naturavtalen inneholder slike forpliktelser, er tolket i henhold til folkerettslig metode,²⁸ EØS-rettslige kilder etter EØS-rettslig

²⁵ I tillegg må lovforslaget hensynta Grunnloven § 112 (se note 10) samt annen nasjonal lovgivning som lovforslaget ikke har til hensikt å endre, men artikkelen går ikke nærmere inn på dette.

²⁶ Convention on Biological Diversity (CBD), vedtatt 22. mai 1992, i kraft 29. desember 1993, 1760 UNTS 69 (konvensjonen om biodiversitet).

²⁷ En tilsvarende beskrivelse av Graver «... den klassiske oppgaven som består i å fortolke og analysere lover og andre grunnlag for rettsregler og å sette reglene i systematiske sammenhenger. Forståelse krever også mer enn dette – at forskjellige rettsordener på nasjonalt og internasjonalt nivå ses i sammenheng, at rettsregler ses i sammenheng med andre deler av retten som verdier, holdninger og tradisjon og at retten ses i sammenheng med andre sosiale og kulturelle institusjoner. Rettsvitenskapen må synliggjøre og problematisere forholdet mellom rett, økonomi, kultur og makt», i Graver, H. P. (2011). Rettsforskningens oppgaver og rettsvitenskapens autonomi. *Tidsskrift for Rettsvitenskap*, 124(2), 230-249. <https://doi.org/10.18261/ISSN1504-3096-2011-02-03>, s. 248. Se også Pedersen, J., & Magnussen, R. S. (2019). Norm- og subsumpsjonslæren – behovet for et supplement til den tradisjonelle rettskilde- og metodelæren. In A. P. Høberg & J. Ø. Sunde (Eds.), *Juridisk metode og tenkemåte*. Universitetsforlaget.

²⁸ Slik den kommer til uttrykk i folkerettslig sedvane-rett, bl.a. som reflektert i Vienna Convention on the Law of Treaties vedtatt 23. mai 1969, i kraft 27. januar 1980, 1155 UNTS 331 (Wien-konvensjonen om traktatretten)

Operating Space for Humanity. *Ecol. Soc. og Will, S.*, mfl. (2015). Planetary boundaries: Guiding human development on a changing planet. *Science*, 347(6223). <https://doi.org/10.1126/science.1259855>.

²³ Burger, J. R. mfl. (2012). The Macroecology of Sustainability. *PLoS Biology*, 10(6 e1001345), 1-7. <https://doi.org/10.1371/journal.pbio.1001345> og Schøning, L. (2021). The Contribution of Integrated Marine Policies to Marine Environmental Protection: The Case of Norway. *International journal of marine and coastal law*, 2, 263-293. <https://doi.org/10.1163/15718085-bja10048>.

²⁴ Bernal, P. mfl. (2016). Chapter 54. Overall Assessment of Human Impacts on the Oceans. I L. Inniss, A. mfl. (Red.), *The First Global Integrated Marine Assessment – World Ocean Assessment I* (s. 1–17) og Díaz, S. mfl. (2019). *IPBES 2019: Summary for policymakers of the global assessment report on biodiversity and ecosystem services (summary for policy makers)*. *IPBES Plenary at its seventh session (IPBES 7, Paris, 2019)*. Zenodo.

metode,²⁹ mens nasjonal rett og lovforslaget er tolket etter den norske tradisjonelle rettskilde- og metodelære.³⁰ Analysen diskuterer både rettslige og politiske forpliktelser, bruker begrepet «forpliktelser» om begge disse og vil presisere i sammenhengen hvilke som er til diskusjon. Formuleringen av politiske forpliktelser baserer seg alene på en ordlydsfortolkning. Metoden for å vurdere om lovforslaget er egnet til å oppnå vernemålene i Naturavtalen sammenstillers vilkår i lovforslaget med enkelte vilkår i vernemålene.

I pkt. 2 redegjøres først kort for vernemålene i Naturavtalen, herunder om vernemålene knytter seg til norske havområder. Andre politiske forpliktelser trekkes også inn i diskusjonen. Deretter diskuteres hvilken rettslig karakter vernemålene har i lys av andre folkerettslige forpliktelser. I pkt. 3 analyseres om lovforslaget er egnet til å nå vernemålsetningene. I pkt. 4 drøftes hvilken rettslig betydning vernet i lovforslaget har for eksisterende og fremtidige aktiviteter.

2. Vernemålene i Naturavtalen

2.1 Vernemålenes politiske grunnlag

Artikkelen vil først identifisere vernemålene i Naturavtalen (eller *Kunming-Montreal Global Biodiversity Framework*³¹), som er en avtale som

art. 31 og Statute of the International Court of Justice (ICJ) statuttene), etablert av Charter for the United Nations 26. juni 1945, 892 UNTS 119 (FN Charteret) art. 38.

²⁹ Jf. avtale 27. november 1992 om det europeiske økonomiske samarbeidsområde (EØS-avtalen) art. 6 og avtale 2. mai 1992 nr. 2 mellom EFTA-statene om opprettelse av et overvåkningsorgan og en domstol, med protokollene 1–7 (ODA) art. 3.

³⁰ Se bl.a. litteraturen referert til i note 26.

³¹ Kunming-Montreal Global Biodiversity Framework (Naturavtalen), CBD/COP/15/L25 (*Conference of the Parties (COP) to the CBD* (se note 31), beslutning 15), 2022, <https://www.cbd.int/article/cop15-final-text-kunming-montreal-gbf-221222> (lest 7. september 2024). En norsk uoffisiell oversettelse av Naturavtalen finnes her <https://www.regjeringen.no/no/tema/klima-og-miljo/naturmangfold/innsiktsartikler-naturmangfold/naturavtalen/id2986497/> (lest 7. september 2024).

ble vedtatt av Norge og andre stater i forbindelse med et møte blant partene til konvensjonen om biodiversitet. Naturavtalen er etter sin ordlyd ikke en klassisk bindende avtale, da den stiller opp hovedmål og mål (*goals and targets*) heller enn f.eks. å statuere plikter om hva statene «shall do» dvs. skal gjøre. Naturavtalen er etter sin vedtaksprosess heller ikke en rettslig bindende avtale, da den er vedtatt på samme måte som andre overenskomster og uttalelser fra partsmøtet til konvensjonen, og det er f.eks. ikke er tilrettelagt for ratifikasjonsprosesser. Forpliktelsene, slik de fremgår av Naturavtalen, er dermed politiske slik de fremgår av avtalens ordlyd og vedtaksprosess.

Hovedmålene i Naturavtalen sikter seg mot 2050, og ett av disse er at alle økosystemer skal være ivaretatt, forbedret eller restaurert innen 2050.³² De mer konkrete målene i Naturavtalen som skal være oppfylt innen 2030, retter seg ikke bare mot vern, men også forurensning, fremmede arter, truede arter, og bærekraftig forvaltning av akvakultur, landbruk, fiske og skog.

De tre kvantitative målene for vern i Naturavtalen fremgår av avtalens mål 1 til 3, og vil her bli tatt inn i sin helhet i omvendt rekkefølge:

Target 3

Ensure and enable that by 2030 at least 30 per cent of terrestrial, inland water, and of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem functions and services, are effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures, recognizing indigenous and traditional territories, where applicable, and integrated into wider landscapes, se-

³² Naturavtalens hovedmål A.

ascapes and the ocean, while ensuring that any sustainable use, where appropriate in such areas, is fully consistent with conservation outcomes, recognizing and respecting the rights of indigenous peoples and local communities, including over their traditional territories.

Target 2

Ensure that by 2030 at least 30 per cent of areas of degraded terrestrial, inland water, and coastal and marine ecosystems are under effective restoration, in order to enhance biodiversity and ecosystem functions and services, ecological integrity and connectivity.

Target 1

Ensure that all areas are under participatory integrated biodiversity inclusive spatial planning and/or effective management processes addressing land and sea use change, to bring the loss of areas of high biodiversity importance, including ecosystems of high ecological integrity, close to zero by 2030, while respecting the rights of indigenous peoples and local communities.

Disse tre målene inneholder sammensatte forpliktelser og detaljer utover det denne analysen fokuserer på, som er de kvantitative sidene av målene, og som kort kan oppsummeres slik:

- 30 % av innlands, kyst- og havområder skal være under effektivt vern;
- 30 % av arealer med forringede økosystemer til lands, vanns, kyst eller havs skal underlegges effektiv restaurering og
- tap av nye arealer av høy viktighet for biodiversitet skal bringes nær null i 2030.

Man kan stille spørsmål ved om disse målene nødvendigvis har til følge at stater skal verne

f.eks. 30 % av havområdene, til forskjell fra 30 % av land, kyst- og havområder sett under ett. Det siste er det mest trolige, samtidig som hensikter om å ivareta representativ natur, som fremhevet både i Naturavtalen³³ og lovforslaget³⁴ nettopp skulle innebærer at det må være en viss fordeling mellom land, kyst og hav. Denne artikkelen drøfter i alle tilfelle for enkelhets skyld om 30 % av de norske havområdene skal vernes, i lys av at lovforslaget nettopp gjelder havområder.³⁵

Om målene heter det i Naturavtalen seksjon C (d):

The goals and targets of the Framework are global in nature. Each Party would contribute to attaining the goals and targets of the Framework in accordance with national circumstances, priorities and capabilities;

Hovedmålene og målene er med andre ord globale, og hver av partene skal bidra til å nå målene i henhold til sine nasjonale omstendigheter, prioriteringer og muligheter. Spørsmålet blir hvilket mål som kan utledes for Norge av dette. Henvisningen til nasjonale omstendigheter, prioriteringer og muligheter peker hen mot prinsippet om «common but differentiated responsibilities», som bl.a. følger av FNs rammekonvensjon for klimaendringer og Rio-erklæringens prinsipp 7.³⁶ I henhold til dette skal velstående

³³ Se Naturavtalens mål 3.

³⁴ Se bl.a. lovforslagets formål i § 1.

³⁵ Ifølge Statistisk sentralbyrå har Norge per 31.12.23 vernet 17,7 % av landarealet og 4,5 % av havarealet i territorialfarvannet, <https://www.ssb.no/natur-og-miljo/areal/statistikk/vernede-omrader>. Denne artikkelen går ikke nærmere inn på hvilken type vern dette dreier seg om.

³⁶ United Nations Framework Convention on Climate Change, vedtatt 9. mai 1992, i kraft 21. mars 1994, 1771 UNTS 107, (FNs rammekonvensjon om klimaendringer) art. 3 og 4, samt fortalen og Rio-erklæringen om miljø og utvikling, vedtatt av FNs generalforsamling i 1992 (A/CONF.151/26 (Vol. I)). FNs rammekonvensjon om klimaendringer har vært beskrevet som en «søsterkonvensjon» til CBD, ettersom begge ble vedtatt under

industriell land bidra mer sammenlignet med mindre utviklede land. Videre har Norge verdens nest lengste kystlinje, og med det jurisdiksjon over enorme havområder. Dette stiller Norge i en nøkkelposisjon når det gjelder etablering av marine verneområder. Disse argumentene indikerer at Norge minst bør verne 30 % av norske havområder.

Den politiske forpliktelsen om å verne minst 30 % av havområdene følger også av andre internasjonale uttalelser Norge har gitt. Norge er også part til OSPAR-konvensjonen om beskyttelse av det marine miljøet i Nordøst-Atlanteren.³⁷ I en uttalelse fra ministermøtet i kommisjonen til OSPAR-konvensjonen i 2021 heter det f.eks.

We will lead by example and will intensify our efforts to protect, conserve and restore the North-East Atlantic (...) We further commit to expand our network of effectively managed, well connected and representative marine protected areas and other effective conservation measures across OSPAR regions to cover at least 30%, which is over 4 million km², of our maritime area by 2030, with a view to achieving a high level of protection over time³⁸

Norge og de andre partene i OSPAR-konvensjonen skal med andre ord være ledende eksempler og intensivere innsatsen for å beskytte, verne og restaurere havområdene i Nordøst-Atlanteren, herunder å sørge for verneområder og tilsvaren-

Rio-toppmøtet i 1992. Se f.eks. Ekaradt, F. mfl. (2023). Legally binding and ambitious biodiversity protection under the CBD, the global biodiversity framework, and human rights law. *Environmental sciences Europe*, 35(1), 80-26. <https://doi.org/10.1186/s12302-023-00786-5>.

³⁷ Convention for the Protection of the Marine Environment of the North-East Atlantic, vedtatt 22. september 1992, i kraft 25. mars 1998, 2354 UNTS 67 (OSPAR-konvensjonen).

³⁸ Ministermøte i OSPAR kommisjonen, «Cascais Declaration», 2021, <https://www.ospar.org/ministerial/deliverables/ministerial-declaration> (lest 7. september 2024).

de effektive arealbeskyttende tiltak tilsvarende minst 30 % av Nordøst-Atlanteren. I uttalelsen heter det at utfordringene uttalelsen gir svar på krever individuelle og kollektive tiltak.³⁹ Denne uttalelsen knytter dermed målet om 30 % vern til Nordøst-Atlanteren, til forskjell fra et globalt mål, slik at avtalepartene til OSPAR til sammen skal verne minst 30 % av denne regionen.⁴⁰

Norge har også i tre andre internasjonale initiativ arbeidet for det globale målet om å verne 30 % av havet innen 2030, i regi av havpanelet⁴¹ og som medlem av de to høyambisjonskoalisjonene *Global Ocean Alliance*⁴² og *High Ambition Coalition for Nature and People*.⁴³

Disse uttalelsene og initiativene viser at Norge har påtatt seg en politisk forpliktelse i mange ulike sammenhenger knyttet til målet om 30 % vern, herunder både et mål for Nordøst-Atlanteren og som et globalt mål som hver stat skal bidra med i lys av sine nasjonale forutsetninger. Dette forsterker inntrykket av at Norge bør verne minst 30 % av sine havområder.

³⁹ «Significant and growing challenges that require individual and collective action», Cascais Declaration, se note 38, s. 2.

⁴⁰ Det kan stilles spørsmål om uttalelsene i Cascais Declaration er relevant i tolkningen av plikten til å treffe alle nødvendige tiltak for å beskytte Nordøst-Atlanteren etter OSPAR-konvensjonen art 2, men denne artikkelen går ikke nærmere inn på dette.

⁴¹ Høypanelet for en bærekraftig havøkonomi (high-level panel for a sustainable ocean economy, «2030 Outcome», 2024, <https://oceanpanel.org/approach/> (lest 7. september 2024).

⁴² Den globale havalliansen (Global Ocean Alliance), «Global Ocean Alliance», 2024, <https://www.gov.uk/government/topical-events/global-ocean-alliance-30by30-initiative> (lest 7. september 2024).

⁴³ Høyambisjonsalliansen for natur og folk (High Ambition Coalition for Nature and People), «We must act now, we must act boldly. 119 Countries, One Planet, One Goal – To deliver 30x30», 2024, <https://www.hacfornatureandpeople.org/about-us/> (lest 7. september 2024).

2.2 Vernemålenes rettslige karakter

Selv om Naturavtalen etter sin ordlyd og vedtaksprosess ikke er en rettslig forpliktende avtale, kan normer i Naturavtalen, i likhet med andre politiske forpliktelser om vernemål, likevel anses for å være rettslig forpliktende i den grad de kan innfortolkes i eller omfattes av andre rettslige plikter. Artikkelen her undersøker i denne sammenhengen to potensielle rettslige grunnlag: plikten til å etablere verneområder etter konvensjonen om biodiversitet og noen utslag av plikten til å ivareta og beskytte det marine miljøet etter havrettskonvensjonen.⁴⁴

Det finnes også andre måter å tilnærme seg Naturavtalen rettslig på. F.eks. kan man karakterisere den som en ikke-bindende, men likevel juridisk forpliktelse («soft law»)⁴⁵ Man kan også se på samspillet mellom bindende og ikke-bindende (juridiske) forpliktelser fra forskjellige vinkler⁴⁶ utover det ene perspektivet denne artikkelen tar (hvorvidt normer i Naturavtalen kan innfortolkes i de nevnte to rettslig bindende pliktene).

Før vi ser nærmere på de to pliktene, som begge bygger på konvensjoner eller traktater, kan det være nyttig å si noe kort om traktatolkning. Wien-konvensjonen om traktatretten setter i art. 31 ut regler for traktatolkning som anses som folkerettslig sedvanerett. Bestemmelsen gir

med andre ord føringer om tolkning og anvendelse av alle traktater. I henhold til art 31 (1) skal traktater skal tolkes «*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*», altså lojalt i henhold til sin ordinære mening som den tillegges i sin kontekst og i lys av innhold og formål. Videre spesifiserer konvensjonen at sammen med konteksten skal det legges vekt på «*any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*», altså at etterfølgende avtaler mellom partene som gjelder tolkning av traktaten eller anvendelse av dens bestemmelser også er relevant for tolkningen og skal vektlegges i denne. Naturavtalen er nettopp en avtale, vedtatt av partene til konvensjonen om biodiversitet, som i tid etterfølger nevnte konvensjon.⁴⁷

Spørsmålet er nå hva plikten til å etablere verneområder etter konvensjonen om biodiversitet innebærer, tolket i lys av Naturavtalen. Konvensjonen om biodiversitet har til formål bl.a. å bevare biologisk mangfold samt bærekraftig bruk av biologiske komponenter,⁴⁸ og har 196 parter herunder Norge. Konvensjonen bygger på et grunnleggende krav om *in-situ* vern, dvs. at vern av områder der arter og habitater naturlig forekommer.⁴⁹ Vern er helt grunnleggende for beskyttelsen av natur, som redegjort for bl.a. i fortalen til konvensjonen:

Noting further that the fundamental requirement for the conservation of biological

⁴⁴ Om plikt til vern også kan utledes av føre-var-prinsippet diskuteres i en annen studie under arbeid av forfatteren og Ingrid Solstad Andreassen.

⁴⁵ Brunnée, J. (2018). Sources of International Environmental Law: Interactional Law. In S. Besson & J. d. Aspremont (Eds.), *The Oxford handbook of the sources of international law* (pp. 960–986). Oxford University Press, Shelton, D. (2009). *Soft law*.

⁴⁶ Se f.eks. Brunnée, J. (2002). COPing with Consent: Law-Making Under Multilateral Environmental Agreements. *Leiden Journal of International Law*, 15(1), 1-52. <https://doi.org/10.1017/S0922156502000018>; Rajamani, L. (2016). The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations. *Journal of Environmental Law*, 28(2), 337-358. <https://doi.org/10.1093/jel/eqw015>.

⁴⁷ Felix Ekardt mfl., "Legally binding and ambitious biodiversity protection under the CBD, the global biodiversity framework, and human rights law," *Environmental sciences Europe* 35, no. 1 (2023), <https://doi.org/10.1186/s12302-023-00786-5>, s. 15, drøfter dette i noe mer detalj og finner at Naturavtalen oppfylder vilkårene til å være en etterfølgende avtale til konvensjonen om biodiversitet.

⁴⁸ Konvensjonen om biodiversitet art. 1.

⁴⁹ For den fulle definisjon, se konvensjonen om biodiversitet art. 2.

diversity is the in-situ conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings (...)⁵⁰

Et *in-situ* vern forutsetter suverenitet eller jurisdiksjon over området der de aktuelle arter og habitater naturlig forekommer. For habitater og relativt stasjonære arter må dermed slikt vern skje gjennom restriksjoner på aktiviteter og arealbruk i henhold til egen suverenitet eller jurisdiksjon. Videre statuerer art 8 i konvensjonen den rettslige forpliktelsen om at

Each Contracting Party shall, as far as possible and as appropriate:

(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;

I henhold til art 8 har *hver av partene*, herunder Norge, en rettslig forpliktelse til å etablere et system av verneområder for å ivareta kravet om *in-situ* vern. Det er knyttet en kvalifikasjon til forpliktelsen, om at den gjelder «*as far as possible and as appropriate*». Som nevnt skal traktater tolkes i lys av sitt formål og sin kontekst. Konvensjonen om biodiversitet er en global avtale, som også favner over stater som har jurisdiksjon over små land- og havområder eller som har svært lite ressurser eller kapasitet. For et velstående land som Norge, som har suverenitet og jurisdiksjon over store land- og havområder kan det vanskelig påstås at staten ikke har mulighet til å verne. Også prinsippet om «*common but differentiated responsibilities*» trekker i samme retning. Prinsippet, følger bl.a. av FNs rammekonvensjon for klimaendringer, som ble inngått

samtidig med konvensjonen om biodiversitet,⁵¹ og er dermed en del av konteksten til inngåelsen av konvensjonen om biodiversitet. I henhold til dette prinsippet skal, som nevnt, velstående industriland bidra mer sammenlignet med mindre utviklede land.⁵² Det må uansett være klart at etablering av et system av verneområder er mulig for Norge. Det er videre vanskelig å påstå at etablering av verneområder ikke er passende, bl.a. under henvisning til de ovenfor nevnte politiske forpliktelsene om vern og betydningen av vern. Etter dette påligger det, iht. konvensjonen om biodiversitet, en plikt for Norge til å etablere et system av verneområder eller områder hvor særlige tiltak gjøres for å bevare biologisk mangfold.

Innebærer så disse forpliktelsene en rettslig plikt til å verne de kvantitative størrelsene, som formulert i vernemålene i Naturavtalen? Ordlyden i plikten i konvensjonen om biodiversitet til å etablere verneområder angir ikke noe om områdenes størrelse, men sier at det skal være *et system av* områder, som indikerer at området ikke nødvendigvis kan være for lite dersom det skal utgjøre et system, f.eks. for å strekke seg over havområdene til forskjellige stater. Ekhard mfl. finner at Naturavtalens vernemål nettopp klargjør og konkretiserer det juridiske innholdet i plikten.⁵³ Dette er etter forfatterens syn ikke en helt åpenbar tolkning. Plikten om en lojal tolkning av innholdet i konvensjonen om biodiversitet, sett i lys av den etterfølgende Naturavtalen, innebærer ikke nødvendigvis at de kvantitative målene skal legges til grunn som rettslig binden-

⁵¹ Se f.eks. FNs rammekonvensjon om klimaendringer art. 3 og 4, se også note 36.

⁵² Se f.eks. fortalet til FNs rammekonvensjon om klimaendringer.

⁵³ Ekardt, F. mfl. (2023). Legally binding and ambitious biodiversity protection under the CBD, the global biodiversity framework, and human rights law. *Environmental sciences Europe*, 35(1), 80-26. <https://doi.org/10.1186/s12302-023-00786-5>.

⁵⁰ Konvensjonen om biodiversitet, fortalet.

de, men snarere at disse vil være veiledende for tolkningen og fastsettelsen av plikten. Det skulle for Norges del innebære at et system av marine verneområder skal etableres, og at verneområdene størrelse må være informert av bl.a. Naturavtalens vernemål, sett i lys av de nasjonale omstendighetene, prioriteringene og mulighetene, herunder prinsippet om «*common but differentiated responsibilities*». Disse peker, som ovenfor diskutert, i retning av at Norge bør verne minst 30 % av norske havområder, at Norge bør restaurere minst 30 % av forringede økosystemer til havs samt at Norge bør redusere tap av arealer av høy biodiversitet til null innen 2030.

Det neste spørsmålet er hvilke plikter til å etablere marine verneområder som kan utledes av havrettskonvensjonens del XII, og om disse gir rettslig forankring til vernemålene. Den generelle plikten for stater til å ivareta og beskytte det marine miljøet følger av havrettstraktaten art. 192, som videre spesifisert og utviklet i bl.a. havrettstraktatens part XII og internasjonal rettspraksis. Plikten til å beskytte miljøet etter havrettskonvensjonen er en begrensning på statenes suverene rettigheter, og dermed statens frihet til å forvalte areal og menneskelige aktiviteter. Dette er f.eks. nylig fastslått i havrettsdomstolens rådgivende uttalelse om klimaendringer og internasjonal rett,⁵⁴ hvor det heter det bl.a. at plikten til å ivareta det marine miljøet «*thus places*

⁵⁴ Havrettsdomstolens (International Tribunal for the Law of the Sea) rådgivende uttalelse 21. mai 2024, sak nr. 31 om klimaendringer og internasjonal rett, tilgjengelig her: <https://www.itlos.org/en/main/cases/list-of-cases/> Noen implikasjoner av uttalelsen for utviklingen av internasjonal rett er diskutert i bl.a. Qian, J., Sun, K., & Chang, Y.-C. (2024). The impact of the ITLOS climate change advisory opinion on the development of international law. *Marine Policy*, 170, 106406. <https://doi.org/10.1016/j.marpol.2024.106406>, samt i Freestone, D., Schofield, C., Barnes, R., & Akhavan, P. (2024). Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case 31. *The International Journal of Marine and Coastal Law*, 1-12. <https://doi.org/10.1163/15718085-bja10207>.

a constraint upon States' exercise of their sovereign right».⁵⁵ Havrettsdomstolen presisere videre at art. 194 i havrettskonvensjonen

imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State.⁵⁶

Havrettsdomstolen finner altså at det påhviler statene en rettslig plikt til å gjøre alle nødvendige tiltak for å redusere og kontrollere bl.a. klimagassutslipp (som saken gjaldt). Domstolen fant videre vitenskapelig grunnlag for at arealbaserte tilnærminger og verneområder er en realistisk strategi i møte med klimaendringer.⁵⁷ Marine verneområder kan dermed også være et nødvendig tiltak som oppfyller denne plikten. Havrettsdomstolen uttrykker videre at «*[s]tates are required to take all necessary measures, including individual actions as appropriate*»,⁵⁸ altså at det ikke er tilstrekkelig å delta i globale initiativ for å bekjempe bl.a. klimaendringer, men statene også er pålagt å ta nødvendige individuelle tiltak som påkrevd.

Havrettsdomstolen fant videre at:

States Parties have the specific obligation to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life from climate change impacts and ocean acidification.

Statene, herunder Norge har altså en spesifikk forpliktelse om å ta vare på og beskytte sjeldne

⁵⁵ *Ibid.* (avsnitt 187).

⁵⁶ *Ibid.* (avsnitt 223).

⁵⁷ *Ibid.* (avsnitt 438).

⁵⁸ *Ibid.* (avsnitt 202).

og sårbare økosystemer og dessuten habitater til sjeldne, truede eller nær truede arter og andre former for marint liv. Når det gjelder habitater samt de sjeldne, truede eller nær truede artene som er relativt stasjonære, er det vanskelig å se for seg hvordan statene skal ivareta denne forpliktelsen på annet vis enn ved bruk av arealbaserte virkemidler og opprettelse av marine verneområder.

Havrettsdomstolen foretok videre en fortolkning av begrepet «*preserve*» (ivareta) i plikten til å ivareta og beskytte det marine miljøet.⁵⁹ Her fant domstolen bl.a. at begrepet «*preserve*» refererer til «*the obligation to preserve the marine environment, which entails maintaining ecosystem health and the natural balance of the marine environment*», og videre at «*preservation*» også kan omfatte restaurering av natur.⁶⁰ Det påhviler dermed statene en ivaretakelsesplikt for det marine miljøet som innebærer opprettholdelse av økosystemenes helse og den naturlige balansen i det marine miljøet og som også kan omfatte restaurering.

Havrettsdomstolen fastslår i avgjørelsen generelt at omsorgsforpliktelsen som omhandler ivaretakelse av det marine miljøet, som fremgår av havrettskonvensjonen, er streng, gitt den høye risikoen for alvorlig og irreversibel skade på det marine miljøet pga. bl.a. klimaendringer.⁶¹

Havrettsdomstolens henviser videre til at man ved fastleggelsen av hva som er nødvendige tiltak for å beskytte og ivareta det marine miljøet skal ta hensyn til bl.a. internasjonale regler

og standarder.⁶² Havrettsdomstolen viste her til at i en klimaendringssammenheng ville bl.a. klimamålene og tidsbanene i Parisavtalen være særlig relevante i fastleggelsen av plikten.⁶³ Konvensjonen om biodiversitet sitt krav til statene om å etablere hver sine system av verneområder samt Naturavtalens vernemål kan nettopp representere slike internasjonale regler og standarder.⁶⁴ Som internasjonale regler og standarder vil disse være særlig relevante i fastleggelsen av hva som er nødvendig tiltak, herunder individuelle tiltak, for å beskytte og bevare det marine miljøet i tråd med havrettskonvensjonen. Sammen med de øvrige momentene utledet av rettspraksis, trekker dette i retning av vern som et nødvendig tiltak for å ivareta plikten til å ivareta og beskytte det marine miljøet.

Dermed kan plikten om å ivareta og beskytte det marine miljøet etter havrettskonvensjonen omfatte etablering av verneområder av et omfang som rimer med konvensjonen om biodiversitet og vernemålene i Naturavtalen, hensyntatt nasjonale omstendigheter, muligheter og prioriteringer og prinsippet om «*common but differentiated responsibilities*». I alle tilfelle legges til grunn for den videre drøftelse at Norge har til hensikt å møte de tre vernemålene i Naturavtalen.

Et EØS-rettslig sidespor kan her være på sin plass. Direktivet om strategiske miljøvurderinger under EØS-avtalen⁶⁵ krever at det gjøres miljøvurderinger for alle planer og program-

⁵⁹ Havrettskonvensjonen art. 192.

⁶⁰ Havrettsdomstolens rådgivende uttalelse om klimaendringer og internasjonal rett, se note 54 (avsnitt 385).

⁶¹ *Ibid.*, (konklusjonen avsnitt 4 (c)). Se også Wewerinke-Singh, M., & Viñuales, J. E. (2024). More than a Sink – The ITLOS Advisory Opinion on Climate Change and State Responsibility. *Verfassungsblog* (2366-7044). <https://doi.org/10.59704/9ae2d180cf04ba0a>.

⁶² *Ibid.* (avsnitt 214 flg). Voigt stiller spørsmål ved hvorfor ITLOS begrenser seg til disse to referansepunktene, se Voigt, C. (*ibid.*). ITLOS and the importance of (getting) external rules (right) in interpreting UNCLOS.

⁶³ *Ibid.* (avsnitt 215).

⁶⁴ *Ibid.* (avsnitt 214 flg. og 388). Havrettsdomstolen nevner konvensjonen om biodiversitet som eksempel, men utdyper ikke dette og nevner ikke Naturavtalen.

⁶⁵ Europa-Parlamentets og Rådets direktiv 2001/42/EF af 27. juni 2001 om vurdering af bestemte planer og programmers indvirkning på miljøet.

mer, herunder lovgivning,⁶⁶ som gjelder fysisk planlegging og arealanvendelse.⁶⁷ Lovforslaget gjelder marint vern som må regnes som fysisk planlegging og arealanvendelse, og utløser dermed miljøvurdering i henhold til dette direktivet. Med drahjelp av presumpsjonsprinsippet kan tilsvarende krav til miljøvurdering antas være gjennomført i norsk rett ved plan- og bygningsloven og konsekvensutredningsforskriften og innfortolkes i disse.⁶⁸ En miljøvurdering av et slikt lovforslag skal iht. direktivet bl.a. inkludere

de miljøbeskyttelsesmål, der er fastlagt på internasjonalt plan, fællesskapsplan eller medlemsstatsplan, og som er relevante for planen eller programmet, og hvordan der under udarbejdelsen af den/det er taget hensyn til disse mål og andre miljøhensyn.⁶⁹

Dersom disse kravene hadde vært fulgt, skulle det medfulgt lovforslaget ikke bare en redegjørelse av globale og regionale vernemål, men hvordan lovforslaget tar hensyn til disse, herunder om lovforslaget har til hensikt å tilrettelegge for oppnåelse av vernemålene etter bl.a.

Naturavtalen.⁷⁰ Neste kapittel diskutere om lovforslaget i alle tilfelle er egnet til å oppnå vernemålene.

3. Er lovforslaget egnet til å oppnå vernemålene?

Spørsmålet her er om vernekriteriene og øvrige bestemmelser i lovforslaget tilrettelegger for eller er egnet til å nå vernemålene. Vernekriteriene fremgår av lovforslagets § 5 (2). Her heter det at som marine verneområder *kan* vernes områder som:

- a) inneholder særegne eller representative økosystemer og som er uten tyngre naturinngrep
- b) inneholder truet, sjelden eller sårbar natur
- c) representerer en bestemt type natur
- d) på annen måte har særskilt betydning for naturmangfold
- e) utgjør en spesiell geologisk forekomst
- f) har særskilt naturvitenskapelig verdi
- g) har særskilt betydning som økologisk funksjonsområde for en eller flere nærmere bestemte arter

Lovforslaget pålegger ikke myndighetene en plikt til å verne marin natur, men gir myndighetene anledning til verne. Dette harmonerer dårlig med pliktene til vern som gjennomgått i pkt. 2.2. Selv om presumpsjonsprinsippet⁷¹ vil lede til at plikter om vern må innfortolkes, er det en lite pedagogisk lovgivningsteknikk, som stiller store krav til rettsanvenderne, å fremstille dette som om myndighetene står fritt.

Vernekriteriene i a til g bruker adjektiver når de setter som vilkår at områdene må ha spesielle kvaliteter i den marine naturen. Det første

⁶⁶ Lov- og forskriftsforslag og endringer til disse omfattes også, slik uttrykket «utarbeidet med tanke på vedtakelse av parlament eller regjering via en lovgivningsprosedyre» i direktivteksten gir anvisning på, se også Fogleman, V. (2017). Plans and Programmes Under the SEA Directive. I G. Jones & E. Scotford (Red.), *The Strategic Environmental Assessment Directive : A Plan for Success?* (1. versjon, s. 41–62). Hart Publishing. <https://doi.org/10.5040/9781474201278.ch-003>. Se også om ev. utredningsplikt etter GrL § 112, Fauchald, O. K. (2016). Plikt til å utrede miljøkonsekvenser av lovgivning. I Lov, liv og lære (s. 187–200). Universitetsforlaget, 2016.

⁶⁷ Direktiv 2001/42/EF, se note 65, art. 3, nr. 2 a).

⁶⁸ Forskrift 21. juni 2016 nr. 854 om konsekvensutredninger, med hjemmel i plan- og bygningsloven.

⁶⁹ Direktivet 2001/42/EF, se note 65, art 5 nr. 1, jf. Bilag I e). Konsekvensutredningsforskriften § 21 ligner, men forenkler bestemmelsen og utelater plikten om å redegjøre for hvordan målene er hensyntatt.

⁷⁰ Høringsnotatet vedlagt lovforslaget, se note 1, sier i tilknytning til Naturavtalens vernemål at det «pågår arbeid med å vurdere hvordan dette skal følges opp nasjonalt», s. 21.

⁷¹ Se f.eks. Rt. 2000 s. 1811.

kvantitative vernemålet i Naturavtalen⁷² om at 30 % av innlands, kyst- og havområder skal være under effektivt vern innen 2030 dreier seg om nesten en tredjedel av de enorme norske havområdene. Spørsmålet er først om vernekriteriene er egnet til å favne over så store områder. Kriteriene synes i så måte krevende på flere måter. For det første fordi de er kvalitative og krever en god økologisk forståelse. Spørsmålet blir da om man i dag i det hele tatt har tilstrekkelig økologisk kunnskap om f.eks. minst 30 % av havområdene for å fastslå at slike kriterier vil være oppfylt. Studier viser at det er manglende kunnskap om havområdene i bl.a. Arktis og i dype havområder.⁷³ Kriteriene vil dermed kunne kreve tid- og ressurskrevende forskning for å fastslå om kriteriene er oppfylt eller ikke. Det fremstår vanskelig å få på plass slik kunnskap samt gjennomføre en verneprosess innen 2030. Den manglende kunnskapen reiser også spørsmål om hvordan føre-var-forpliktelse skal håndteres, men analysen går ikke nærmere inn på dette spørsmålet.⁷⁴

Den andre innvendinga mot vernekriterienes evne til å favne over store havområder er at flere av disse fokuserer på det spektakulære, se f.eks. vilkårene om «særegne», «sjelden», «truet», «spesiell» og «særskilt» inntatt syv ganger i vernekriteriene. Det finnes gode grunner for

at slike områder bør vernes. Men spørsmålet er hvor mye spektakulær natur som finnes. Finnes det eksempelvis minst 30 % spektakulær marin natur? I alle tilfeller synes det hensiktsmessig at kriteriene også må favne over natur som ikke er så spektakulær, men som er vanlig og viktig f.eks. for noen (ordinære) arter, i noen livssykluser, som er viktig for større økosystem eller næringsnett.⁷⁵ Man kan også stille spørsmål ved verdisynet som ligger bak forslaget om å gjøre spektakulær natur mer verneverdig enn ordinær natur.⁷⁶ Et av vernekriteriene som synes favne videre enn det spektakulære er det om «sårbar natur». Et annet kriterium som i utgangspunktet også kunne favne videre er vernekriteriet om «representative økosystemer», men dette inneholder tilleggsvilkår om at området må være uten tyngre naturinngrep. Som vi har sett beskriver de norske havforvaltningsplanene bl.a. hvordan Nordsjøen og Skagerrak er betydelig påvirket av klimaendringer og menneskeskapte aktiviteter, slik at kriteriets anvendelighet kan være begrenset av tilleggsvilkåret. I alle tilfelle er også kriteriene om sårbarhet og representativitet også kvalitative kriterier, som forutsetter faglig kunnskap om havområdene.

På bakgrunn av disse innvendingene, og i lys av at Norge har til hensikt å nå vernemålene i Naturavtalen, foreslås at det formuleres som en plikt på myndighetene å verne norske havområder, overensstemmende med de folkerettslige plikter herunder de som ovenfor er nevnt. Videre foreslås at vernekriteriene revideres og suppleres med et kvantitativt kriterium som gir

⁷² Naturavtalens mål 3.

⁷³ Se f.eks. IASC *State of Arctic science report*, 2023, <https://iasc.info/about/publications-documents/state-of-arctic-science> (lest 7. september 2024), hvor et samlet arktisk forskningsmiljø pekt på status og kunnskapshull. Se også Ramirez-Llodra, E. mfl. (2020). Benthic Communities on the Mohn's Treasure Mound: Implications for Management of Seabed Mining in the Arctic Mid-Ocean Ridge. <https://doi.org/10.3389/fmars.2020.00490>, Rogers, A. D., & Ramirez-Llodra, E. (2024). Deep-sea exploration of marine ecosystems – Knowledge and solutions for marine biodiversity. *The International hydrographic review*, 30(1), 10-37. <https://doi.org/10.58440/ihr-30-1-a09>.

⁷⁴ Den manglende kunnskapen reiser også spørsmål om føre-var-forpliktelse, som er gjenstand for en egen studie, se note 44.

⁷⁵ Rob Amos, "Protecting commonplace biodiversity under international conservation law," *Biodiversity and Conservation* 33, no. 5 (2024). <https://doi.org/10.1007/s10531-024-02823-y>.

⁷⁶ Krause, M., & Robinson, K. (2017). "Charismatic Species and Beyond How Cultural Schemas and Organisational Routines shape Conservation". *Conservation and Society*, 15(3), 313-321. https://doi.org/10.4103/cs.cs_16_63.

grunnlag for å verne f.eks. 30 % av norske havområder.

Det andre vernemålet i Naturavtalen innebærer at 30 % av arealer med forringede økosystemer på land, kyst og til havs skal underlegges effektiv restaurering.⁷⁷ For Norge er et relevant eksempel her at store deler av bl.a. havbunnen i Barentshavet er forringet av bunntråling.⁷⁸ Tråling av havbunn innebærer en oppvirvling av ulike sedimenter og organismer. Den vil kunne restaureres av naturen selv, dersom den blir latt være i fred i f.eks. 10 år eller lengre,⁷⁹ dvs. vernes mot aktivitet på havbunnen i lang tid. Spørsmålet er i alle tilfelle om de foreslåtte kriteriene for vern vil favne over 30 % av bl.a. havbunn som er forringet av bunntråling.

Lovforslaget har i § 5 (3) en bestemmelse om restaurering som henviser til de ovennevnte vernekriteriene i § 5 (2). Her heter det at som

marint verneområde kan også vernes et område som ved fri naturlig utvikling eller aktive restaureringstiltak kan oppfylle noen av vilkårene i første ledd bokstav a til g.

Lovforslaget legger her opp til at restaurering kan skje der naturen kan oppfylle de kvalitetene som fremgår av vernekriteriene a til g. Lovforslaget pålegger dermed heller ikke myndighetene noen plikter til å sørge for at forringede økosystemer restaureres. Forslaget setter videre ingen krav til at forringede økosystemer skal restaureres uavhengig av hvilken kvalitet økosystemet kan oppnå. Enn videre setter lovforslaget

ingen krav til hvilket omfang av forringet marin natur som skal restaureres, men for så vidt heller ingen begrensninger for hvor mye marin natur som kan restaureres, såfremt de nevnte kvalitative begrensninger i at restaurert natur må ha potensial til å oppfylle vernekriteriene er oppfylt. Hvorvidt 30 % av forringede økosystemer i norske havområder har slikt potensial er ukjent.

I alle tilfelle kunne bestemmelsene i lovforslaget, for bedre å harmonere med Naturavtalens vernemål om restaurering,⁸⁰ revideres for bedre å sikre at restaurering skal skje og at de kvalitative kriteriene ikke blir en begrensning på omfanget av restaurering. Kanskje bør man også her introdusere et kvantitativt kriterium for å sikre at restaurering skal skje i det omfang som følger av Naturavtalen, dvs. 30 % av forringede økosystemer.

Det tredje kvantitative vernemålet i Naturavtalen er i korthet at tapet av nye arealer av høy viktighet for biodiversitet, inkludert økosystemer med høy økologisk integritet, skal bringes nær null i 2030.⁸¹ Det er ingen av vernekriteriene i lovforslaget som bruker akkurat begrepet «høy viktighet for biodiversitet» eller naturmangfold. Litra d har kriteriet «på annen måte har særskilt betydning for naturmangfold», der «på annen måte» antas referere til på annen måte enn ved å være dekket av kriteriene a til c. Begrepene «særskilt betydning for» i lovforslaget og «høy viktighet» i Naturavtalen er nokså sammenfallende. På den bakgrunn passer kriteriet isolert sett med vernemålet i Naturavtalen.

Men der legger loven opp til at slike områder «kan vernes», er Naturavtalens mål er at tap av slike områder skal bringes nær null i 2030. Lovforslaget formulerer som nevnt ingen plikter på myndighetene til å verne områder, til tross for de folkerettslige pliktene som gjengitt ovenfor.

⁷⁷ Naturavtalens mål 2.

⁷⁸ Jørgensen, L. L., Bakke, G., & Hoel, A. H. (2020). Responding to global warming: New fisheries management measures in the Arctic. *Progress in Oceanography*, 188, 102423. <https://doi.org/10.1016/j.pocean.2020.102423>.

⁷⁹ Løkkeborg, S., & mfl. (2023). *Effekter av bunntråling – Sammenstilling av kunnskap om bunnpåvirkning fra trål og snurrevad relevant for norske farvann* (Rapport fra havforskningen 2023-1), som også påpeker at det er store kunnskapshull angående dette.

⁸⁰ Naturavtalens mål 2.

⁸¹ Naturavtalens mål 1.

For å kunne oppnå dette målet, må myndighetene for det første ha oversikt over arealer av høy viktighet for biodiversitet. I de norske havområdene er det allerede identifisert såkalte SVO-områder (særlig verdifulle eller sårbare områder), som kanskje kan brukes for dette formålet, i det de er områder som «er basert på kriterier definert i FNs Konvensjon om biologisk mangfold (...) for å vurdere økologisk eller biologisk viktige områder (EBSA)».⁸² For at tap av slike arealer skal bringes nær null i 2030, vil en egnet fremgangsmåte være å verne SVO-områdene mot påvirkning og aktiviteter, så langt man har jurisdiksjon over dette, som leder til tap av slike arealer. Da må en verneprosess etter lovforslaget for SVO-områdene snarlig igangsettes, slik at tap av slike områder skal bringes nær null i 2030. Dersom lovforslaget skal sikre at dette vil skje, kan en plikt om dette med fordel formuleres.

4. Hvilken betydning har lovforslaget for eksisterende og nye aktiviteter?

I diskusjoner om vern og hvor store områder som skal vernes er et sentralt spørsmål hva vernet innebærer. Som nevnt innledningsvis er vern et relevant og aktuelt virkemiddel for å bøte på de negative påvirkningene på det marine miljøet som allerede er en realitet og et problem, samt å forhindre ytterligere forverring.

Lovforslagets § 7 regulerer forholdet til annen lovgivning. Her slås det fast at

dersom virksomhet som krever tillatelse etter annen lov kan innvirke på verneverdiene i et verneområde etter § 5, skal hensynet til disse verneverdiene tillegges vekt ved avgjørelsen av om tillatelse bør gis, og ved fastsetting av vilkår.

Dette stiller sektormyndighetene fritt til å gi tillatelser til f.eks. petroleumsvirksomhet, sjø-

bunnsmineralvirksomhet og fiske i verneområder etter loven, men disse myndighetene må ta hensyn til verneverdiene ved avgjørelsen. Spørsmålet er om dette egentlig medfører noe annet enn hva som allerede følger av eksisterende regler. Dersom det er kjent at det foreligger f.eks. «spektakulær» (se pkt. 3), representativ eller sårbare natur i et område hvor sektormyndighetene utsteder tillatelse til aktiviteter, vil både havrettskonvensjonens plikt til å beskytte det marine miljøet, konvensjonen om biodiversitets art. 6 om plikt til å integrere miljøhensyn, Grunnloven § 112 krav til disponering av ressurser og plikter til å treffe tiltak for å ivareta miljøet, plan- og prosjektdirektivet under EØS-avtalen krav til at å ta hensyn til miljøvurderinger,⁸³ naturmangfoldlovens bestemmelser om bærekraftig bruk herunder bestemmelsen om å opptre aktsomt, samt havressursloven eller annen særlovgivning medføre at sektormyndighetene i alle tilfelle må ta hensyn til dette. Høyesterett har f.eks. artikulert at myndighetene «som gjer vedtak om å tillate eit naturinngrep, har ansvaret for å gjennomføre dei tiltaka og vurderingane som Grunnlova § 112 tredje ledd, jf. fyrste ledd krev».⁸⁴

På denne bakgrunn er det vanskelig å se at verneområder etter lovforslaget beskytter marin natur utover det kobbelt av plikter om å ta hensyn til miljø som allerede foreligger på tillatelsesutstedende sektormyndigheter. Dette gir grunn til å stille spørsmål ved ambisjonene ved hele lovforslaget. Lovforslagets formål er etter § 1 «å bidra til å bevare marin natur utenfor territorialfarvannet, gjennom langsiktig, effektivt og representativt vern (...)». Det er vanskelig å se at

⁸² Havforvaltningsplanene, s. 9.

⁸³ Direktiv 2001/42/EF, se note 65, art. 8, jf. miljøinformasjonsloven § 20 (2) og Europa-parlamentets og rådets direktiv 2011/92/EU af 13. december 2011 om vurdering af visse offentlige og private projekters indvirkning på miljøet art. 2 jf. lov 27. juni 2008 nr. 71 om planlegging og byggesaksbehandling kap. 14.

⁸⁴ Rt. 2020 s. 2472 (avsnitt 182).

loven har et slikt bidrag når det gjelder utstedelse av fremtidige tillatelser.

Lovforslaget tar videre for seg forholdet til eksisterende aktiviteter bl.a. gjennom vernekriteriet i § 5 a). Dette retter seg mot områder som «inneholder særegne eller representative økosystemer og som er uten tyngre naturinngrep» (forfatterens understrekning). Det understrekte tilleggsvilkåret innebærer at man ikke kan verne særegne eller representative økosystemer som også er påvirket av tyngre naturinngrep. Med andre ord medfører vilkåret at eksisterende aktiviteter som til sammen utgjør «tyngre naturinngrep» vil føre til marine økosystemer i slike områder aldri vil beskyttes gjennom vernetiltak.

Områder hvor det foreligger tyngre naturinngrep vil nettopp være forringede områder som trenger restaurering. Tilleggsvilkåret harmonerer derfor dårlig med mål og plikter til å restaurere natur som er forringet av tyngre naturinngrep, etter eksempelvis Naturavtalen, konvensjonen om biodiversitet og havrettskonvensjonen. Den valgte formuleringen er uheldig da den i praksis gir et vern av marine aktiviteter som forringer naturmiljøet og utgjør tyngre naturinngrep, stikk i strid med formålet i lovforslagets § 1. Det foreslås av denne grunn at tilleggsvilkåret «uten tyngre naturinngrep» fjernes fra lovforslaget.

Også høringsnotatet som medfølger lovforslaget beskriver i rene ord at «[s]om hovedregel legges det opp til at eksisterende aktivitet i områder som vernes kan fortsette, eventuelt på nærmere angitte vilkår».⁸⁵

De fremhevede momentene om hvilket vern eksisterende aktiviteter nyter i lovforslaget kan med fordel ses i lys av f.eks. brede vitenskapelige vurderinger av havets miljøtilstand, som fremhever arealbruk som en av de største

truslene mot denne,⁸⁶ samt konklusjonene i den siste havforvaltningsplanen, hvor det heter at: «[s]amlet er vurderingen at målene for verdiskapning, næring og samfunn kan sies å være nådd, mens mange av målene for naturmangfold, økosystem og forurensning ikke er nådd eller de er vanskelig å vurdere.»⁸⁷ Dersom man verner eksisterende aktiviteter vil det ikke skje noe med miljøpåvirkningen de påfører marin natur, og denne delen av påvirkninga vil forbli konstant. Det er vanskelig å se hvordan lovens formål skal fremmes i lys av den manglende rettslige betydningen lovforslaget vil ha både for fremtidige og for eksisterende aktiviteter.

5. Avsluttende merknader

Analysen har vist at Norge har påtatt seg politiske forpliktelser om 30 % vern av havområder i en rekke sammenhenger. Herunder har Norge sluttet seg til Naturavtalen som inneholder tre ulike kvantitative vernemål, som er globale, men som etter en nærmere vurdering indikerer at Norge bl.a. bør verne minst 30 % av norske havområder. Analysen har videre funnet at konvensjonen om biodiversitet pålegger Norge å etablere et system av marine verneområder, og at verneområdenes omfang må være informert av bl.a. Naturavtalens vernemål, sett i lys av de nasjonale omstendighetene, prioriteringene og mulighetene, herunder prinsippet om «*common but differentiated responsibilities*». Disse peker i retning av at Norge bør verne minst 30 % av norske havområder, restaurere minst 30 % av forringede områder samt redusere tap av arealer med høy biodiversitet til null innen 2030.

Analysen har videre funnet at Norge iht. havrettskonvensjonen er pliktig til å ivareta og beskytte det marine miljøet, herunder økosystemet og den naturlige balansen i havmiljøet,

⁸⁵ Høringsnotatet, jf. note 1, s. 90.

⁸⁶ Se f.eks. note 24.

⁸⁷ Havforvaltningsplanene, s. 10.

som kan omfatte en plikt til å restaurere marin natur. Norge er, i likhet med andre stater, særlig forpliktet til å ivareta sjeldne og sårbare arter samt habitater til sjeldne, truede eller nær truede arter. Marine verneområder kan være ett nødvendig tiltak som oppfyller denne plikten til å ivareta og beskytte det marine miljøet og plikten til å redusere klimagassutslipp. I fortolkningen av hva som er et nødvendig tiltak vil konvensjonen om biodiversitet sitt krav til statene om å etablere hver sine system av verneområder samt Naturavtalens kvantitative vernemål være særlig relevante.

Når pliktene etter konvensjonen om biodiversitet og havrettskonvensjonen ses i sammenheng foreligger det to internasjonalt bindende plikter på Norge som peker i retning av at Norge bør etablere et vern som harmonerer med plikten i konvensjonen om biodiversitet og Naturavtalen, f.eks. ved å verne minst 30 % av norske havområder, restaurere minst 30 % av forringede områder samt redusere tap av arealer med høy biodiversitet til null innen 2030.

Analysen viser videre at lovforslaget ikke artikulere plikten etter folkeretten om å verne norske havområder, som kompliserer rettsanvendelse iht. lovforslaget og gjør rettanvendelsen sårbar for feil. Lovforslaget er videre i liten grad egnet til å møte vernemålene i Naturavtalen, særlig hva gjelder vernemålene om å verne minst 30 % av norske havområder samt restaurere minst 30 % av forringede norske havområder. På bakgrunn av disse innvendingene, foreslås at de plikter som påhviler norske myndigheter tydeliggjøres i lovforslaget, samt at vernekriteriene revideres og suppleres med kvantitative kriterier som gir grunnlag for å verne f.eks. 30 % av norske havområder samt restaurere 30 % av forringede økosystemer.

For at tap av arealer av høy viktighet for biodiversitet skal bringes nær null i 2030, vil en egnet fremgangsmåte være å verne SVO-områ-

dene mot påvirkning og aktiviteter, så langt man har jurisdiksjon over dette, som leder til tap av slike arealer. Da må en verneprosess etter lovforslaget for SVO-områdene snarlig igangsettes, slik at tap av slike områder skal bringes nær null i 2030. Analysen viser dermed at lovforslaget bør revideres på vesentlige punkter før den nye loven kan bli det viktige virkemidlet for å oppfylle de internasjonale målene i Naturavtalen som Norges klima- og miljøminister har bebudet.⁸⁸

Etablering av marine verneområder er et anerkjent tiltak for å bevare biodiversitet og marine økosystemer, men forutsetter at vernet har et reelt og rettslig innhold. Det er vanskelig å se hvordan lovens formål skal fremmes i lys av den manglende rettslige betydningen lovforslaget vil ha både for fremtidige og for eksisterende aktiviteter.

I denne sammenheng kan det vises til NOU 2023:25 om omstilling til lavutslipp, som fremhever behovet for å planlegge for lavutslipp, lav ressursbruk og lavt miljøavtrykk. Veien mot lavutslipp, lav ressursbruk og lavere miljøavtrykk innebærer nødvendigvis at eksisterende aktiviteter og planlegging av fremtidige aktiviteter nødvendigvis ikke kan gjøres som før. Det nye lovforslaget har mulighet være en del av en omstilling til et lavutslippssamfunn med mindre miljøavtrykk, men det vil kreve at lovforslaget revideres vesentlig.

Det kan tenkes flere alternative fremgangsmåter. Inspirert av vassdragsvernet i Norge fra 70-tallet kunne man f.eks. tenkt seg følgende. For disse var problemstillingen at alle vassdrag ville egne seg for kraftutbygging, som ville gi både økonomisk virksomhet og nyttig kraft. På den andre siden inneholdt alle vassdrag økosystemer, habitater og arter som det var grunn til å verne. Ved å ta en overordnet avgjørelse, kunne man velge å bygge ut noen vassdrag samt å

⁸⁸ Se note 17.

verne andre. Dette ble gjort ved et bredt politisk forankret forlik.

Det samme kan tenkes om de havområdene Norge har jurisdiksjon over. De kan være nyttig grunnlag for økonomisk virksomhet samtidig som de inneholder økosystemer det er grunn til å verne. En overordnet tilnærming kan være å ta en mer kvantitativ eller skjematisk tilnærming, hvor man også hensyntar manglende kunnskap om områdene og SVOene, og fastsetter at f.eks. 30 % av områdene skal vernes mot all økonomisk aktivitet, så langt Norges jurisdik-

sjon rekker. I de øvrige f.eks. 70 % kan økonomisk aktivitet forekomme, og selvsagt må man ta miljøhensyn innenfor disse områdene i tråd med eksisterende plikter, slik man også er pliktig til å gjøre i dag. Andre presentsatser (50/50)⁸⁹ og inndelingsmåter (relative andeler i sør, midt og nord) kan også tenkes. Fremoverlente løsninger krever derimot at lovgiverne legger fra seg berøringsangsten overfor eksisterende aktiviteter og forvaltningen av denne, og viser evne og vilje til å gjøre de omstillingsgrep som de store fremtidsutfordringene krever.

⁸⁹ Se f.eks. Wilson, E. O. (2016). *Half-earth : our planet's fight for life* (1. utg. red.). Liveright Publishing Corporation. og What is the Half-Earth conservation idea? (environmentamerica.org).

Planeringens roll för lokaliseringen av ny vindkraft i Sverige

*Aron Westholm**

Sammanfattning

En viktig del i arbetet med att minska samhällets negativa påverkan på klimatet är att öka produktionen av förnybar energi. Här spelar vindkraften en viktig roll. Etableringen av vindkraft innebär dock lokal påverkan på omgivningen, både naturmiljön och omgivande samhällen. Därför uppstår ofta konflikter när ny vindkraft planeras. För projektörer, närboende och andra intressenter är det centralt att veta om viss plats är lämplig och hur stor chansen är att en ny vindkraftspark får uppföras där. Enligt Energimyndigheten avslås ca en tredjedel av alla ansökningar om nya vindkraftsparker i Sverige vilket tyder på att förutsebarheten brister. Ett viktigt verktyg för förutsebarhet när det kommer till lokalisering av nya verksamheter är fysisk planering, såväl kommunal som statlig. Det statliga verktyg för att fysiskt planera ny vindkraft som finns till hands är riksintressesystemet, där områden som är särskilt lämpliga för vindkraft kan identifieras. I den här artikeln presenteras resultaten från en enkätstudie med svenska vindkraftsprojektörer, där de har fått svara på frågor om vilka faktorer som är viktiga vid etablering av ny vindkraft. Resultaten visar att riksintressesystemet verkar spela liten roll. Om något så fungerar riksintressen frånstyrande, på så vis att projektörer till viss del undviker områden där motstående intressen finns. Dock verkar det faktum att ett område är utpekad som riksintresse för vindbruk inte vara någon avgörande faktor vid val av lokalisering för ny vindkraft.

Abstract

Increasing the production of renewable energy is an important part of reducing society's negative impact on the climate. In this process, wind power plays an important role. Still, the establishment of wind power has a local impact on surrounding areas, both the natural environment and the surrounding communities. This is why conflicts often arise when new wind power is planned. For developers, local residents and other stakeholders, it is crucial to know whether a particular site is suitable and what the chances are that a new wind farm can be built there. According to the Swedish Energy Agency, about one third of all applications for new wind farms in Sweden are rejected, indicating a lack of predictability. An important tool for predictability when it comes to locating new activities, is spatial planning, both local and national. The available tool for national spatial planning of new wind power in Sweden is the system with national interests, where areas that are particularly suitable for wind power can be identified. This article presents the results of a survey with Swedish wind power developers, where they have been asked to answer questions about the factors that are important when establishing new wind power. The results show that the national interest system seems to play a small role. If anything, national interests act as a deterrent, in that developers to some extent avoid areas where conflicting interests exist. However, the fact that an area is designated as a national interest for wind power does not seem to be a decisive factor in the choice of location for new wind power.

Keywords: Vindkraft, planering, riksintresse, förnybar energi, miljörätt

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1. Vindkraft, planering och förutsebarhet

Energiproduktion och -konsumtion är centrala delar av den globala klimatkrisen. År 2019 stod energiförsörjningssektorn för cirka 34 procent av de globala utsläppen av växthusgaser.¹ 80 procent av den globala energiproduktionen är fortfarande baserad på fossila bränslen.² De globala utsläppen behöver nästan halveras till 2030 för att undvika de värsta effekterna av klimatförändringar,³ och energiproduktionen är en viktig faktor i denna minskning. Såväl FN:s globala mål för hållbar utveckling (mål 7 och 13) som Sveriges miljö kvalitetsmål har målsättningar om att producera mer fossilfri energi och att begränsa samhällets klimatpåverkan. Rapporter visar att energianvändningen i Sverige kan komma att mer än fördubblas under de kommande 20 åren.⁴ Vindkraft lyfts ofta fram som en lösning, i alla fall på kort sikt.⁵ Samtidigt har etableringen av ny vindkraft ofta negativ lokal påverkan på samhällen och naturmiljön. Därför är det viktigt att säkerställa att utbyggnaden av förnybar energiproduktion sker på ett sätt där den negativa påverkan på omgivningen minimeras. Ett viktigt verktyg för att säkerställa detta och för att ge förutsebarhet i tillståndprocessen är fysisk planering: om en plats är utpekad i den fysiska planeringen som lämplig för exempelvis vindkraft så ska det också betyda att chanserna för att få tillstånd för att uppföra vindkraftverk där är särskilt goda. I den bästa av världar har också påverkan på omgivningen bedömts i planeringsprocessen och platser valts ut där denna påverkan minimeras.

¹ Naturvårdsverket (2022). *Begränsad klimatpåverkan – Fördjupad utvärdering av miljömålen 2023*, s. 54.

² International Energy Agency (2022). *World Energy Outlook 2022*, s. 30.

³ Naturvårdsverket (2022). S. 8–9.

⁴ Energimyndigheten (2023). *Scenarier över Sveriges energisystem 2023*, ER 2023:07, s. 74.

⁵ Prop. 2023/24:105 (2024). *Energipolitikens långsiktiga utveckling*, s. 39.

I den fysiska planeringen spelar såväl den nationella som den kommunala planeringen en viktig roll, och det är viktigt att de två planeringssystemen kommunicerar med varandra för att de ska fylla sina respektive funktioner. En central funktion är som sagt förutsebarhet i processen. Det nuvarande tillståndssystemet uppvisar brister i sådan förutsebarhet. Enligt Energimyndigheten avslås i genomsnitt cirka en tredjedel av alla tillståndsansökningar för nya vindkraftparker.⁶ Skälen till avslagen kan vara många, men de många avslagen visar att tillståndprocessen ur projektörernas synvinkel är förknippad med stora osäkerheter.

En ansökan om en ny vindkraftspark är förenad med stora kostnader för projektören, men det är också en kostnad för samhället eftersom det är många myndigheter som är inblandade i samrådsprocessen och tillståndsförfarandena. En del av dessa kostnader kan undvikas om det redan från början står klart vilka platser som är lämpliga och vilka som inte är det. Bristfällig planering riskerar att skapa onödiga konflikter i lokalsamhällen eftersom det kan leda till att det projekteras i områden som inte är lämpliga och det därmed aldrig skulle vara aktuellt med vindkraft. Om planeringssystemet inte ger tillräckligt med information finns det inte något sätt för en projektör att veta om en plats anses lämplig utan att ansöka om tillstånd, vilket är en process som i många fall leder till konflikter med lokala intressen. Det är därför viktigt att ha en planeringsprocess där motstående intressen klargörs i ett tidigt skede för att minimera såväl kostnader som konflikter.

I den här artikeln presenteras en förstudie till ett projekt som utvärderar den nationella planeringens roll och funktion för utbyggnaden av vindkraft i Sverige. Förstudien består i en enkät

⁶ Energimyndigheten (2021). *Nationell strategi för en hållbar vindkraftsutbyggnad*, s. 21.

som har skickats ut till vindkraftsprojektörer i Sverige och som fokuserar på vilka faktorer projektörerna uppfattar som viktiga vid lokalisering av ny vindkraft samt vilka faktorer de uppfattar som osäkerheter i tillståndsprocesser. Förstudien utgör underlag för att identifiera den roll som de fysiska planeringsprocesserna i Sverige spelar i utbyggnaden av ny vindkraft. Studien är del av en större studie av hur de olika planeringsprocesserna samspelar med varandra på nationell, regional och kommunal nivå.

2. Energibehov och forskningsläget

Energimyndigheten har prognosticerat elanvändningens utveckling under de kommande decennierna, och även om beräkningarna är osäkra rör det sig om en ökning med 94-215 Twh till år 2025.⁷ Samtidigt ställs inom EU-samarbetet krav på ökad produktion av förnybar energi. Som en del av arbetet med den gröna given rekommenderar EU-kommissionen att medlemsstaterna säkerställer en rationalisering och effektiv samordning mellan nationell, regional och kommunal nivå när det gäller roller och ansvar i samband med projekt för förnybar energi. Kommissionen uppmanar också medlemsstaterna att snabbt identifiera lämpliga land- och havsområden för sådana projekt.⁸ Alla dessa åtgärder kräver ett välfungerande system för fysisk planering. Utan ett sådant system kommer vare sig exploitörer eller intressenter att i förväg kunna förutse vilka områden som är mest lämpade för vindkraftsutbyggnad. Risken för konflikter mellan olika intressenter ökar också. I regeringens proposition 2023/24:105 "Energipolitikens långsiktiga utveckling" konstateras att en fortsatt

utbyggnad av vindkraft är särskilt viktig för att inte tappa tempo i elektrifieringen av samhället på kort sikt.⁹ Lokal acceptans är en viktig förutsättning för en sådan utbyggnad.¹⁰

Det har förekommit några större forskningsprojekt, finansierade av Naturvårdsverket och Energimyndigheten, som har handlat om planering och vindkraft.¹¹ Inget av dem har dock en tydlig juridisk ansats. Visserligen har vindkraften behandlats ur ett juridiskt perspektiv under senare år, men då utan fokus på planering. Det största rättsvetenskapliga projektet har finansierats av Uppsala universitet och Naturvårdsverket med fokus på hur djur- och växtskydd har hanterats i tillståndsprocesser för vindkraftverk.¹² Därutöver har två doktorsavhandlingar skrivits med anknytning till vindkraft. År 2008 disputerade Maria Pettersson på avhandlingen "Renewable Energy Development and the Function of Law" och 2014 disputerade Stefan Larsson på avhandlingen "Law and Spatial Planning. Socio-legal Perspectives on the Development of Wind Power and 3G Mobile Infrastructures in Sweden". Båda avhandlingarna ägnar dock liten uppmärksamhet åt förhållandet mellan nationell och lokal planering.¹³ Förutom de tidigare nämnda projekten finns det flera pågående och avslutade projekt som rör både vindkraft och

⁹ Prop. 2023/24:105 (2024). *Energipolitikens långsiktiga utveckling*, s. 39.

¹⁰ Ibid.

¹¹ Naturvårdsverket (2024). *Vindval.*, besökt 17-05-2024, <https://www.naturvardsverket.se/om-miljoarbetet/forskning/vindval/>.

¹² Darpö, J. (2020). *Hur många fick lov? Och varför fick de andra nobben? – Statistik och betraktelser över tillstånd till vindkraft på land och till havs.*

¹³ Pettersson, M. (2008). *Renewable energy development and the function of law: a comparative study of legal rules related to the planning, installation and operation of windmills*. Diss. Luleå: Luleå tekniska universitet, 2008, kapitel 4.3.2; Larsson, S. (2014). *Law and Spatial Planning. Socio-legal Perspectives on the Development of Wind Power and 3G Mobile Infrastructures in Sweden* Blekinge Institute of Technology, s. 58.

⁷ Energimyndigheten (2023). *Scenarier över Sveriges energisystem 2023*, ER 2023:07, s. 74.

⁸ European Commission (2022). *Commission Recommendation (EU) 2022/822 of 18 May 2022 on speeding up permitting procedures for renewable energy projects and facilitating Power Purchase Agreements*, para 11 och 21.

planering, men inget av dem har ett juridiskt fokus.

3. Fysisk planering i Sverige

I Sverige finns två huvudsakliga rättsliga system för fysisk planering som delvis samspelar med varandra. Det ena är statlig planering som realiserar genom hushållningsbestämmelserna, med riksintressen, i 3 och 4 kap. Miljöbalken. Det andra är kommunal planering som regleras genom plan- och bygglagen. Förutom skillnader i geografisk skala skiljer sig de två planeringsinstrumenten åt genom att hushållningsbestämmelserna endast omfattar vissa specifika intressen, såsom naturvård¹⁴ och energiproduktion¹⁵, medan den kommunala planeringen omfattar all markanvändning inom kommunens gränser.

Hushållningsbestämmelserna började utvecklas på 1950-talet när den svenska befolkningen blev mer rörlig och efterfrågan på rekreationsområden ökade. Samtidigt innebar den industriella utvecklingen att behovet av att säkerställa förutsättningar för fortsatt utbyggnad av industriella verksamheter ökade.¹⁶ Från början av 1960-talet och fram till slutet av 1980-talet gjordes försök att utveckla olika typer av rättsliga system för att hantera markanvändningskonflikter. Det här skedde genom ett förstärkande av den kommunala planeringen, samtidigt som ett system för statlig hantering av markanvändningsintressen utvecklades parallellt.¹⁷ I slutändan placerades de två planeringssystemen i olika lagar: hushållningsbestämmelserna, med tillhörande riksintressen, i lag (1987:12) om hus-

hållning med naturresurser, och kommunal planering i plan- och bygglag (1987:10), två regelkomplex som i hög grad samspelar med varandra.¹⁸

Hushållningsbestämmelserna innehåller bestämmelser om att vissa områden kan identifieras som riksintressanta för specifika ändamål. Det är den delen av bestämmelserna som undersöks i den här texten och i det följande benämns som "riksintressesystemet". Som en del av riksintressesystemet identifierar Energimyndigheten områden av riksintresse för vindbruk, dvs. områden som uppvisar särskilt goda förutsättningar för etablering av vindkraftverk. Det finns för närvarande 313 områden av riksintresse för vindbruk i Sverige. Av dessa är 284 områden belägna på land och 29 till havs och i sjöar. Det totala anspråket uppgår till drygt 1,5 procent av Sveriges yta, inklusive vatten.¹⁹ De huvudsakliga kriterierna som Energimyndigheten använder sig av vid riksintresseutpekanden på land är: vindförutsättningar (minst 7,2 m/s i årsmedelvind 100 m ovan mark); området ska vara större än 5 kvadratkilometer (undantaget elområde 4); avstånd till bebyggelse (minst 800 meter vid nya utpekanden).²⁰ Det finns också områden som är undantagna, vilket motsvarar vissa intressen och skyddade områden enligt 4 och 7 kap. Miljöbalken.²¹

¹⁴ Miljöbalk (1998:808), 3 kap. 6 §.

¹⁵ Ibid., 3 kap. 8 §.

¹⁶ SOU 2015:99 (2015). *Riksintresseutredningen – Planering och beslut för hållbar utveckling: Miljöbalkens hushållningsbestämmelser: slutbetänkande*. Stockholm: Stockholm: Wolters Kluwer, s. 83.

¹⁷ Se: prop. 1972:111 Bil. 2 (1972). *Regional utveckling och hushållning med mark och vatten*; och SOU 2015:99 (2015). *Riksintresseutredningen*, s. 91.

¹⁸ Hushållningsbestämmelserna ska tillämpas vid kommunal planläggning och staten har, genom länsstyrelserna, möjlighet att bryta igenom det kommunala planmonopolet om så inte sker, se plan- och bygglag (2010:900) 2 kap. 2 § och 11 kap. 10 §. Samtidigt spelar de kommunala översiktsplanerna en stor roll vid avgöranden om lämplig markanvändning enligt 3 kap. miljöbalken, se prop. 1997/98:45 (1997). *Miljöbalk*. del 2 s. 29.

¹⁹ Energimyndigheten (2024). *Riksintressen energiproduktion – vindbruk*, besökt 17-05-2024 <https://www.energimyndigheten.se/fornybart/tillstand-och-provning/riksintressen-for-energi/riksintressen-for-vindbruk/>.

²⁰ Energimyndigheten (2013). *Riksintresse vindbruk 2013*, p. 15.

²¹ Ibid.

Utpekanden av riksintressen är inte i sig bindande. Att ett område pekats ut som riksintresse för ett visst ändamål utesluter inte heller att annan verksamhet kan bedrivas inom området. Det innebär endast att ingen annan verksamhet får bedrivas i området om det kan medföra påtaglig skada på eller påtagligt försvåra bevarandet av riksintresset i fråga.²² Ett områdes status som riksintresse avgörs av prövningsmyndigheten om det i en process uppstår en fråga om ett utpekat intresse kommer att skadas eller ej.²³ Slutligen bör nämnas att riksintressesystemet inte innebär att utplacering av vindkraftverk endast är möjlig inom dessa områden, utan det identifierar endast områden där utplacering är särskilt lämplig utifrån de kriterier Energimyndigheten utgår ifrån.

Det viktigaste verktyget för strategisk planering av mark- och vattenanvändningen i ett lokalt sammanhang är den kommunala översiktsplanen. En översiktsplan omfattar hela kommunen och är ett strategiskt dokument som anger riktningen för markanvändningen. Planen är inte bindande men fungerar som en vägledning i efterföljande markanvändningsprocesser.²⁴ Kommunen har en skyldighet att redovisa hur områden av riksintresse beaktas i översiktsplanen.²⁵ Härigenom blir översiktsplanen ett helt centralt instrumentet för att samordna den kommunala och nationella planeringen.²⁶ Eftersom översiktsplanerna inte är bindande finns det, precis som vid utpekandet av riksintresseområden, inga hinder mot att ansöka om tillstånd att uppföra vindkraftverk utanför de områden som i översiktsplanen pekats ut som särskilt lämpliga för vindkraft. Kommunerna har dock ett så

kallat veto mot vindkraft, vilket innebär att för att ett vindkraftverk ska få tillstånd måste kommunen ha tillstyrkt ansökan.²⁷

För att hela systemet med fysisk planering ska ge förutsebarhet när det gäller hur och var vindkraft kan byggas ut är det viktigt att de olika planeringsnivåerna kommunicerar med varandra.²⁸ Dessutom är det viktigt att lokalsamhället inkluderas i planeringen för att säkerställa att processer som rör vindkraftsetablering uppfattas som legitima.²⁹

Utbyggnaden av vindkraft har hanterats i två offentliga utredningar som har lämnat sina slutbetänkanden under de senaste åren: SOU 2021:23 "En rättssäker vindkraftsprövning", och SOU 2023:18, "Värdet av vinden". Även om båda utredningarna berör planeringsfrågor på olika sätt så behandlas riksintressen endast i begränsad omfattning. I stället diskuteras energiplanering på nationell nivå. Denna planering är dock mer strategisk, det är inte en typ av fysisk planering. Detsamma gäller den nationella strategin för vindkraftsutbyggnad. Den behandlar energiplanering i stort, men riksintressesystemet ges relativt lite utrymme.³⁰

Länsstyrelsen har i sitt kartverktyg "Vindbrukskollen"³¹ publicerat en interaktiv karta där alla riksintresseanspråk visas. Kartan visar även alla redan uppförda vindkraftverk, aktuella ansökningar samt beviljade och avslagna ansökningar. En studie av kartan visar att många

²² Miljöbalk (1998:808), 3 kap. 8 § 2 st.

²³ Prop. 1997/98:45 (1997). *Miljöbalk*, del 1 s. 242.

²⁴ Plan- och bygglag (2010:900). 3 kap.

²⁵ *Ibid.* 3 kap. 4 §.

²⁶ Se bl.a. SOU 2015:99 (2015). *Riksintresseutredningen*, kapitel 5.

²⁷ Miljöbalk (1998:808), 16 kap. 4 §, enligt andra stycket har dock regeringen en möjlighet att tillåta verksamheter. Om så skett gäller inte längre kravet på kommunal tillstyrkan.

²⁸ Westholm, A. (2021). *Scaling Marine and Water Management* University of Gothenburg, s. 267.

²⁹ Liljenfeldt, J., & Mels, S. (2019). Vindkraftsplanering och lokal anpassning. I G. Forsberg (red.), *Samhällsplaneringens teori och praktik*. Liber, s. 346.

³⁰ Energimyndigheten (2021). *Nationell strategi för en hållbar vindkraftsutbyggnad*.

³¹ Vindbrukskollen. Hämtad 2024-04-25 från <https://vbk.lansstyrelsen.se/>.

vindkraftverk har byggts inom områden av riksintresse för vindbruk, men också att en stor andel av verken är byggda eller planerade att byggas utanför de områden som pekats ut av Energimyndigheten. Detta indikerar att riksintresseutpekanden inte har någon betydande effekt på var ny vindkraft etableras eller planeras. En poäng med förhandsplanering är att skapa förutsebarhet för potentiella verksamhetsutövare, men även för andra intressenter. Dock verkar de i förväg utpekade prioriterade områdena för vindkraft i Sverige endast ha en blygsam påverkan på vindkraftsutbyggnaden.³² Det har till och med visat sig att chansen att få igenom en tillståndsansökan är större utanför ett riksintresseområde än innanför.³³

Resultaten från enkätstudien som redovisas i den här artikeln ger en första indikation på hur projektörer ser på riksintressenas roll vid lokalisering av ny vindkraft. Vidare ger de en indikation på hur projektörerna uppfattar att kommunala beslutsfattare ser på riksintressena. Båda de här frågorna är viktiga för att förstå hur planeringen fungerar och hur de olika planeringssystemen samspelar med varandra.

4. Förutsebarhet

Fysisk planering, på såväl statlig som kommunal nivå, kan bidra med förutsebarhet i efterkommande processer. Om planeringen däremot inte fungerar ger den ingen vägledning. Den kan till och med riskera att försämra förutsebarheten genom att planera för en markanvändning som vid närmare analys inte är lämplig. I ett sådant fall riskerar projektörer att lägga ner stora summor

på att planera för en vindkraftspark som aldrig kommer att kunna bli av. Det är därför viktigt att planeringen bygger på ett gediget underlag och att intressekonflikter tydliggörs och i bästa fall hanteras i planen. Eftersom såväl riksintresseutpekanden som kommunala översiktsplaner är vägledande vid bedömningen av om en plats anses lämplig för en viss typ av verksamhet eller ej, är dessa planeringsinstrument centrala för att säkerställa förutsebara tillståndprocesser.³⁴

I denna artikel föreslås och används två olika förståelser av begreppet förutsebarhet. Den första förståelsen kallar jag "processuell förutsebarhet", vilket innebär förutsebarhet i bland annat tillståndprocessen: vilka steg som ingår i denna process, hur samråd ska genomföras och omfattningen/innehållet i en miljökonsekvensbeskrivning (MKB). Den andra typen av förutsebarhet kallar jag "materiell förutsebarhet", vilket innebär att både projektörer och intressenter redan från början kan förutse om en viss plats är lämplig för etablering av en vindkraftspark eller inte. Den materiella förutsebarheten baseras på olika typer av offentlig information, till exempel en översiktsplan.³⁵ I en ideal situation är både den processuella och den materiella förutsebarheten hög, vilket gör det enkelt för alla inblandade aktörer att kunna identifiera de mest lämpade platserna för att etablera ny vindkraft. Om det finns brister i någon av eller båda dessa typer av förutsebarhet kommer processen att bli svårare, dyrare och kanske mer konfliktfylld. Utifrån svaren i enkäten går det att få en bild av

³² Lauf, T., Ek, K., Gawel, E., Lehmann, P., & Söderholm, P. (2020). The regional heterogeneity of wind power deployment: an empirical investigation of land-use policies in Germany and Sweden. *Journal of Environmental Planning and Management*, 63(4), 751–778. <https://doi.org/10.1080/09640568.2019.1613221>.

³³ SOU 2021:53 (2021). *En rättssäker vindkraftsprövning*.

³⁴ Se t.ex. MÖD 2005:2, där domstolen betonar översiktsplanens vägledande funktion vid bedömningen av var ny vindkraft kan etableras.

³⁵ Se exempelvis Ebbesson, J. (2010). The rule of law in governance of complex socio-ecological changes. *Global Environmental Change*, 20(3), 414–422. <https://doi.org/10.1016/j.gloenvcha.2009.10.009>, som diskuterar förutsebarhet i en miljörättslig kontext, dock utan att göra uppdelningen mellan processuell och materiell förutsebarhet.

vilka aspekter som från ett projektörsperspektiv kan påverka såväl den materiella som den processuella förutsebarheten i processer för att etablera ny vindkraft.

5. Metod

Artikeln bygger på en enkätundersökning med aktörer aktiva inom vindkraftsprojektering i Sverige. Aktörerna identifierades genom branschorganisationen Svensk Vindenergi som på sin hemsida listar sina medlemsföretag. Ett antagande som gjordes vid urvalet för studien var att i princip alla projektörer för vindkraft i Sverige är medlemmar i Svensk Vindenergi. Förutsatt att antagandet stämmer så rör det sig om ett så kallat totalurval³⁶, där alla projektörer inkluderades i den första kontakten för enkäten. Alla företag som listas under rubriken "projektörer och ägare" har betraktats som relevanta för studien och ett första kontaktförsök gjordes med alla dessa aktörer. 10 företag meddelade att de av olika anledningar inte var relevanta för studien, alternativt svarade inte trots upprepade förfrågningar. Det rörde sig främst om företag med hemvist utanför Sverige. Enkäten skickades ut till 53 företag, varav 28 besvarade den, vilket motsvarar knappt 53 %. Den geografiska spridningen på var de olika respondenterna har projekt är relativt jämn, vilket redovisas närmare i avsnitt åtta. Eftersom urvalet innefattade alla projektörer i Sverige ger den något låga svarsfrekvensen ändå möjlighet att dra vissa slutsatser om hur gruppen projektörer uppfattar systemet för lokalisering av ny vindkraft i Sverige.

Enkätens utformning, som beskrivs nedan, innebär att frågorna är förenklade och ger liten möjlighet för respondenterna att utveckla sina svar. Det kan ses som en brist att enkäten inte ger

svar på *varför* en viss faktor uppfattas som mer eller mindre viktig. Det svaren på enkäten visar är i stället vilka faktorer som uppfattas som mest problematiska, eller osäkra vid etablering av ny vindkraft. Utifrån dessa svar går det sedan att formulera mer djupgående forskningsfrågor för att bättre förstå planeringssystemet och hur det fungerar i praktiken. Artikeln utgör en förstudie i ett större projekt om planering och vindkraft. Som sådan har den också innehållsmässiga begränsningar. Den kanske främsta begränsningen är att motstående riksintressen inte är specificerade. Det går därmed inte att utläsa vilka motstående intressen som betraktas som de största utmaningarna. Syftet med enkäten var att ge en första lägesbild av hur systemet uppfattas av projektörer i dagsläget. Inom ramen för det större projektet kommer de olika riksintressena och deras betydelse undersökas mer på djupet.

Enkäten var utformad med tre introducerande frågor avseende var i landet företaget är aktivt, hur många projekt det har och vilken roll på företaget den svarande har. Därpå följde tre flervalsfrågor, den första rörde hur viktiga eller oviktiga olika faktorer är vid val av plats för etablering av ny vindkraft. Skalan som användes var "mycket oviktig faktor", "ganska oviktig faktor", "varken viktig eller oviktig faktor", "ganska viktig faktor" och "mycket viktig faktor". De olika faktorerna randomiserades i enkäterna för att undvika att de skulle komma i samma ordning för varje respondent. Faktorerna att ta ställning till var "vindförhållanden", "närhet till elnätsanslutning", "kommunens inställning", "utpekade riksintresse vindbruk", "avsaknad av andra riksintresseutpekanden (motstående intressen)", "avstånd till bebyggelse", "markägarförhållanden", "utpekade intressen i kommunal översiktsplan", "lokal opinion" och "närhet till politiskt val". Den efterföljande frågan handlade om hur viktiga eller oviktiga respondenterna uppfattade att samma faktorer var för

³⁶ Esaiasson, P. (2017). *Metodpraktikan: konsten att studera samhälle, individ och marknad* (femte uppl.). Stockholm: Wolters Kluwer, s. 171.

kommunala beslutsfattare (frågan om kommunens inställning fanns inte med här). Den tredje skattningsfrågan behandlade osäkerheter vid etablering av ny vindkraft i Sverige och i vilken utsträckning respondenterna ansåg att miljötillståndsprocessen, riksintresseutpekanden, annan lagstiftning (artskydd, områdesskydd m.m.), det kommunala vetot, och förändringar i opinionen utgjorde osäkerheter. Skalan i dessa frågor var "mycket liten osäkerhet", "ganska liten osäkerhet", "varken en osäkerhet eller inte en osäkerhet", "ganska stor osäkerhet" och "mycket stor osäkerhet". Enkäten avslutades med en fråga om respondenterna upplevde skillnader i olika delar av landet och, om de svarade ja på den frågan, hur skillnaderna tar sig uttryck. Den sista frågan gav möjlighet till fritextsvar.

Resultaten av enkäten presenteras i de kommande tre avsnitten av artikeln. Avsnitt sex behandlar de faktorer som respondenterna anser viktiga och mindre viktiga vid val av lokalisering av ny vindkraft, avsnitt sju behandlar osäkerheter i tillståndsprocessen och avsnitt åtta behandlar frågor om regionala skillnader, här redovisas också fritextsvaren. Artikeln avslutas sedan med en analys av resultaten och ett avsnitt där vissa slutsatser från enkäten behandlas.

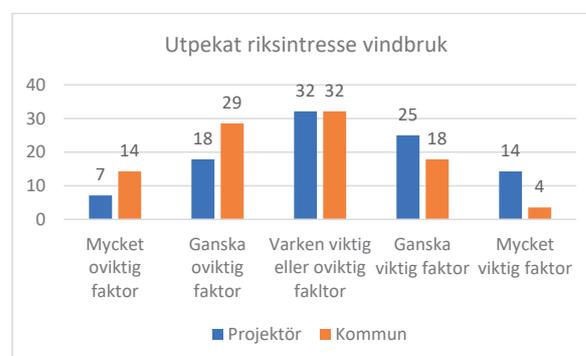
6. Viktiga faktorer vid val av lokalisering

Syftet med den enkät som skickades ut till projektörerna var att utreda vad de uppfattar som viktiga faktorer samt osäkerheter vid etablering av ny vindkraft. Enkäten utgör en förstudie och täcker alltså bara en av de aktörer som är inblandade i eller påverkas av etablering av ny vindkraft. Den är således inte heltäckande utan till för att skapa en överblick över projektörernas syn på frågan. Svaren i enkäten ger dock vissa indikationer på vad som uppfattas som mest problematiskt från projektörernas perspektiv.

Resultaten från enkäten presenteras här utifrån de frågor som ställdes (se bilaga). Den för-

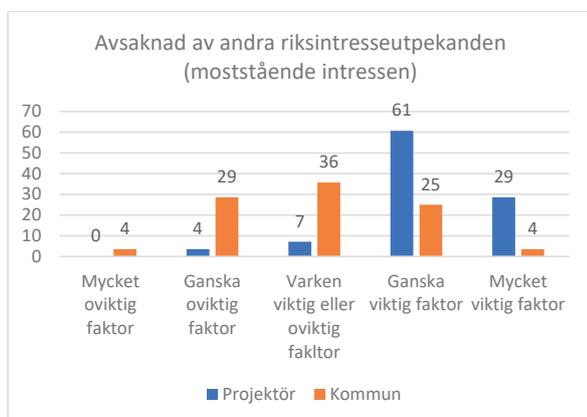
sta frågan handlade om hur viktiga eller oviktiga respondenterna ansåg att olika faktorer var vid lokaliseringen av ny vindkraft. I enkäten fick projektörerna ange om de främst är aktiva på land eller till havs, skillnaderna i svaren var dock marginella, varför totalen redovisas i det följande.

Som väntat anser de flesta respondenter (89 %) att vindförhållanden utgör en viktig eller mycket viktig faktor. Lika många anser att kommunens inställningar är en viktig eller mycket viktig faktor, vilket kopplar till kravet på kommunal tillstyrkan. Om kommunen är negativt inställd till lokaliseringen sjunker utsikterna för att lyckas etablera verksamheten drastiskt. Endast 14 % anser att utpekat riksintresse vindbruk är en mycket viktig faktor. 32 % anser att det varken är en viktig eller oviktig faktor (se figur 1). Betydelsen av detta kommer att diskuteras i analysavsnittet, men det indikerar att riksintresseutpekanden har en svag tillstyrande effekt vid lokalisering av ny vindkraft. Avsaknaden av andra utpekade riksintressen är däremot en viktigare faktor. Här anser 61 % att det är en ganska viktig faktor och 29 % att det är en mycket viktig faktor (se figur 2). Det tyder på att riksintressen är mer fränstyrande, dvs. att exploitörer undviker områden där det finns andra riksintressen i högre grad än vad de söker sig till områden som är utpekade som riksintressen för vindbruk.



Figur 1: Hur viktig eller oviktig är faktorn utpekat riksintresse vindbruk vid val av plats för etablering

av ny vindkraft (blå stapel)?, hur viktig uppfattar du att den faktorn är för kommunala beslutsfattare (orange stapel)?



Figur 2: Hur viktig eller oviktig är faktorn avsaknad av andra riksintresseutpekanden (motstående intressen) vid val av plats för etablering av ny vindkraft (blå stapel)?, hur viktig uppfattar du att den faktorn är för kommunala beslutsfattare (orange stapel)?

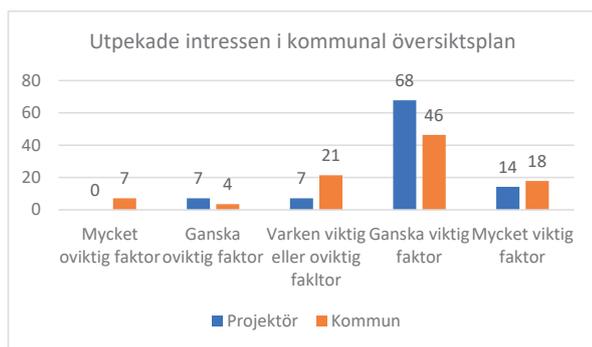
En del av enkäten handlade om hur respondenterna uppfattar att kommunala beslutsfattare viktat de olika faktorerna. Även här framgår att förekomsten av motstående riksintressen är viktigare än riksintresseutpekanden för vindbruk. Skillnaden jämnas dock ut något när respondenterna får svara på hur de uppfattar kommunala beslutsfattarens inställning. Det mest anmärkningsvärda är kanske att respondenterna uppfattar att kommunala beslutsfattare ofta inte lägger så stor vikt vid något av riksintresseutpekandena. På båda frågorna tror över 60 % att de kommunala beslutsfattarna antingen ser intressena som en varken viktig eller oviktig faktor, eller en ganska oviktig faktor (se figur 1 och 2).

I förhållande till den kommunala planeringen finns det också intressanta resultat i materialet. Respondenterna anser själva att den kommunala översiktsplanen är viktigare än vad de tror att kommunala beslutsfattare tycker att den är (se Figur 3). Skillnaden är inte stor, och

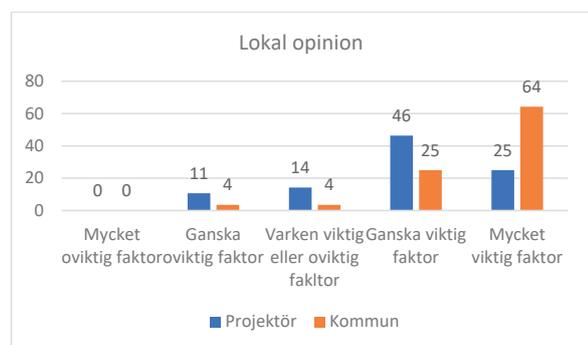
kan kanske förklaras av det faktum att många respondenter tror att kommunala beslutsfattare anser att den lokala opinionen och närheten till politiska val är mycket viktiga faktorer (64 respektive 54 %, se figur 4 och 5). En översiktsplan är ett långsiktigt strategiskt dokument, medan den lokala opinionen kan svänga snabbt och politiska valcykler kan göra att man frångår överväganden i planen. Samtidigt är tanken med en översiktsplan att den ska vara vägledande för att bedöma frågan om lämplig användning av mark- och vattenområden i enskilda ärenden.³⁷ Det kan förklara varför projektörerna anser att den är viktig.

Ytterligare ett intressant resultat som framgår av figur 4 och 5 är förhållandet mellan vad projektörerna själva anser är viktigt och vad de tror att kommunala beslutsfattare anser är viktigt när det kommer till närhet till politiskt val och den lokala opinionen. En stor andel av projektörerna ser närhet till politiskt val och lokal opinion som mycket viktiga faktorer för kommunala beslutsfattare. Men projektörerna själva uppfattar inte dessa faktorer som lika viktiga. Den här skillnaden blir framför allt intressant i förhållande till hur projektörerna ser på kommunens inställning (figur 6), där 64 % anser att det är en mycket viktig faktor och 25 % en ganska viktig faktor. Om kommunens inställning är viktig för projektörerna hade ett rimligt antagande varit att det skulle finnas en överensstämmelse också med de faktorer som uppfattas som viktiga för kommunala beslutsfattare, eftersom dessa med stor sannolikhet påverkar kommunens inställning.

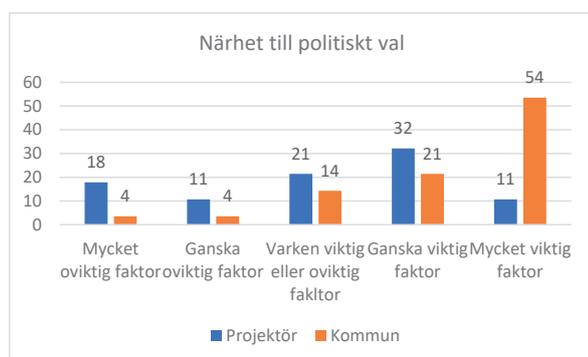
³⁷ Prop. 1997/98:45 (1997). Miljöbalk, del 2 s. 29.



Figur 3: Hur viktig eller oviktig är faktorn utpekade intressen i kommunal översiktsplan vid val av plats för etablering av ny vindkraft (blå stapel)?, hur viktig uppfattar du att den faktorn är för kommunala beslutsfattare (orange stapel)?

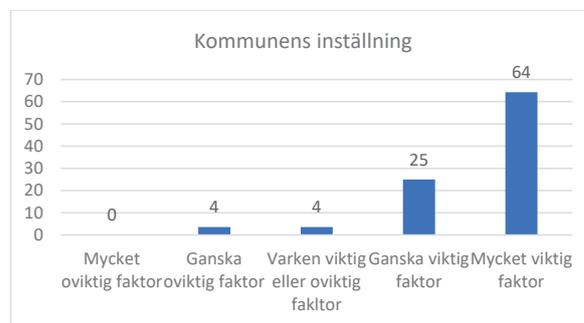


Figur 4: Hur viktig eller oviktig är faktorn lokal opinion vid val av plats för etablering av ny vindkraft (blå stapel)?, hur viktig uppfattar du att den faktorn är för kommunala beslutsfattare (orange stapel)?



Figur 5: Hur viktig eller oviktig är faktorn närhet till politiskt val vid val av plats för etablering av ny vindkraft (blå stapel)?, hur viktig uppfattar du att den faktorn är för kommunala beslutsfattare (orange stapel)?

den faktorn är för kommunala beslutsfattare (orange stapel)?



Figur 6: Hur viktig eller oviktig är faktorn kommunens inställning vid val av plats för etablering av ny vindkraft?

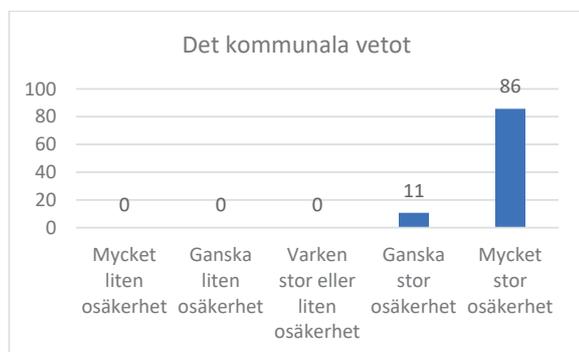
7. Osäkerheter i tillståndsprocessen

I enkäten ställdes en fråga om vad som skulle kunna uppfattas som osäkerheter i tillståndsprocessen. Nyetablering av vindkraft beskrivs ofta som kantad av osäkra och i tiden alltför utdragna tillståndsprocesser.³⁸ Dessa tidsutdräcker och osäkerheter kan bestå av processuella faktorer, dvs. länsstyrelsens och domstolens handläggning av ärendet, samrådsprocesser etc. Det kan också vara materiella faktorer, dvs. andra skyddsområden, planering, närboende etc., som påverkar processen.

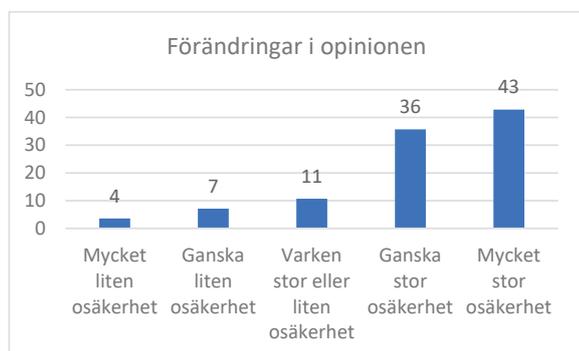
Det minst överraskande resultatet i svaren är kanske hur projektörerna betraktar det kommunala vetot. Hela 86 % anser att det utgör en mycket stor osäkerhet (figur 7). Kravet på kommunal tillstyrkan vid etablering av ny vindkraft har varit föremål för mycket diskussion och det faktum att tillstyrkan kan dras tillbaka närsomhelst i en pågående tillståndsprocess utgör en stor osäkerhet. Resultaten här är i linje med resultaten i föregående avsnitt som visade att kommunens inställning av många uppfattas

³⁸ Se t.ex. Regeringen (2023). *Kommittédirektiv – Förenklade och förkortade tillståndsprocesser enligt miljöbalken* (Dir. 2023:78).

som mycket viktig. Resultaten korrelerar också väl med resultaten på frågan hur stor osäkerhet den lokala opinionen utgör. Här svarar 43 % att den utgör en mycket stor osäkerhet och 36 % att den utgör en ganska stor osäkerhet (figur 8).



Figur 7: I vilken utsträckning upplever du det kommunala vetot som en osäkerhet vid etablering av ny vindkraft i Sverige?



Figur 8: I vilken utsträckning upplever du förändringar i opinionen som en osäkerhet vid etablering av ny vindkraft i Sverige?

Utöver dessa två faktorer uppfattas miljötillståndsprocessen som en stor eller ganska stor osäkerhet av en majoritet av projektörerna (25 respektive 46 %). Även annan lagstiftning (artskydd, områdesskydd mm) anses utgöra en stor eller ganska stor osäkerhet (54 respektive 18 %). Vari osäkerheterna består ligger utanför enkätens räckvidd att undersöka men i förhållande till artskydd skulle det kunna handla om var känsliga arter finns, vilket är svårt att avgöra

innan själva ansökningsprocessen har initierats. Det kan också vara svårt som projektör att på förhand avgöra vilken påverkan som är godtagbar och inte. Det handlar således om den materiella förutsebarheten. I miljötillståndsprocessen finns också flera andra källor till osäkerhet och tidsutdräkt som bland annat diskuterats i Miljöprövningsutredningen³⁹ men som inte behandlas vidare här.

Slutligen ingick en fråga i undersökningen om hur stor osäkerhet riksintresseutpekanden utgör vid etablering av ny vindkraft. Svaren stärker intrycket av att riksintressena inte har särskilt stor betydelse för lokaliseringen av ny vindkraft i Sverige. 57 % av respondenterna anger att riksintressena varken är en stor eller liten osäkerhet, och 21 % anger att de är en ganska liten osäkerhet (figur 9).



Figur 9: I vilken utsträckning upplever du riksintresseutpekanden som en osäkerhet vid etablering av ny vindkraft i Sverige?

Att riksintresseutpekanden inte uppfattas som osäkerheter är intressant i förhållande till dess rättsliga något oklara status. Ett riksintresseutpekande är inte bindande för en beslutsmyndighet, det är först myndighetens prövning i ett enskilt ärende som avgör om det faktiskt utgör ett riksintresse eller ej.⁴⁰ Det finns inte hel-

³⁹ SOU 2022:33 (2022). *Om prövning och omprövning – en del av den gröna omställningen.*

⁴⁰ Prop. 1997/98:45 (1997). *Miljöbalk*, del 1 s. 242.

ler någon inbördes hierarki som klargör hur motstående riksintressen ska prioriteras (med undantag för försvarsintressen). En avvägning skall göras i det enskilda fallet kring vad som är den långsiktigt mest hållbara användningen av marken.⁴¹ Samtidigt är riksintresseutpekandena ofta relativt generella och det kan vara svårt att avgöra exakt hur intresset kommer påverkas av olika etableringar.⁴² Alla dessa omständigheter innebär materiella osäkerheter i en tillståndsprocess, men trots detta uppfattas inte riksintresseutpekanden som en osäkerhet i någon större utsträckning av projektörerna.

8. Regionala skillnader

Sverige är ett stort land med skilda geografiska förutsättningar för etablering av vindkraft. Knappt 9,4 av Sveriges dryga 10,5 miljoner invånare bor i Svealand och Götaland,⁴³ trots att dessa landsdelar endast utgör 42 % av Sveriges landyta. I Norrland finns därmed större arealer med potential för vindkraft, samtidigt som stora delar av Norrland är utpekade som riksintressen för olika ändamål. Tre femtedelar av all den areal som utpekats som riksintresse 2014 ligger i de tre nordligaste länen.⁴⁴ En konfliktsituation som vid ett flertal tillfällen har hanterats i domstol rörande just de nordliga länen är den mellan rennärings- och vindkraften.⁴⁵ Mot bakgrund

av detta är det intressant att utreda huruvida projektörerna upplever regionala skillnader när det kommer till möjligheten att etablera ny vindkraft. Den fanns två frågor i enkäten som berörde denna fråga. Projektörerna fick inledningsvis svara på om de är aktiva i fler än en del av Sverige och i slutet av enkäten fanns möjligheten för fritextsvar om huruvida projektörerna upplever skillnader mellan de olika delarna av Sverige.

16 av bolagen angav att de hade verksamhet i norra Sverige. Av dessa 16 angav 12 att de också hade verksamhet i södra eller mellersta Sverige, alternativt båda två. För Mellansverige var motsvarande siffror 19 som hade projekt i området och av dessa hade 16 projekt också i något av de andra områdena. I södra Sverige hade 16 av projektörerna verksamhet och 12 av dessa var också aktiva i någon av de andra regionerna. Sammanfattningsvis var spridningen relativt jämn geografiskt över Sverige och det kan förväntas att eventuella skillnader skulle framkomma i fritextsvaren.

De svar som respondenterna lämnat i fritext ger ingen entydig bild. Ett flertal respondenter nämner utmaningar med kommunpolitiker. Här verkar det dock inte röra sig om någon geografisk skillnad, vissa har haft mer framgång i norra Sverige, andra i södra Sverige. Rennärings- nämns i ett svar som en osäkerhet, men det framkommer inget i enkätsvaren i övrigt som indikerar att rennärings- skulle vara ett mycket större problem än andra faktorer. En faktor som återkommer i några av svaren är att länsstyrelserna gör olika bedömningar på olika platser, såväl på grund av kunskapsnivå som på inställning gentemot vindkraften. Utöver detta verkar det finnas en uppfattning att olika länsstyrelser ställer olika krav på de utredningar som behöver genomföras.

⁴¹ Miljöbalk (1998:808), 3 kap. 10 §.

⁴² SOU 2015:99 (2015). *Riksintresseutredningen*, s. 274.

⁴³ Statistikmyndigheten (SCB), *Folkmängd i landskapen den 31 december 2023*. Besökt 2024-11-06 <https://www.scb.se/hitta-statistik/statistik-efter-amne/befolkning/befolkningens-sammansattning/befolkningsstatistik/pong/tabell-och-diagram/folkmangd-och-befolkningsforandringar---helarsstatistik/folkmangd-i-landskapen-den-31-december-2023/>.

⁴⁴ SOU 2015:99 (2015). *Riksintresseutredningen*, s. 286.

⁴⁵ Se t.ex. HovR M 6204-22 (Mark- och miljööverdomstolen 2023), om kompensationsåtgärder för rennärings- vid etablering av vindkraftspark; HovR M 3359-22 (Mark- och miljööverdomstolen 2023), avseende frågan om påtaglig skada på riksintresset för rennärings- vid etablering av vindkraftspark.

9. Analys

Den här studien utgör ett första steg i en undersökning av den nationella planeringens roll för etableringen av ny vindkraft i Sverige. Moderna system för fysisk planering bygger generellt på samverkansprocesser där alla berörda ska höras inom ramen för planeringen. Tanken är att om alla intressen är på bordet så kommer det vara lättare att avgöra vilken påverkan genomförandet av en viss plan kommer att innebära.⁴⁶ Riksintressen är en viktig del av den processen därför att de visar var staten anser att det är särskilt gynnsamt att etablera vindkraft. Riksintressena har därför potentialen att spela en central roll i lokaliseringen av ny vindkraft i Sverige. Enkäten som ligger till grund för den här analysen ger dock bilden av att så inte är fallet.

Vindkraftprojektörernas uppfattning om vad som påverkar val av plats och investering är central för förståelsen av hur det svenska systemet fungerar. Här framträder vindförhållanden, närhet till elnätsanslutning och kommunens inställning som särskilt viktiga faktorer. Markägarförhållanden, avstånd till bebyggelse, utpekade intressen i översiktsplanen samt avsaknad av motstående intressen framstår också som relativt viktiga. Intressant är hur respondenternas uppfattning om vad som är viktigt för kommunala beslutsfattare skiljer sig mot vad de själva anser är viktigt. Påtagligast är skillnaden när det kommer till vindförhållanden, närhet till elnätsanslutning och markägarförhållanden, vilka projektörerna upplever att kommunala beslutsfattare i stor utsträckning ser som ganska eller mycket oviktiga faktorer. Eftersom kommunens uppfattning i frågan om vad som är en lämplig lokalisering är av avgörande betydelse vid etablering av ny vindkraft, vore det gyn-

samt för såväl planeringen som lokaliseringen om kommunala beslutsfattare och projektörer uppfattade att samma faktorer var viktiga. Att vindförhållanden, närhet till elnät och markägarförhållanden uppfattas som mindre viktiga för kommunala beslutsfattare indikerar att projektörerna upplever att beslutsfattarna inte har så bra insyn i vad som är viktigt vid nyetableringar. En annan möjlig tolkning är att det finns andra faktorer, t. ex. lokal opinion, som är så viktiga att de mer materiella förutsättningarna blir mindre viktiga för de kommunala beslutsfattarna.

Det mest påtagliga resultatet av enkätstudien är att utpekade riksintressen inte verkar vara av särskilt stor vikt för vare sig projektörer eller kommunala beslutsfattare, i synnerhet inte riksintresseutpekanden för vindbruk. Inte heller listas riksintresseutpekanden som någon större osäkerhet när det kommer till processerna för en vindkraftsetablering. Eftersom riksintressesystemet är det enda verktyg för fysisk planering som staten har, är det här resultatet anmärkningsvärt. Om riksintresseutpekanden för vindbruk inte har någon inverkan på var projektörer väljer att lokalisera sina parker måste den delen av planeringssystemet ifrågasättas, även om enkäten indikerar att riksintressesystemet som helhet har den funktionen att områden som har motstående riksintressen utpekade undviks. Systemet verkar fränstyrande, snarare än tillstyrande när det kommer till lokalisering.

Det finns tre intressanta aspekter av enkätsvaren i förhållande till riksintressen för vindbruk som är värda att närmare diskutera. Den första är varför inte riksintresseutpekanden i någon större utsträckning verkar vara viktigt för projektörerna. Den andra är att det även om det finns skillnader i hanteringen av vindkraft mellan kommuner och mellan länsstyrelser, så visar resultaten i studien inte på några tydliga geografiska kopplingar till dessa skillnader. Den tredje intressanta aspekten är att riksintresseut-

⁴⁶ Wegener, M., Button, K. J., & Nijkamp, P. (2007). *Planning history and methodology*. Cheltenham: Edward Elgar, s. xvii.

pekanden inte verkar uppfattas som osäkerheter i processerna.

Avseende den första aspekten, riksintresseutpekandens funktion, så hänger det ihop med vilken sorts planering riksintressesystemet möjliggör. Moderna planeringsideal bygger i stort på kollaborativa processer där alla sakägare får säga sitt och planeraren måste visa hur alla intressen har hanterats i processen. Planeringen bygger på ett stort och komplext underlag där avvägningar mellan motstående intressen görs på förhand.⁴⁷ När det kommer till det svenska riksintressesystemet så saknas såväl avvägningar som deltagande i planeringsprocessen. I stället är det enbart vindförhållanden och till viss del närhet till bebyggelse som avgör vilka områden som blir utpekade. Utpekanden som bygger på ett så tunt underlag utgör liten hjälp när en projektör ska navigera alla de intressen som påverkas av en ny vindkraftsetablering, där vindförhållanden endast är en av många viktiga faktorer. Det här väcker en större fråga om riksintressesystemets roll och behov av översyn. Hela systemet utreddes och förslag på ändringar gavs av Riksintresseutredningen 2015,⁴⁸ men inga av förslagen har blivit verklighet. Det innebär att alla de brister som pekades ut av utredningen fortfarande finns kvar, och som den här enkätstudien visar bidrar osäkerheterna till att riksintressesystemets funktion i dagsläget är som bäst oklar.

Den andra aspekten, avsaknad av regionala skillnader, är en fråga som behöver ett betydligt bredare underlag för att kunna redas ut i sin helhet. Å ena sidan hade ett rimligt antagande varit att rennäringsen i norra Sverige skulle uppfattas som en stor utmaning för projektörerna och att

det därför skulle finnas fördelar med etablering i södra Sverige. Några sådana resultat visar dock inte enkätstudien. Ett av fritextsvaren nämner rennäringsen som en osäkerhet, men säger samtidigt att den kommunala dialogen generellt fungerar bättre i norra Sverige. Å andra sidan hade en rimlig hypotes varit att det skulle vara mer konfliktfyllda processer i södra Sverige eftersom det är mer tätbefolkat. Dock saknas stöd även för detta påstående i enkätsvaren. En respondent nämner problemen med befolkningstäthet som en svårighet med projekt i södra Sverige, samtidigt som en annan respondent anger att de har haft större lokalpolitisk framgång med projekt i södra Sverige. För att skapa en mer fullständig bild av potentiella regionala skillnader i vad som upplevs som utmanande i etableringsprocesser krävs ytterligare studier som går mer på djupet i frågan.

Avseende den tredje aspekten, osäkerheter i tillståndsprocessen, så finns det också anledning att fundera över riksintressenas roll i dagens svenska miljörett. En verksamhet som påtagligt skadar ett riksintresse får generellt inte komma till stånd inom ett utpekat område. Samtidigt är många riksintresseutpekanden generella och vaga, vilket gör att det är svårt att bedöma påverkan.⁴⁹ Själva systemet med riksintressen bygger också på en förväntan om att kombinerad markanvändning är eftersträvansvärt, något som syns i formuleringen av avvägningsregeln i 3 kap. 10 §, som stadgar att "det eller de ändamål som på lämpligaste sätt främjar en långsiktig hushållning" ska ges företräde.⁵⁰ Slutligen är inte riksintresseutpekanden bindande, det är först vid en prövning om potentiell påverkan på ett riksintresseområde som dess status prövas av en prövningsmyndighet. Det finns således flera

⁴⁷ Se bl.a. Healey, P. (2016). *The Planning Project*. In S. S. Fainstein & J. DeFilippis (red.), *Readings in Planning Theory*. John Wiley & Sons, Incorporated. <http://ebookcentral.proquest.com/lib/gu/detail.action?docID=4043002>.

⁴⁸ SOU 2015:99 (2015). *Riksintresseutredningen*.

⁴⁹ *Ibid.*, s. 274.

⁵⁰ Se prop. 1985/86:3 (1986). *Förslag till lag om hushållning med naturresurser m.m.*, s. 47 och 78.

osäkerheter inbyggda i själva riksintressesystemet. Trots detta uppfattas inte riksintresseutpekanden som någon större osäkerhet av projektörer, vilket indikerar att själva riksintressesystemets roll i en tillståndsprocess inte är, eller åtminstone inte uppfattas som, avgörande.

10. Slutsatser

Studien visar att utpekade riksintressen fyller en vag och oklar roll vid etableringen av nya vindkraftparker. Projektörer själva verkar inte lägga en alltför stor tyngd vid var riksintresseutpekanden finns. Det bekräftar intrycket från Vindbrukskollens kartverktyg, som visar att många ansökningar sker i områden utanför riksintresseutpekanden.⁵¹ Riksintressesystemet utvecklades parallellt med det kommunala planmonopolet och det fanns, och finns ännu, en tydlig tanke om att de två planeringssystemen ska samspela med varandra.⁵² Den svaga vägledning som riksintresseutpekanden verkar ge i dagsläget tyder på att det är en planering som inte bidrar med vare sig processuell eller materiell förutsebarhet vid lokalisering av ny vindkraft, vilket också väcker frågan vilken funktion planeringen har idag. Enkätstudien som presenterats i artikeln är för begränsad för att kunna ge ett svar på den frågan, men visar att vidare forskning är angelägen.

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⁵¹ Vindbrukskollen, besökt 2024-04-25, <https://vbk.lansstyrelsen.se/>.

⁵² Se avsnitt 3.

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The role of the voluntary carbon market in achieving national climate targets in Europe: A case for systems thinking

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Abstract

To achieve its climate objectives, the European Union (EU) has developed a complex legal framework which includes binding national targets for greenhouse gas (GHG) reductions and removals for each Member State. At the same time, many companies are adopting voluntary climate targets, often relying on carbon offsets purchased through the voluntary carbon market (VCM) to meet them. Recent trends indicate a growing convergence between national and corporate climate target frameworks. This article discusses one such example, where EU Member States leverage the VCM to support domestic climate projects as part of their strategies to meet national climate targets. The article analyses the implications of this by examining the interaction between national and corporate climate target frameworks in Europe. Using systems thinking as a conceptual lens, it views these frameworks as distinct yet interconnected subsystems within the broader system of global climate objectives. The analysis compares key elements of each framework and addresses potential ‘systemic challenges’ that arise from their interaction, particularly the risks of double claiming and non-additionality. The article argues that without proper regulatory reforms, reliance on the VCM to advance national climate targets could undermine broader climate objectives, including those of the Paris Agreement. Given the complexity of these two target-based frameworks and their interaction, the article advocates for the use of systems thinking in regulating the VCM in Europe.

Keywords: National climate targets, corporate net-zero targets, EU climate law, voluntary carbon market, double claiming, additionality, systems thinking

1. Introduction

The European Union (EU) has developed a complex framework of legal rules, mechanisms, and institutions aimed at achieving its climate objectives.¹ A key component of this framework is a

set of binding national targets for greenhouse gas (GHG) reductions and removals assigned to each Member State under the Effort Sharing² and LULUCF Regulations.³ Concurrently, a

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¹ For a general overview of EU’s climate law and policy, see Edwin Woerdman et al. (eds), *Essential EU Climate Law* (2nd edn, Edward Elgar Publishing 2021) 10–97.

² Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 [2018] OJ L156/26 (Effort Sharing Regulation).

³ Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use,

parallel framework of voluntary climate targets has emerged in Europe, reflecting a global trend where companies independently commit to climate goals, often using offsets from the voluntary carbon market (VCM)⁴ to meet them.⁵

These frameworks, though operating in separate domains of climate governance, both reflect a common overarching objective: to contribute to the global climate mitigation goals of the Paris Agreement, particularly the long-term temperature goal set out in Article 2(1).⁶ Given this shared foundation within the global climate regime,⁷ it is hardly surprising that national and corporate efforts are increasingly seeking syn-

ergies.⁸ This article examines one such synergy, the seemingly growing interest among European policymakers to leverage the VCM to support domestic GHG reduction and removal activities, with the aim of advancing national climate targets. The article argues that, without appropriate regulatory reforms, such reliance may risk undermining broader climate objectives, including those of the Paris Agreement.

Given the complexity of national and corporate climate target frameworks and their intricate interactions, this article advocates for applying systems thinking to the regulation of the VCM in Europe. Systems thinking, initially developed in quantitative fields like computer science and engineering,⁹ is gaining prominence in qualitative legal scholarship¹⁰ and sustainability research.¹¹ This approach helps manage complexity by viewing the world as an interconnected network of components working together as a cohesive system with a specific purpose.¹² In

land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU [2018] OJ L156/1 (LULUCF Regulation).

⁴ In this article, the term ‘voluntary carbon market’ refers collectively to diverse and fragmented private-sector markets where carbon credits are traded. ‘Carbon credits’, often also called ‘carbon offsets’, represent the climate benefits of GHG emission reduction, avoidance and removal projects, referred to in this article as ‘climate projects’. By purchasing carbon credits, companies (and other entities and individuals) use climate benefits achieved outside their value chains to offset their own emissions, typically without being legally required to do so.

⁵ Nicolas Kreibich and Lukas Hermwille, ‘Caught in Between: Credibility and Feasibility of the Voluntary Carbon Market Post-2020’ (2021) 21 *Climate Policy* 939, 942; Danick Trouwloon et al. ‘Understanding the Use of Carbon Credits by Companies: A Review of the Defining Elements of Corporate Climate Claims’ (2023) 7 *Global Challenges* 8.

⁶ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740.

⁷ The term ‘global climate regime’ here refers to the principles and substantive rules that are relevant for the achievement of the mitigation objectives of international climate agreements, ‘together with the institutions and procedural tools established to oversee their implementation, development and enforcement’. See Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press 2004) 6–7.

⁸ See e.g., *Synergy Solutions for Climate and SDG Action: Bridging the Ambition Gap for the Future We Want, Report on strengthening the evidence base*, 2nd edn. (UN 2024). See also Klas Wetterberg et al., *The Interplay between Voluntary and Compliance Carbon Markets: Implications for Environmental Integrity*, OECD Environment Working Papers No. 244 (OECD 2024) 11.

⁹ Lynn M. LoPucki, ‘Systems Approach to Law’ (1997) 82 *Cornell Law Review* 479, 481. On the history and development of systems thinking, see Robert C. Bird and Julie Manning Magid, ‘Toward a Systems Architecture in Corporate Governance’ (2021) 24 *University of Pennsylvania Journal of Business Law* 84, 89–94.

¹⁰ On systems analysis in legal research, see e.g., Charles Maechling ‘Systems Analysis and the Law’ (1976) 62 *Virginia Law Review* 721–36 and LoPucki (n 9) 479–522. See also Bird and Magid (n 9) 94 (and sources cited therein, n 56).

¹¹ N. Voulvoulis et al., ‘Systems Thinking as a Paradigm Shift for Sustainability Transformation’ (2022) 75 *Global Environmental Change* 1, 5.

¹² See e.g., Erin Betley et al., ‘Introduction to Systems and Systems Thinking’ (2021) 11 *Lessons in Conservation* 9, 12. Detailed discussion on the definition of ‘systems thinking’ is found in Ross D. Arnold and Jon P. Wade, ‘A Definition of Systems Thinking: A Systems Approach’ (2015), *Procedia Computer Science* 669–78.

this context, a ‘system’ is understood as a ‘complex unity formed of many often diverse parts subject to a common plan or serving a common purpose’.¹³ Systems typically consist of subsystems that operate both independently and in conjunction with one another, often containing their own internal subsystems.¹⁴

In the realm of climate governance, systems thinking allows for an analysis of the frameworks developed around national and corporate climate targets as interacting ‘subsystems’ within the broader ‘system’ of global climate objectives. Using systems thinking as a conceptual lens, this article compares key elements of these target-based frameworks. As the article demonstrates, this perspective helps in identifying and analyzing ‘systemic challenges’ arising from their interaction. A high-level perspective, or ‘bird’s-eye view,’ on such challenges can be crucial to understanding how these interacting subsystems respond to specific national policies and measures.

The article is structured as follows: *Chapter 2* provides an overview of the EU’s legal framework for achieving collective climate objectives, focusing on Member States’ GHG reduction and removal targets. *Chapter 3* shifts the focus to the evolving landscape of corporate net-zero targets, particularly the role of the VCM in achieving these goals. *Chapter 4* explores the role of the VCM in achieving national climate targets in Europe. To that end, it examines the interplay between national and corporate climate target frameworks in Europe, framing them as distinct yet interconnected subsystems within the broader system of global climate objectives. Finally, conclusions are presented in *Chapter 5*.

¹³ Bird and Magid (n 9) 89 (and sources cited therein, n 19). See also LoPucki (n 9) 482.

¹⁴ LoPucki (n 9) 487.

2. National climate targets under EU law

2.1 National emission reduction and carbon removal targets

In their latest Nationally Determined Contribution (NDC) update, the EU and its Member States pledged to jointly reduce emissions by at least 55% by 2030, compared to 1990 levels, as a step towards achieving climate neutrality by 2050.¹⁵ In line with this, the EU’s substantive and procedural climate rules were significantly reformed under the ‘Fit for 55’ package, which incorporated the European Green Deal’s long- and medium-term climate targets into the EU *acquis*.¹⁶ To operationalize these targets, the EU has established a framework of interconnected mechanisms, each playing a critical role within a complex web of legal rules, institutions, procedures, and transparency requirements.¹⁷

¹⁵ The Update of the Nationally Determined Contribution of the European Union and its Member States – Submission by Spain and the European Commission on behalf of the European Union and its Member States (16 October 2023), <<https://unfccc.int/sites/default/files/NDC/2023-10/ES-2023-10-17%20EU%20submission%20NDC%20update.pdf>> accessed 16 September 2024 (EU NDC 2023).

¹⁶ See Karin Bäckstrand, ‘Towards a Climate-Neutral Union by 2050? The European Green Deal, Climate Law, and Green Recovery’ in Antonina Bakardjieva Engelbrekt et al. (eds), *Routes to a Resilient European Union* (Springer International Publishing 2022) 57.

¹⁷ See further *ibid* 39–61. The transparency requirements include the obligation of Member States, under the ‘Governance Regulation’ to submit to the Commission a ten-year National Energy and Climate Plan (NECP) and biennial progress reports. Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council [2018] OJ L328/1 (Governance Regulation).

A key component of this framework is the national emission reduction and removal targets assigned to individual Member States.¹⁸ Under the Effort Sharing¹⁹ and LULUCF Regulations,²⁰ Member States are required to achieve specific, quantified mitigation outcomes within set timeframes.²¹ Alongside the EU Emissions Trading System Directive (EU ETS Directive),²² these regulations form the primary legal instruments for achieving the EU and Member States' NDC, covering all sectors and GHGs included in the NDC.²³

2.1.1 National targets under the Effort Sharing Regulation

The Effort Sharing Regulation covers several multiple-source sectors within the EU, including domestic transport,²⁴ buildings, agriculture, small industry and waste.²⁵ The framework es-

tablished under the regulation is intended to achieve a collective 40% emission reduction from these sectors within the EU during the period 2021–2030, compared to 2005 levels.²⁶ Guided by principles of fairness and solidarity,²⁷ the Effort Sharing Regulation allocates to each Member State a 'fair share' of this target through binding commitments, which range from 10% to 50% emission reduction requirements.²⁸

The legal structure of these commitments is relatively straightforward, involving annual quantitative emission limitations for each Member State,²⁹ to be achieved within specific time periods. These limitations are translated into Annual Emission Allocations (AEAs), which decrease each year to achieve the overall Effort Sharing Regulation's target.³⁰

2.1.2 National targets under the LULUCF Regulation

Similarly, under the LULUCF Regulation, Member States are subject to legal obligations to achieve certain quantified outcomes in the land use, land-use change and forestry (LULUCF) sectors.³¹ Following the Fit for 55 amendments, the regulation includes an EU-wide target of net GHG removals of 310 million tons by 2030, based

¹⁸ In the context of this article, a distinction needs to be made between the binding emission reduction and carbon removal targets established at EU level and the voluntary national targets set by individual Member States through their own national laws and policies. Such targets often exceed the EU-level targets and can vary in scope and structure. See further e.g., <<https://www.un.org/en/climatechange/net-zero-coalition>> accessed 16 September 2024.

¹⁹ See n 2.

²⁰ See n 3.

²¹ The Effort Sharing and LULUCF Regulations were incorporated into Protocol 31 of the Agreement on the European Economic Area (EEA Agreement) with Decision of the EEA Joint Committee No 269/2019 of 25 October 2019 amending Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms. EEA Supplement 2023/EEA/5/23, 32. This decision made Iceland and Norway subject to Effort Sharing and LULUCF targets, applying the same criteria as those used for EU Member States.

²² Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC, [2003] OJ L275/32 (EU ETS Directive).

²³ EU NDC 2023, 11.

²⁴ Excluding aviation.

²⁵ Effort Sharing Regulation, Article 2 (as amended by Article 1 of Regulation (EU) 2023/857 [2023] OJ L111/1).

²⁶ Effort Sharing Regulation, Article 1 (as amended by Article 1 of Regulation (EU) 2023/857 [2023] OJ L111/1).

²⁷ Effort Sharing Regulation, preamble, item 2.

²⁸ Effort Sharing Regulation, Article 4, see also individual targets set out in column 2 of Annex I (as amended by Article 1 of Regulation (EU) 2023/857 [2023] OJ L111/1).

²⁹ See Marjan Peeters and Natassa Athanasiadou, 'The Continued Effort Sharing Approach in EU Climate Law: Binding Targets, Challenging Enforcement?' (2020) 29 *RECIEL* 201.

³⁰ Effort Sharing Regulation, Article 4, see also Article 3(2) (as amended by Article 1 of Regulation (EU) 2023/857 [2023] OJ L111/1).

³¹ The LULUCF sectors are defined in Article 2 of the LULUCF Regulation, (as amended by Article 1 of Regulation (EU) 2023/839 [2023] OJ L107/1).

on average emissions in 2016–2018.³² However, individual national targets are more complex and nuanced than those under the Effort Sharing Regulation. In simplified terms, from 2021 to 2025, each Member State must ensure that all accounted GHG emissions from LULUCF activities are offset by at least an equivalent amount of accounted removals.³³ In the period 2026 to 2030, the commitments take the form of specific binding net carbon removal targets for each Member State,³⁴ determined based on factors such as its share of the managed land area and its capacity to improve its climate performance in the land-use sectors.³⁵

2.1.3 Flexibilities and offsetting potential

To enhance cost-effectiveness of achieving the EU's climate objectives, Member States have significant flexibility in how they choose to meet their Effort Sharing and LULUCF targets, which partly involves interplay between these two instruments.³⁶ For example, Member States can use land-use-based carbon removals that exceed their LULUCF target to offset their Effort Sharing emissions, up to a certain level specified for each Member State.³⁷ Some Member States may also account a portion of allowances they could

have auctioned under the EU ETS towards their Effort Sharing target.³⁸

Moreover, Member States can sell a limited percentage of AEAs that exceed their needs for Effort Sharing compliance to other Member States.³⁹ Similarly, excess removals under the LULUCF Regulation can be traded.⁴⁰ These flexibilities and offsetting options effectively create intra-EU carbon markets at the state level, allowing Member States to trade specific types of emission units and carbon removals, thereby fulfilling their obligations at a lower cost than if restricted to actions within their own borders.⁴¹ For the purposes of this article, it is important to note that all emission reductions and removals to be counted towards Effort Sharing and LULUCF targets must occur within the EU, and Member States cannot use credits from any external market mechanisms for compliance purposes. In contrast, until 2021, Member States were allowed to use certain types of international carbon credits issued under the Kyoto Protocol to implement their emission reduction obligations.⁴²

³² LULUCF Regulation, Article 4(2) (as amended by Article 1 of Regulation (EU) 2023/839 [2023] OJ L107/1).

³³ LULUCF Regulation, Article 4(1) (as amended by Article 1 of Regulation (EU) 2023/839 [2023] OJ L107/1). This rule is generally referred to as the 'no-debit rule'.

³⁴ LULUCF Regulation, Article 4(3), see also individual targets set out in column C of Annex IIa (as amended by Article 1 of Regulation (EU) 2023/839 [2023] OJ L107/1).

³⁵ See Regulation (EU) 2023/839, amending the LULUCF Regulation, preamble, item 8.

³⁶ Effort Sharing Regulation, Article 5(1)–(3) (as amended by Article 1 of Regulation (EU) 2023/857 [2023] OJ L111/1).

³⁷ LULUCF Regulation, Article 12(1) (as amended by Article 1 of Regulation (EU) 2023/839 [2023] OJ L107/1); Effort Sharing Regulation, Article 7 (as amended by Article 1 of Regulation (EU) 2023/857 [2023] OJ L111/1).

³⁸ Effort Sharing Regulation, Article 6 (as amended by Article 1 of Regulation (EU) 2023/857 [2023] OJ L111/1).

³⁹ Effort Sharing Regulation, Article 5(4)–(5) (as amended by Article 1 of Regulation (EU) 2023/857 [2023] OJ L111/1).

⁴⁰ LULUCF Regulation, Article 12(2) (as amended by Article 1 of Regulation (EU) 2023/839 [2023] OJ L107/1).

⁴¹ See further: Peeters and Athanasiadou (n 29) 205–206.

⁴² See Article 5 of Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L140/136 (Effort Sharing Decision).

3. Corporate climate action and the voluntary carbon market

3.1 Corporate net-zero targets

In the past decade, voluntary corporate climate action⁴³ has significantly increased⁴⁴ and become a prominent focus of scholarly research.⁴⁵ A notable trend within these efforts is the increasing number of companies independently setting their own climate targets, often labeled as ‘net-zero’ targets.⁴⁶ The concept of net-zero, which refers to the balancing of GHG emissions with an equivalent amount removed from the atmosphere, has gained substantial traction among corporations in recent years.⁴⁷

However, the actual impact of these targets is often ambiguous and they differ widely in robustness and transparency, making it challenging to evaluate their achievement.⁴⁸ Many of these targets have faced criticism for being potentially misleading,⁴⁹ with some studies suggesting that they frequently fall short of their in-

tended outcomes.⁵⁰ In response to such concerns, several standards and guidelines have emerged to help companies formulate credible targets aligned with the goals of the Paris Agreement.⁵¹ While such initiatives have primarily been driven by private sector efforts,⁵² regulators increasingly recognize the need for clearer guidelines and accountability.⁵³

3.2 The voluntary carbon market

3.2.1 The evolving role of the voluntary carbon market in global climate action

The rise in corporate net-zero targets has significantly increased the demand for carbon credits in the VCM.⁵⁴ However, despite forecasts of continuing expansion and relevance in global climate governance,⁵⁵ the future of the VCM

⁴³ The term ‘voluntary corporate climate action’ here refers to climate initiatives that companies and other private entities choose to engage in beyond what is legally required.

⁴⁴ See e.g., Simon Dietz et al., ‘An Assessment of Climate Action by High-carbon Global Corporations’ (2018) 8 *Nature Climate Change* 1072–75. See also Priyadarshi R. Shukla et al. (eds), *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, 2022) 426.

⁴⁵ See e.g., Jonathan M. Gilligan and Michael P. Vandenberg, ‘A Framework for Assessing the Impact of Private Climate Governance,’ (2020) 60 *Energy Research & Social Science*.

⁴⁶ See Thomas Hale et al., ‘Assessing the Rapidly-emerging Landscape of Net Zero Targets’ (2022) 22 *Climate Policy* 18–29.

⁴⁷ Sam Fankhauser et al., ‘The Meaning of Net Zero and How to Get it Right’ (2022) 12 *Nature Climate Change* 15, 17.

⁴⁸ Hale et al., ‘Assessing the Rapidly-emerging Landscape of Net Zero Targets’ (n 46) 23; Kreibich and Hermwille (n 5) 941–42.

⁴⁹ Trouwloon et al. (n 5) 1–18.

⁵⁰ Anne-France Bolay et al. ‘What Drives Companies’ Progress on their Emission Reduction Targets?’ (2024) 468 *Journal of Cleaner Production* 1, 2; Kreibich and Hermwille (n 5) 942.

⁵¹ Of such initiatives, the most well-known is the Science Based Targets Initiative (SBTi), founded by CDP, the World Resources Institute (WRI), the World Wide Fund for Nature (WWF) and the United Nations Global Compact (UNGC) in 2015.

⁵² See Kaya Axelsson et al., ‘Is Impact out of Scope? A Call for Innovation in Climate Standards to Inspire Action Across Companies’ Spheres of Influence’ (2024) 15 *Carbon Management* 1.

⁵³ See Thomas Hale et al., ‘Turning a Groundswell of Climate Action into Ground Rules for Net Zero’ (2024) 14 *Nature Climate Change* 306, 306–307.

⁵⁴ The size of the VCM, by value of traded carbon credits, sharply increased between the years 2020 and 2021, from \$534 million to \$2.1 billion (respectively), but fell between 2022 and 2023, from \$1.98 billion to \$723 million (respectively). Alex Procton, *State of the Voluntary Carbon Market 2024: On the Path to Maturity* (Ecosystem Marketplace 2024) 4.

⁵⁵ See e.g. *Treeprint – Carbon Markets: The Beginning of the Big Carbon Age* (Credit Suisse 2022) 5 and Nasim Pour and Leila Toplic, ‘Why the Voluntary Carbon Market is Key to Scaling Carbon Dioxide Removal and Delivering Net-zero’ (6 September 2024) <<https://www.weforum.org/agenda/2024/09/voluntary-carbon-market-carbon-dioxide-removal-net-zero/>> accessed 18 September 2024.

remains uncertain.⁵⁶ This uncertainty stems, in part, from complex challenges regarding the interplay between the VCM and national climate commitments.⁵⁷ Additionally, much of this uncertainty relates to concerns over the market's integrity, underscored by a series of scandals which have cast doubt on its credibility, including allegations of overestimation of mitigation outcomes in large climate projects.⁵⁸ These controversies have triggered a crisis of confidence in the market, leading some to question the legitimacy of carbon offsets altogether.⁵⁹ One recurring critique of the VCM is that it allows developed countries and companies to continue their GHG emissions by offsetting through mitigation activities in developing countries.⁶⁰

Proponents of the VCM argue that with effective management of the risks associated with the market, carbon offsets can play a vital role in global climate action by providing a crucial

channel for climate financing.⁶¹ Recognizing the challenges and flaws of the VCM, commentators have pointed out that these risks are, in fact, outweighed by the urgency for large-scale climate action and the pressing need to mobilize climate finance.⁶² It has been noted that if global climate efforts are effective, the financial incentives of carbon markets will no longer be needed in a few decades, given that carbon prices will be 'fully incorporated into all market prices'.⁶³ Thus, as pointed out by *Streck*, while 'offsetting cannot replace efforts to reduce emissions [...] it can serve as a transitional strategy to accelerate progress towards carbon neutrality'.⁶⁴ For the purposes of this article, it is worth mentioning that the VCM has not only been seen as a means to stimulate finance flow to developing countries, but also as one of the potential methods to be used by developed countries, under Article 9 of the Paris Agreement, to mobilize climate finance in general.⁶⁵

⁵⁶ See Jos Dalbeke et al., *Towards an EU Policy Agenda for Voluntary Carbon Markets*, STG Policy Papers: Policy Brief, ISSUE 2023/08 (EUI School of Transnational Governance 2023), 3; Kreibich and Hermwille (n 5) 941.

⁵⁷ Rob Macquarie, *The Voluntary Carbon Market and Sustainable Development*, Policy brief (Grantham Research Institute on Climate Change and the Environment 2023) 3.

⁵⁸ See e.g., Alejandra Padín-Dujon, 'The Verra Scandal Explained: Why "Avoided Deforestation" Credits are Hazardous' (26 January 2023) <<https://blogs.lse.ac.uk/internationaldevelopment/2023/01/26/the-verra-scandal-explained-why-avoided-deforestation-credits-are-hazardous/>> accessed 16 September 2024.

⁵⁹ See e.g., 'Global Charities Say Using Companies' Carbon Offsets to Lower Emissions Undermines Climate Targets' (2 July 2024) <https://www.wsj.com/articles/global-charities-say-using-companies-carbon-offsets-to-lower-emissions-undermines-climate-targets-b281a097?mod=WTRN_pos1&cx_testId=3&cx_testVariant=cx_189&cx_artPos=0> accessed 16 September 2024.

⁶⁰ See Joseph Romm, *Are Carbon Offsets Unscalable, Unjust, and Unfixable—and a Threat to the Paris Climate Agreement?* A White Paper from the Penn Center for Science, Sustainability, and the Media 17 and 43. <<https://bpbus-w2.wpmucdn.com/web.sas.upenn.edu/dist/0/896/files/2023/06/OffsetPaper7.0-6-27-23-FINAL2.pdf>> accessed 16 September 2024.

⁶¹ See Charlotte Streck, 'How Voluntary Carbon Markets can Drive Climate Ambition' (2021) 39 *Journal of Energy & Natural Resources Law* 367, 369; Oliver Miltenberger et al., 'The Good Is Never Perfect: Why the Current Flaws of Voluntary Carbon Markets Are Services, Not Barriers to Successful Climate Change Action', (2021) 3 *Frontiers in Climate* 1, 4–5.

⁶² See Miltenberger et al. (n 61) 2.

⁶³ *Ibid.*

⁶⁴ Streck (n 61) 368. It should be noted, however, that current empirical evidence on the actual impact and effectiveness of the VCM remains insufficient to assess its contribution to global climate efforts. See B. Buma et al., 'Expert Review of the Science Underlying Nature-based Climate Solutions' (2024) 14 *Nature Climate Change* 402–406.

⁶⁵ *Defining Results-Based Climate Finance, Voluntary Carbon Markets and Compliance Carbon Markets*, World Bank Working Paper (World Bank 2022) 4. Article 9(3) of the Paris Agreement reads as follows: 'As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance

Recent scholarly discourse on the VCM has largely focused on issues of credibility and governance.⁶⁶ Like compliance markets, the VCM faces concerns regarding a variety of challenges, including environmental integrity,⁶⁷ non-additionality,⁶⁸ market manipulation,⁶⁹ lack of effectiveness,⁷⁰ and carbon leakage.⁷¹ Some of these concerns are particularly acute in the VCM due to its self-regulated governance structure, which *Betz et al.* describe as ‘an extreme case of involvement of private actors as sources of governance’.⁷² In contrast to compliance markets, which are regulated by international agreements or specific laws, the VCM is primarily governed by independent certification organizations,⁷³

usually with limited oversight by governments or central institutions.⁷⁴

Over time, these certification organizations have developed a set of core principles for the VCM, establishing widely accepted minimum standards for project validation, monitoring, and verification.⁷⁵ However, competition among private certification bodies, along with potential conflicts of interest, has created incentives for over-crediting and non-additionality, exacerbating existing integrity challenges.⁷⁶ Combined with limited governmental oversight, these factors increase the risk of abuses compared to compliance carbon markets.⁷⁷

3.2.2 Calls for regulatory response

Efforts to improve the quality of carbon credits in the VCM and ensure market integrity have predominantly been led by private entities and NGOs. National regulators, on the other hand, have generally been reluctant to impose quality requirements on corporate offsets in the VCM or restrict their use.⁷⁸ Recently, calls have intensified for stronger regulatory oversight of

should represent a progression beyond previous efforts.’ See analysis on this paragraph in Jorge Gastelumendi and Inka Gnittke, ‘Climate Finance (Article 9)’ in Daniel Klein et al. (eds), *The Paris Agreement on Climate Change – Analysis and Commentary* (Oxford University Press 2017) 244–45.

⁶⁶ See e.g., Kreibich and Hermwille (n 5); Streck (n 61); Jan Cornillie et al., *What Future for Voluntary Carbon Markets?* STG Policy Papers; Policy Brief, ISSUE 2021/08 (EUI School of Transnational Governance 2021).

⁶⁷ For an overview of scholarship on environmental integrity risks in international carbon markets, see Lambert Schneider and Stephanie La Hoz Theuer, ‘Environmental Integrity of International Carbon Market Mechanisms under the Paris Agreement’ (2018) 19 *Climate Policy* 386, 387.

⁶⁸ On the concept of additionality, see Axel Michaelowa et al., ‘Additionality Revisited: Guarding the Integrity of Market Mechanisms under the Paris Agreement’ (2019) 19 *Climate Policy* 1211–1224.

⁶⁹ Regina Betz et al., *The Carbon Market Challenge: Preventing Abuse Through Effective Governance* (Cambridge University Press 2022) 9.

⁷⁰ Schneider and La Hoz Theuer (n 67) 392–95.

⁷¹ Alice Pirlot, ‘Carbon Leakage and International Climate Change Law’ (2024) 13 *Transnational Environmental Law* 61–86.

⁷² Betz et al. (n 69) 8.

⁷³ A small number of such organizations issue most carbon credits on the VCM, including Verra, Gold Standard and American Carbon Registry.

⁷⁴ See Vittoria Battocletti et al., ‘The Voluntary Carbon Market: Market Failures and Policy Implications’ (2024) 95 *University of Colorado Law Review* 519, 521.

⁷⁵ See e.g. the Carbon core principles of the Integrity Council for the Voluntary Carbon Market (ICVCM), <<https://icvcm.org/core-carbon-principles/>> and the Oxford Principles for Net-zero Aligned Carbon Offsetting, <<https://www.smithschool.ox.ac.uk/sites/default/files/2024-02/Oxford-Principles-for-Net-Zero-Aligned-Carbon-Offsetting-revised-2024.pdf>>, both accessed 17 September 2024.

⁷⁶ Betz et al. (n 69) 22; Battocletti et al. (n 74) 550.

⁷⁷ Betz et al. (n 69) 21.

⁷⁸ However, governments are increasingly publishing non-binding guidelines and principles for the VCM to enhance its integrity. See e.g., recent examples from the United States, *Voluntary Carbon Markets Joint Policy Statement and Principles* (White House 2024) and Finland, Anna Laine et al., *Guide to Good Practices for Voluntary Carbon Markets: Supporting Voluntary Mitigation Action with Carbon Credits* (Finnish Government 2023).

both corporate net-zero targets⁷⁹ and VCM operations.⁸⁰ In that discussion, the application of various governmental capabilities has been suggested, including different means to influence the integrity of the supply side, demand side and market operations.⁸¹ While the nature and scope of such regulatory interventions remain a subject of debate,⁸² among recurring themes in this discussion is the need for governments to clarify the ‘legal status of credits and rights to generate, own and use them’.⁸³ In light of the uncertainty surrounding the VCM, it has been noted that ‘clear signals of regulatory intent are key to the supply of high-quality credits given that unpredictability harms confidence to invest’.⁸⁴

In this context, it should be noted that recent regulatory developments on the demand side of the VCM are expected to influence offsetting practices.⁸⁵ This includes legal developments in areas such as consumer protection and corporate sustainability disclosures, where companies are required to substantiate their net-zero claims and disclose relevant information, which may curb the misuse of offsets.⁸⁶ Alongside this, the rise of greenwashing litigation may compel companies to exercise greater caution when us-

ing offsets to meet their net-zero targets, in order to avoid legal and reputational risks.⁸⁷

4. The role of the voluntary carbon market in achieving national climate targets in Europe? The case for systems thinking

4.1 Regulating the VCM – European context

While the VCM is widely recognized for its role in mobilizing private capital for climate action,⁸⁸ its interaction with national mitigation measures introduces notable challenges. Concerns around issues such as double claiming and non-additionality⁸⁹ have received considerable attention in both scholarly and public discourse about the VCM,⁹⁰ and have contributed to growing calls for regulatory intervention. However, these discussions have largely focused on VCM projects in the Global South, which typically are funded by entities (states and non-state actors) from the Global North.⁹¹ In contrast, there is limited academic research on the implications of the increasing number of VCM projects occurring within developed countries, including EU Member States. Although VCM transactions within and between developed countries share many challenges with those involving both developing and developed countries, the distinct legal context in developed regions, such as the EU, may give rise to unique variations of these challenges, discussed further in this chapter.

⁷⁹ See e.g., Hale et al., ‘Turning a Groundswell of Climate Action into Ground Rules for Net Zero’ (n 53) 306–308 and Rosalie Arendt, ‘Residual Carbon Emissions in Companies’ Climate Pledges: Who has to Reduce and Who Gets to Remove?’ (2024) *Climate Policy* 1–16.

⁸⁰ See e.g. *Voluntary Carbon Markets and Offsetting* (UK Climate Change Committee 2022) 83.

⁸¹ Wetterberg et al. (n 8) 46.

⁸² See Battocletti et al. (n 74) 557; Bryce A. Davis, ‘A Climate Solution on Shaky Ground: The Voluntary Carbon Market and Agricultural Sequestration’ (2023) 3 *University of Illinois Law Review* 955, 978.

⁸³ See Macquarie (n 57) 4.

⁸⁴ *Ibid.*

⁸⁵ See e.g., Jan Cornillie, *Can the New European Sustainable Finance Rules Improve the Integrity of Voluntary Carbon Markets?* STG Policy Papers, Policy Brief, ISSUE 2022/28 (EUI School of Transnational Governance 2022) 5.

⁸⁶ See Dalbeke et al. (n 56) 5–8. See also Cornillie (n 85) 4.

⁸⁷ Nicolas Kreibich et al., *Governing Corporate Claims: Increasing transparency of climate-related claims*, Carbon Mechanisms Research Policy Paper No. 03/2022 (Wuppertal Institute for Climate, Environment and Energy 2022) 27–28.

⁸⁸ See e.g., Streck (n 61).

⁸⁹ Double claiming and non-additionality will be further discussed in Chapter 4.2.3.

⁹⁰ See e.g., Michaelowa et al. (n 68); Kreibich and Hermwille (n 5); Betz et al. (n 69) 50–53; Battocletti et al. (n 74) 531–34.

⁹¹ See e.g., Streck (n 61), 368–69; Battocletti et al. (n 74) 526–27; Trouwloon et al. (n 5) 14; Macquarie (n 57) 2.

As highlighted in the introduction, this article contends that, without appropriate regulatory reforms, European policymakers' reliance on VCM activities to support national climate targets could potentially undermine broader climate goals, including those of the Paris Agreement. Drawing on discussions from previous chapters, the article further argues that effectively regulating the VCM in Europe requires a comprehensive understanding of the intricate interactions between national and corporate climate target frameworks. Using systems thinking as a conceptual lens, the following chapters will provide a high-level perspective on the interaction between these two frameworks, in order to address the dynamic and multifaceted regulatory challenges involved.

4.2 Interplay between national and corporate climate target frameworks

4.2.1 Leveraging the VCM for national climate targets

Evidence from around the world shows an increasing interplay between climate-related compliance instruments⁹² and the VCM, with policymakers actively seeking to leverage the VCM to stimulate private investments in climate projects.⁹³ Here, 'leveraging the VCM' broadly refers to any kind of efforts to mobilize, through public policy, private finance through the VCM, by enabling, facilitating or encouraging the participation of non-state entities, including companies, in VCM activities and transactions.

This approach is not new. International climate market mechanisms tapping into volun-

tary private efforts date back to the Kyoto Protocol, which explicitly enabled private entities to participate in the generation of credits to help Annex I parties meet their quantified emission reduction commitments.⁹⁴ A similar strategy is now emerging under Article 6(4) of the Paris Agreement, which also envisions voluntary participation by private entities in a state-level carbon crediting mechanism.⁹⁵ Another example at the international level is the Carbon Offsetting and Reduction Scheme for International Aviation (CORISIA),⁹⁶ which, under certain conditions, permits the use of VCM credits as 'eligible emissions units' for compliance purposes.⁹⁷

Reliance on the VCM at the domestic level is, on the other hand, relatively recent, although a small number of countries, including Switzerland and Australia, have a history of integrating the VCM into national compliance mechanisms.⁹⁸ Now, however, more variations of this

⁹⁴ Kyoto Protocol, Articles 6(3) and 12(9). Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 22.

⁹⁵ Paris Agreement, Article 6(4)(b). See also e.g., Decision 3/CMA.3 (2021) Rules, modalities and procedures for the mechanism established by Article 6, paragraph 4, of the Paris Agreement, Annex (V)(A)(30), FCCC/PA/CMA/2021/10/Add.1. See further Jürg Füssler et al., *Incentives for Private Sector Participation in the Article 6.4 Mechanism*, Discussion Paper (German Emissions Trading Authority 2019).

⁹⁶ See Assembly Resolutions In Force (as of 7 October 2022), Doc. 10184, A41-22: Consolidated statement of continuing ICAO policies and practices related to environmental protection – Carbon Offsetting and Reduction Scheme for International Aviation (CORISIA) (International Civil Aviation Organization 2022).

⁹⁷ The International Civil Aviation Organization (ICAO) regularly publishes a list of programmes which are approved by the ICAO Council to supply units that airlines can use to comply with their offsetting requirements. See the most current one: *CORSIA Eligible Emissions Units: March 2024* (ICAO 2024).

⁹⁸ See Allegra Dawes et al., *Voluntary Carbon Markets: A Review of Global Initiatives and Evolving Models*, CSIS Briefs (CSIS 2023) 5–6 and Giulio Galdi et al., *Emissions Trading Systems with Different Offsets Provisions: Implica-*

⁹² 'Climate-related compliance instruments' here refers to any type of legally mandated tools or mechanisms aimed at advancing climate mitigation objectives.

⁹³ See e.g., Wetterberg et al. (n 8). See also Eve Tamme, 'The Convergence of the Voluntary and Compliance Carbon Markets' (9 November 2023) <<https://evetamme.com/2023/11/09/converging-vcm-and-compliance-markets/>> accessed 14 September 2024.

approach appear to be emerging across the globe, many of which display elements of ‘regulatory experimentalism’.⁹⁹ These include measures taken by several EU Member States in recent years to leverage the VCM to support their national climate targets. Sweden and Denmark, for instance, have each established funding mechanisms for BECCS projects,¹⁰⁰ based on blended public-private financing models that partly rely on the VCM.¹⁰¹ Countries such as France, Austria, Germany, Italy, the Netherlands, and Spain, have developed official certification frameworks for issuing VCM carbon credits from domestic projects that mostly target land-use practices.¹⁰² In Iceland, tax incentives are offered to companies that offset their own emissions through funding of climate projects.¹⁰³

tions for Linking, Report for the Carbon Market Policy Dialogue, Research Project Report, Issue 2022/01 (Florence School of Regulation 2022) 21.

⁹⁹ Examples of such initiatives in the context of land-use-based carbon sequestration (carbon farming) are discussed in Nidhi Raina et al., ‘Incentive Mechanisms of Carbon Farming Contracts: A Systematic Mapping Study’ (2024) 352 *Journal of Environmental Management* 1, 7-10. On ‘regulatory experimentalism’ see Megan Bowman, *Regulatory Leadership for a Net Zero Transition: Central Banks and Financial Regulators: Levers and Limits* (King’s College London 2022), 24–31.

¹⁰⁰ BECCS stands for ‘bioenergy with carbon capture and storage’ and involves capturing and storing CO₂ from biomass energy generation.

¹⁰¹ For a discussion of these initiatives, see (for Sweden) Malin Dufour et al., ‘How to Maintain Environmental Integrity when Using State Support and the VCM to Co-finance BECCS Projects – a Swedish Case Study’ (2024) 12 *Frontiers in Environmental Science* 1–12 and (for Denmark) Jean-Philippe Brisson et al., *Denmark to Allow Stacking of Voluntary Carbon Credits and Nationally Determined Contribution*, June 20, 2024 <<https://www.globalelr.com/2024/06/denmark-to-allow-stacking-of-voluntary-carbon-credits-and-nationally-determined-contribution/>> accessed 14 September 2024.

¹⁰² See an overview of these initiatives in Mengxue You and Sylvain Delerce, *The Low-carbon Label: A French Approach to Improving the Voluntary Market for Emissions Reductions and Removals*, Policy Brief (Carbon Gap 2023) 5.

¹⁰³ Income Tax Act (Lög um tekjuskatt) No 90/2003 (with later amendments), Article 31(2).

This experimental approach is also evident at the EU level. Proposed legal frameworks for ‘carbon farming’¹⁰⁴ and the Carbon Removals Certification Framework (CRCF)¹⁰⁵ aim to enable private actors to generate carbon credits within the EU for sale on the VCM.¹⁰⁶ The EU thus appears open to harness the economic incentives of the VCM to promote both nature-based and technological carbon removals across Europe.

These examples suggest that Member States and the EU are increasingly turning to the VCM to mobilize climate finance for mitigation efforts, particularly for scaling up technological carbon removals and advancing land-use-based carbon farming. This shift signifies a transformation in the VCM’s role, evolving from being merely an ‘avenue of choice’¹⁰⁷ for voluntary climate action to becoming a crucial instrument for meeting the goals of the Paris Agreement.¹⁰⁸ As noted earlier, this also reflects a geographic shift in VCM projects. Historically, VCM projects were predominantly located in developing countries and funded by entities in developed nations, which offered lower-cost emission offsets for advanced

¹⁰⁴ Proposal for a Regulation of the European Parliament and of the Council establishing a Union certification framework for permanent carbon removals, carbon farming and carbon storage in products, 2022/0394 (COD).

¹⁰⁵ Proposal for a Regulation of the European Parliament and of the Council establishing a Union certification framework for carbon removals, COM/2022/672 final.

¹⁰⁶ For an overview of these proposals, including their relationship to the voluntary carbon market, see Sanja Bogojević, ‘Carbon removals, ecosystems and the European Green Deal’ (2024) 3 *European Law Open* 199–208.

¹⁰⁷ Markus Gehring and Freedom-Kai Phillips, *Intersections of the Paris Agreement and Carbon Offsetting: Legal and Functional Considerations*, Policy Brief No 88 (CIGI 2016) 1.

¹⁰⁸ See e.g. a policy statement and principles issued by the Biden-Harris Administration in the United States in May 2024, noting inter alia that ‘[h]igh-integrity voluntary carbon credit markets (VCMs), as well as carbon credit markets more broadly, have the potential to support decarbonization efforts within the United States and globally’. *Voluntary Carbon Markets Joint Policy Statement and Principles* (White House 2024), 1.

economies with limited ‘low hanging fruit’.¹⁰⁹ Today, developed countries appear to be utilizing the VCM as a tool to finance domestic climate efforts.

4.2.2 Comparison of key elements

At first glance, the concurrent expansion of national and corporate climate target frameworks, both aligned with global climate goals, appears to be mutually beneficial. Although empirical evidence remains limited,¹¹⁰ a recent study – the first to quantify the reciprocal relationship between these two levels of climate action – found a ‘statistically significant and positive influence’ between national and corporate climate targets.¹¹¹ According to its authors, this supports the theory of an ‘ambition loop’, where national and corporate climate action reinforces each other through shared ambition signaling.¹¹²

However, translating this shared ambition into effective implementation is challenging. While the frameworks developed around national and corporate climate targets essentially pursue the same overarching objective (the Paris Agreement’s temperature goal), they differ significantly in architecture and functions, which raises questions about their ability to work together towards a shared goal. As demonstrated in the following three subchapters, which compare national and corporate climate target frameworks in Europe, these disparities include the formulation and scope of targets, methods for achieving targets (mitigation methods) and governance structures.

¹⁰⁹ See e.g., Shukla et al. (n 44) 814.

¹¹⁰ Shaikh Eskander et al., ‘Testing the Ambition Loop: Do Country- and Company-Level Net-Zero Targets Reinforce Each Other? A Global Comparison’ (2024) 26 *Journal of Comparative Policy Analysis: Research and Practice* 3–4, 267.

¹¹¹ *Ibid* 273, 278.

¹¹² *Ibid* 267.

4.2.2.1 Formulation and scope of targets

The difference between the target-setting techniques of national and corporate frameworks is, at least partly, the result of different underlying drivers. As discussed in Chapter 2, the EU and its Member States pledged, in their joint NDC under the Paris Agreement, to collectively achieve at least 55% GHG emission reduction by the year 2030, compared to 1990. To achieve this target,¹¹³ each EU Member State has undertaken quantified, legally binding emission reduction and removal targets under the Effort Sharing and LULUCF Regulations,¹¹⁴ representing its contribution to the collective target.¹¹⁵ In contrast, companies typically adopt climate targets voluntarily, motivated not by specific legal commitments but by factors such as stakeholder demands and reputational benefits.¹¹⁶ The definition and ambition levels of corporate targets are thus determined by the companies themselves.¹¹⁷ Although companies increasingly adhere to widely recognized standards and methodologies developed by independent

¹¹³ The 55% target was made legally binding in the ‘European Climate Law’. Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 [2021] OJ L243/1 (European Climate Law), Article 1 and preamble, item 8.

¹¹⁴ See further Chapters 2.2.1 and 2.2.2.

¹¹⁵ Under the procedural framework set out in the European Climate Law and the Governance Regulation, the EU is set to revise its interim target, which will lead to updating of national targets in the Effort Sharing and LULUCF Regulations.

¹¹⁶ Zola Berger-Schmitz et al., ‘What Explains Firms’ Net Zero Adoption, Strategy and Response?’ (2023) 32 *Business Strategy and the Environment* 5583, 5587–88. However, legal requirements in various fields, including financial regulation, and rules to promote fair competition and consumer protection, increasingly influence the formulation of these targets.

¹¹⁷ See Hale et al. ‘Assessing the Rapidly-emerging Landscape of Net Zero Targets’ (n 46) 21–22.

bodies,¹¹⁸ the formulation of their targets can vary considerably.¹¹⁹

The scope of the targets is subject to similar differences. The Effort Sharing and LULUCF targets cover emissions and removals of an exhaustive list of GHGs from specific categories of activities occurring within the territory of the Member States. The Effort Sharing and LULUCF Regulations, together with the EU ETS Directive, are designed to ensure comprehensive coverage and control of the GHGs that are included in the EU and Member States' NDC. On the other hand, the scope of corporate climate targets is not harmonized, and companies define their own 'target boundaries'. Thus, the companies themselves determine the permissible type and geographic location of emissions reduction and removal activities falling under their targets' scope.¹²⁰ Consequently, these targets range significantly in scope. For example, some corporate targets encompass all GHGs, while others focus exclusively on CO₂.¹²¹ Similarly, some targets address only direct emissions whereas others also include indirect emissions, *i.e.* emissions that result from the company's activities but occur at sources owned or controlled by another entity.¹²²

¹¹⁸ Berger-Schmitz et al. (n 116) 5585.

¹¹⁹ In practice, however, many corporate targets are formulated similarly to national targets, for example by including a long-term goal to be achieved by a specific year and one or more intermediate targets. See e.g., *SBTi Corporate Net-zero Standard*, Version 1.2 (SBTi 2024) 41–42.

¹²⁰ See Thomas Hale et al., 'Assessing the Rapidly-emerging Landscape of Net Zero Targets' (n 46) 22. See also *SBTi Corporate Net-zero Standard* (n 119) 24–27.

¹²¹ Hale et al., 'Assessing the Rapidly-emerging Landscape of Net Zero Targets' (n 46) 22.

¹²² *Ibid.* See also *Calculation Tools FAQ*, Information on the Greenhouse Gas Protocol's website, <<https://ghg-protocol.org/calculation-tools-faq>> accessed 18 September 2024. Direct emissions are typically categorized as Scope 1 emissions, while indirect emissions are divided into Scope 2 emissions, which relate to consumption of purchased energy, and Scope 3 emissions, namely '[o]ther indirect emissions, such as the extraction and

4.2.2.2 Mitigation methods

Another notable difference between the national and corporate frameworks lies in the accepted methods for achieving climate targets. While EU Member States generally select their own policies and measures to meet climate targets, their choices are heavily influenced by various harmonized EU measures.¹²³ In contrast, the voluntary nature of corporate climate targets allows companies significant flexibility in how they achieve their targets, resulting in varied mitigation methods across corporate targets. This distinction also applies to offsetting options. As discussed earlier, EU Member States' national targets can be partially met through specific offsetting methods, governed by rules and restrictions in the Effort Sharing and LULUCF Regulations.¹²⁴ These offsetting options are limited to state-level transfers of mitigation outcomes, and except for certain emission allowances transferable from the EU ETS,¹²⁵ carbon credits or units from other market mechanisms are not accepted for compliance. Corporate climate targets, by contrast, do not face these limitations; companies can typically choose the volume, type, and geographical origin of carbon credits used to offset residual emissions.¹²⁶

production of purchased materials and fuels, transport-related activities in vehicles not owned or controlled by the reporting entity, electricity-related activities (e.g. T&D losses) not covered in Scope 2, outsourced activities, waste disposal, etc.' *ibid.*

¹²³ See e.g. Effort Sharing Regulation, preamble, Item 8.

¹²⁴ See further Chapter 2.2.3.

¹²⁵ Effort Sharing Regulation, Article 6 (as amended by Article 1 of Regulation (EU) 2023/857 [2023] OJ L111/1).

¹²⁶ However, as noted earlier, certain widely accepted quality criteria for carbon offsetting are considered minimum standards. These include additionality, permanence, accurate monitoring and reporting, avoidance of carbon leakage, avoidance of double counting and the 'do no significant harm' principle. See e.g. a detailed overview of the minimum criteria in a guidance document for the VCM, issued by the Finnish Government in 2023, Anna Laine et al. (n 78) 16–58. 'Almost all carbon crediting programmes apply internationally established

4.2.2.3 Governance structures

Finally, the governance frameworks for implementing national and corporate climate targets differ significantly. EU Member States operate within a highly structured procedural framework, where the EU Commission monitors progress toward national targets.¹²⁷ This framework includes regular planning and reporting obligations, compliance procedures, and standardized accounting and reporting rules to ensure consistency across the EU. In contrast, corporate climate targets are implemented in a more fragmented, ad hoc manner.¹²⁸ Although independent standards and guidance have evolved into widely accepted best practices,¹²⁹ and various integrity initiatives address credit issuance, accounting, registration, and credit usage,¹³⁰ no overarching structure exists to comprehensively track and enforce corporate progress.¹³¹

4.2.3 Systemic challenges

The differences between national and corporate climate target frameworks in Europe, discussed above, raise questions about potential synergies

minimum criteria with a view to ensuring the quality of carbon credits', *ibid.* 16. Also, independent standards and guidelines frequently recommend that companies prioritize absolute emission reductions and only use offsets for 'residual emissions' (also called 'hard-to-abate emissions') which refers to emissions that remain after a company has taken all reasonable mitigation measures.

¹²⁷ See e.g. Governance Regulation, Chapter 5.

¹²⁸ *Taskforce on Scaling Voluntary Carbon Markets*, Final report (TSVCM 2021) 43.

¹²⁹ Berger-Schmitz et al. (n 116) 5584.

¹³⁰ Examples include various accounting standards of Greenhouse Gas Protocol, the Net Zero Standard of the Science Based Targets initiative's (SBTi), the Core Carbon Principles (CCPs) of the Integrity Council for the Voluntary Carbon Market (ICVCM) and the Claims Code of the Voluntary Carbon Markets Integrity Initiative (VCMI).

¹³¹ However, some private initiatives provide transparency on target implementation. See especially The Net Zero Tracker, <<https://zerotracker.net/about>> accessed 14 September 2024.

and conflicts. While these frameworks largely operate independently, they are becoming more interconnected. This increasing interaction is, at least partly, driven by policymakers' growing reliance on voluntary climate initiatives, like VCM activities, to help meet national targets.¹³²

From a systems thinking perspective, achieving the goals of a larger system requires the effective functioning of its interconnected 'subfunctions'.¹³³ In the situation explored in this article – where EU Member States use the VCM to support national climate targets – two subsystems are in fact attempting to work together to achieve a common climate objective. While the structural and functional differences of these subsystems do not necessarily prevent effective collaboration, systems thinking literature suggests that such disparities can lead to internal inconsistencies¹³⁴ and negative feedback loops.¹³⁵ These dynamics can cause unintended consequences that could ultimately undermine the broader system's goals.¹³⁶ This article argues that systems thinking offers valuable insights into these complexities of national and corporate climate target frameworks – and their interactions – which can help identify potential 'error[s] or untoward results'¹³⁷ that may lead to a 'malfunctioning system'.¹³⁸

When an EU Member State encourages or facilitates voluntary climate action, such as VCM projects, to support its national climate targets, a key question arises: Can both the national and corporate players involved achieve their goals through this interaction? In this si-

¹³² See examples in Chapter 4.2.1.

¹³³ See LoPucki (n 9) 504.

¹³⁴ LoPucki (n 9) 506.

¹³⁵ Tamara Belinfanti and Lynn Stout, 'Contested Visions: The Value of Systems Theory for Corporate Law' (2018) 166 *University of Pennsylvania Law Review* 579, 604.

¹³⁶ LoPucki (n 9) 502–503.

¹³⁷ See *id.* 497.

¹³⁸ *Ibid.*

tuation, the Member State is in fact leveraging the framework which has developed around corporate climate targets, including its incentives and infrastructure, to meet its own objectives. Meanwhile, the companies in question expect to use this same framework to achieve their own goals. However, given the substantial differences in scope, methods, and governance between national and corporate frameworks, it is not guaranteed that corporate climate actions will seamlessly align with national benefits or interests. This misalignment, as systems thinking suggests, can lead to ‘systemic challenges’.¹³⁹ The following two subchapters will zoom in on two such potential challenges, double claiming and non-additionality.

4.2.3.1 National-corporate double claiming

The issue of national-corporate double claiming arises from the overlap of mitigation activities between national and corporate climate target frameworks. As one form of double counting,¹⁴⁰ double claiming involves two or more different entities using the same mitigation outcome to compensate for their respective emissions toward two or more separate targets.¹⁴¹ Such

¹³⁹ Here, that term refers to challenges which arise from tensions between national and corporate targets systems, potentially disrupting the effectiveness of both.

¹⁴⁰ The risk of double counting, *i.e.* counting the same mitigation outcome more than once against climate targets, is among major challenges of carbon markets at all levels. It manifests itself in three main ways: 1) *double issuance*, where more than one credit is issued on basis of the same mitigation result, 2) *double claiming*, where the same mitigation outcome is counted towards two or more climate targets, and 3) *double use*, where the same credit is used more than once to achieve a climate target. Betz et al. (n 69) 50–51.

¹⁴¹ Schneider and La Hoz Theuer (n 67) 389; Kreibich and Hermwille (n 5) 940, 951; Hanna-Mari Ahonen et al., *Raising Climate Ambition with Carbon Credits: Exploring the Roles and Interplay of the Voluntary Carbon Markets and Article 6 in Contributing to the Implementation of National Climate Targets and Raising Global Ambition*, Discussion Paper (Perspectives Climate Group 2023).

practices, if widespread, may potentially undermine global climate objectives, as they can ‘delay climate action [and] create a misleading picture that emissions have been reduced by more than they actually have in reality’.¹⁴²

The question of how to address national-corporate double claiming is the subject of ongoing scholarly and public debate.¹⁴³ Emphasizing integrity challenges and the risk of undermining global climate objectives, some have argued that cross-border VCM transactions should be ‘adjusted’ in national accounting inventories to prevent double claiming.¹⁴⁴ Others have expressed the view that such a requirement is unnecessary as the mitigation outcomes belong to separate accounting systems.¹⁴⁵ In this context, it has also been pointed out that rigidly linking national and corporate accounting to avoid double claiming would impose excessive limitations on the VCM’s ability to finance climate action.¹⁴⁶

¹⁴² See Jonathan Crook, ‘Was COP27 the beginning of the end for corporate offsetting?’, <<https://carbonmarketwatch.org/2022/12/07/was-cop27-the-beginning-of-the-end-for-corporate-offsetting/>> accessed 14 September 2024.

¹⁴³ See an overview of key arguments of this debate in Wetterberg et al. (n 8) 25.

¹⁴⁴ For example, Kreibich and Hermwille maintain that adjusting national bookkeeping under the Paris Agreement to reflect VCM transactions is the ‘only solution that strengthens and protects the legitimacy of using carbon credits for offsetting in the context of carbon neutrality targets while ensuring a high degree of environmental integrity’. Kreibich and Hermwille (n 5) 951. See references to other sources where similar views are expressed in Charlotte Streck et al., *Double Claiming and Corresponding Adjustments: A Deep Dive into the Double Counting of Emission Reductions, Corresponding Adjustments, and their Implications for the Voluntary Carbon Market* (Climate Focus 2023) 5.

¹⁴⁵ Andrew Howard and Sandra Greiner, *Accounting Approaches for the Voluntary Carbon Market* (VCM Global Dialogue 2021), <https://vcm-gd.org/wp-content/uploads/2021/10/VCM_Accounting-1.pdf> accessed 14 September 2024.

¹⁴⁶ Streck et al. (n 144) 29; Ahonen et al. (n 141) 50.

This debate typically centers on the interaction between the VCM and state-level carbon trading under the Paris Agreement, and whether cross-border VCM transactions should be backed by ‘corresponding adjustments’ – an accounting tool established in the Article 6 Rulebook¹⁴⁷ to prevent double counting of mitigation outcomes between two national registries.¹⁴⁸ While that question, in principle, also applies to VCM transactions involving intra-EU climate projects, the distinctive legal framework governing EU-mandated national climate targets introduces unique legal implications that demand more context-specific research.

As mentioned above, the EU and its Member States have a joint NDC under the Paris Agreement, on the basis of which the EU has created legally binding emission reduction and removal targets for individual Member States.¹⁴⁹ While the EU legal framework allows specific transfers of mitigation outcomes between individual Member States,¹⁵⁰ it does, unlike the Article 6 Rulebook, not enable ‘corresponding adjustments’. As a result, EU Member States cannot ‘adjust’ their national accounting for cross-border VCM transactions originating from intra-EU climate projects. Thus, when mitigation outcomes achieved through the VCM fall under the scope of the Effort Sharing or LULUCF

Regulations, the host Member State must count these outcomes toward its national targets.¹⁵¹ At the same time, a company purchasing the corresponding carbon credits is likely using the same mitigation outcomes to offset its residual emissions to achieve its own climate target.

This dual use of mitigation outcomes heightens the challenge of national-corporate double claiming under the EU legal framework. Addressing this issue may be even more difficult than under Article 6 of the Paris Agreement, as Member States lack the ability to adjust their national accounting to reflect VCM-related exports of carbon credits. From a systems thinking perspective, this situation indicates internal inconsistencies between national and corporate climate target frameworks (systems) in Europe, potentially leading to unintended consequences for the overall system’s goal. To address such inconsistencies, adaptation may be needed within either or both systems – such as the introduction of new mechanisms to adjust the Member States’ accounting or other kind of alignment or coordination between the national compliance framework and the VCM.

4.2.3.2 *Non-additionality*

The issue of non-additionality is another example of a potential systemic challenge arising from the interaction between national and corporate climate target frameworks in Europe. ‘Additionality’ is a core criterion of the VCM, requiring that carbon credits from VCM projects represent mitigation outcomes that would not have occurred without the revenue from selling these credits.¹⁵² Demonstrating additionality in-

¹⁴⁷ ‘Article 6 Rulebook’ here refers to decisions on the implementation of the Paris Agreement’s Article 6 made by the Conference of the Parties to the UNFCCC serving as the meeting of the Parties to the Paris Agreement (CMA). An overview of these decisions can be found here: <<https://unfccc.int/process/the-paris-agreement/cooperative-implementation>> accessed 14 September 2024.

¹⁴⁸ See e.g., Decision 2/CMA.3 (2021) Guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement), Annex (III), FCCC/PA/CMA/2021/10/Add.1. For further information on corresponding adjustment, see e.g., Kreibich and Hermwille (n 5) 947 and onwards.

¹⁴⁹ See further Chapters 2.2.1 and 2.2.2.

¹⁵⁰ See further Chapter 2.2.3.

¹⁵¹ See Governance Regulation, Article 26(3), cf. Annex V (Part 1) (as amended by Article 2 of Regulation (EU) 2023/857 [2023] OJ L111/1).

¹⁵² On additionality in general, see e.g., Michaelowa et al. (n 68) 1213–1214 and James Salzman and David Weisbach, ‘The Additionality Double Standard’ (2024)

volves establishing a theoretical baseline of what would have happened under a business-as-usual scenario, a task complicated by the need to predict future developments based on subjective assumptions and often complex modeling.¹⁵³

While non-additionality is a risk in most VCM transactions, the stringency of Member States' commitments under EU law makes it particularly challenging for intra-EU climate projects. The Effort Sharing and LULUCF Regulations not only impose national emission reduction and removal targets for the Member States but also prescribe robust ground rules on how to achieve them, including an exhaustive list of flexibilities and offsetting mechanisms, confined to intra-EU state-level carbon trading.¹⁵⁴

Furthermore, under the Governance Regulation, Member States must submit a ten-year National Energy and Climate Plan (NECP) and report regularly on their progress, allowing the EU Commission to continually assess whether the Member States are on track to meet the EU's collective climate targets.¹⁵⁵ These rules require a high degree of transparency about planned future developments within the Member States. For example, the NECP shall include a description of their planned policies and measures for achieving their Effort Sharing and LULUCF targets, 'as well as a general overview of the investment needed' to meet these targets.¹⁵⁶

This regulatory framework makes demonstrating additionality in intra-EU VCM projects even more challenging than in the traditional VCM model, which typically involves financial flows from developed to developing countries.¹⁵⁷ Developing countries are usually subject to less stringent climate targets than the EU Member States and often have conditional NDCs, *i.e.* they pledge to meet specific targets contingent on financial support.¹⁵⁸ This allows 'additional' mitigation outcomes to be achieved through market mechanisms like the VCM. In contrast, the compliance mechanisms of the Effort Sharing and LULUCF Regulations, along with the Governance Regulation, leave little room for unplanned activities within the Member States, thereby limiting the potential for EU-based projects to demonstrate additionality. This challenge is further complicated by the recently emerging concept of 'regulatory additionality',¹⁵⁹ which requires VCM projects to be 'additional to, and not required or enabled by, policies and measures that the host government has introduced'.¹⁶⁰

Even if VCM projects fall outside the scope of the Effort Sharing and LULUCF Regulations,¹⁶¹ the additionality requirement may still lead to systemic challenges. As additionality is a requirement for issuing VCM carbon credits, EU Member States may face perverse incentives to

48 *Harvard Environmental Law Review* 117, 123–129. See also Betz et al. (n 69) 16 (Table 3).

¹⁵³ See further, Axel Michaelowa and Igor Shishlov, 'Evolution of International Carbon Markets: Lessons for the Paris Agreement' (2019) 10 *Wiley Interdisciplinary Reviews: Climate Change*.

¹⁵⁴ See further Chapter 2.2.3. Importantly in this context, Member States are not allowed to use carbon credits from the VCM to achieve their Effort Sharing and LULUCF targets.

¹⁵⁵ See Kati Kulovesi et al., 'The European Climate Law: Strengthening EU Procedural Climate Governance?' (2024) 36 *Journal of Environmental Law* 23, 27 and 32–34.

¹⁵⁶ Governance Regulation, Article 3(2)(c).

¹⁵⁷ See further Chapter 4.1.1.

¹⁵⁸ On contingent NDCs, see W. P. Pauw et al., 'Conditional Nationally Determined Contributions in the Paris Agreement: Foothold for Equity or Achilles Heel?' (2020) 20 *Climate Policy* 468–84.

¹⁵⁹ See Betz et al. (n 69) 72.

¹⁶⁰ A practitioner's guide: Aligning the Voluntary Carbon Market with the Paris Agreement test (Gold Standard, 2024), <<https://www.goldstandard.org/publications/a-practitioners-guide-aligning-the-voluntary-carbon>> accessed 14 September 2024.

¹⁶¹ Such projects could include technological carbon capture projects like direct air capture and carbon storage (DACCS) or projects involving carbon sequestration through coastal and marine ecosystems (blue carbon projects).

reduce ambition in future revisions of collective EU targets, to ‘leave room’ for additionality.¹⁶² From a systems thinking perspective, this reflects a negative feedback loop, where action in one subsystem trigger counterproductive responses in another, potentially undermining the broader system’s goals.¹⁶³

Overall, these situations illustrate a tension between national and corporate climate target frameworks in Europe. This tension stems from a conflict between the additionality criteria – a core principle of the VCM – and the scope, mitigation methods and governance structures of EU compliance mechanisms. For these subsystems to collaborate effectively towards global climate objectives, adaptation in one or both of them may be necessary. Without such adjustments, their interaction risks producing unintended consequences that could hinder their collective progress toward broader climate goals.

5. Conclusions

Most research on the interaction between climate-related compliance instruments and the VCM has focused on projects in developing countries. This article, on the other hand, focused on a seemingly growing interest among developed countries, including EU Member States, in leveraging the VCM to support domestic climate action and advance national climate targets. While intra-EU VCM projects face challenges similar to global ones, the distinct legal context of the EU – characterized by stringent national climate targets and a strong emphasis

on transparency – presents unique regulatory complexities.

The article examined the risks that intra-EU VCM projects may pose to broader climate goals if left unregulated, including the long-term mitigation objectives of the Paris Agreement. As demonstrated in the article, determining the appropriate regulatory response is complex, given the need for comprehensive understanding of both national and corporate climate target frameworks and their fundamentally different and dynamic nature. Highlighting these differences, the article showed that the integration of the fragmented, self-regulated, and rapidly evolving VCM into the structured legal framework governing EU-mandated national targets requires a broad, high-level perspective, essentially a ‘bird’s eye view’. For this reason, the article advocates for the use of systems thinking in regulating the VCM in Europe.

From a systems thinking perspective, achieving the objectives of the Paris Agreement requires the effective functioning of interconnected ‘subfunctions’ within many subsystems, including national and corporate target-based frameworks. By exploring a situation where EU Member States leverage the VCM to support their national targets, the article revealed potential misalignments between national and corporate climate target frameworks, such as those related to double claiming and non-additionality, which could undermine global climate objectives.

Based on this analysis, the article argues that systems thinking offers valuable insights into the complexities of national and corporate climate target frameworks and their interactions. It can help identify potential systemic challenges, such as conflicts and negative feedback loops, which may undermine the broader system’s goals. While only two examples of such challenges were discussed in the article, many

¹⁶² See for comparison Schneider and La Hoz Theuer who argue, in the context of Article 6 of the Paris Agreement, that the possibility to sell credits on international carbon markets ‘could create incentives to set mitigation targets at unambitious levels, or to define their scope narrowly, in order to accrue more benefits from transferring units internationally’. Schneider and La Hoz Theuer (n 67) 392. See also *ibid* 395 and Betz et al. (n 69) 52.

¹⁶³ Belinfanti and Stout (n 135) 604.

others undoubtedly exist, where misalignments between system elements could lead to unintended consequences that risk undermining the overarching goals of the Paris Agreement.

