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Excerpts regarding the situation in France

SUMMARY

Appeals for judicial review regarding permits for proposed wind farms in France

November 2020

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Supported by:
Bundesministerium für Wirtschaft und Energie
aufgrund eines Beschlusses des Deutschen Bundestages

Supported by:
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Abstract

The development of wind power is one of the objectives of the energy transition and a relatively new legal topic, the regulations of which are constantly evolving. The development of onshore wind power can be a highly contentious issue. Appeals increase the time it takes to deliver proposed wind farms by several years, causing delays and generating legal uncertainty for the initiators of these projects.

In France, legislation has therefore sought to simplify the system for granting authorisations for onshore wind power projects, as well as the system for resolving disputes (Part II). Legislation in France simplified litigation processes for offshore wind in 2016 and for onshore wind in 2018. In particular, it assigned exclusive jurisdiction at first and last instance to the administrative appeal courts for disputes relating to proposed wind farms

Furthermore, the procedure for applying for authorisations for wind farms was changed in France in 2017 with the transition over to the environmental authorisation. This authorisation procedure is now governed by the full appeal system which is better suited to resolving disputes over proposed wind farms than the system for appeal on the grounds of abuse of authority was previously – the full appeal system grants the administrative judge power to settle disputes in relation to authorisations.

Acknowledgements:

Catharina Post and Julian Nebel - Brahms Nebel & Kollegen
Olivier Fazio - Bird&Bird
Hélène Gelas - LPA-CGR Lawyers

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Content

I. Introduction

Projects to build onshore wind farms must factor in a range of environmental and territorial factors, from protecting nature and biodiversity to preserving landscapes and historical monuments, as well as issues to do with air traffic and radar.

In France, since 2011, wind turbines with masts equal to or higher than 50 m and wind farms the total power of which is more than 20 MW and which have at least one mast equal to or higher than 12 m have required authorisations to ensure compliance with the regulations governing facilities which have been classified for the purposes of environmental protection. The authorisation application must include an impact study[1] to assess the environmental effects of the proposed projects. This study must measure impact on the landscape, noise, security risks, and any consequences for biodiversity. A public survey is also conducted in the vicinity of the proposed location.

The regulations governing wind farms have evolved considerably in France over the last six years. Although several authorisations are required under the energy code, the environmental code and the urban planning code to build wind farms, a law adopted in 2014 has been testing a single authorisation system. This system has been more widely applied as an environmental authorisation created by the law of 26 January 2017 (no. 2017-80), which came into force on 1 March 2017. Henceforth, all authorisations are now grouped together in a single authorisation procedure and a single decision is taken by the *préfet* as an order as to whether it should be granted. However, one difference between the single authorisation system that has been undergoing testing since 2014 and the environmental authorisation system in place since 2017 is that the environmental authorisation does not serve as a building permit. Indeed, since law no. 2017-81 of 26 January 2017 came into force, wind turbines are exempt from having to obtain building permits[2]. This exemption from having to obtain a building permit could therefore reduce litigation. The *Conseil d'Etat* has also considered that exemption from having to obtain a building permit would not lead to a reduction in the constraints applicable to proposed onshore wind farms[3].

Public participation also results in greater acceptance of the project, since interested parties are invited to express any objections they may have to it. In practice, a project initiator is advised to involve and inform citizens as much as possible about the projects, right from the planning stage.

The planning tools used in both France can be subject to an action for annulment. However, planning disputes will not be addressed in this summary report, which will attempt instead to present the dispute procedures for appealing against authorisations and provide an overview of current litigation practice.

As regards appeals, the same phenomenon can be seen in France, where almost 70% of wind farm authorisations are appealed against[4]. The result is a high level of legal uncertainty for project initiators, who cannot, in practice, received financing while they are under appeal. The most frequently cited reasons for people not wanting wind farms are related to noise, their being unsightly and the shadows that they create. All of this allegedly devalues real estate properties or harms the development of regional tourism, as well as damaging biodiversity[5]. It is also interesting to note, by way of example, that in 2017 in the Hauts-de-France region, about two-thirds of the refusals to grant authorisations were disputed[6]. In addition, lead times can sometimes be very long, significantly delaying projects.

Litigation is thus an unavoidable aspect of projects to build wind farms. French legislation has intervened to simplify litigation procedures for proposed onshore and offshore wind farms.

[1] Article L. 181-8 C. of the environmental code.
[2] Art. R. 425-29-2 of the urban planning code. This article only concerns wind farms. Proposed methanisation facilities, for which a single environmental authorisation is also required, are not exempt from the requirement to obtain a planning decision. The environmental authorisation is therefore less appealing for these projects than the experimental single authorisation was – which served as a building permit. It enabled them to take advantage of a single procedure for building and operating such projects (Source: Green-law Avocats link)
[3] EC, 14 June 2018, no. 409227 (link) "While article R. 425-29-2, introduced into the planning code by the contested law, exempts proposed onshore wind farms requiring environmental authorisations from having to obtain a building permit, it has neither the purpose nor the effect of exempting such projects from compliance with the urban planning rules applicable to them. The administrative authority, when examining the application for an environmental permit, is required to carry out a review of the proposed wind turbine installations' compliance with the relevant planning documents
[4] Ministry for the Ecological Transition, Conclusions of the "wind power" working group", January 18, 2018 (link)
[5] In 2019 in France, the total height of wind turbines could be up to 155 metres. In Germany in 2017, the largest projects are as high as 246 metres (Source: 2019 wind power in France watchdog, link, p. 28)
[6] GEDC, CGE, GAAER, Audit of the implementation of the natural and technological risk prevention policy in the Hauts-de- France region, May 2019, p.49 (link)

II. Legal framework for appeals regarding proposed wind farms

French legislation intervened in 2016 for offshore wind and in 2018 for onshore wind in order to simplify the procedures for contentious appeals.

II.1. France

Litigation in relation to onshore and offshore wind farms was simplified in 2016 and 2018 respectively in France. In addition, France has been experimenting since 2014 with the single authorisation system for proposed wind power farms, whereby project initiators can obtain most of the necessary authorisations for installing wind turbines through a single procedure. Between 2011 and 2017, project initiators were required to obtain, among other things, a building permit, an ICPE permit and, where applicable, clearance or other permits. Since 2017, wind project initiators have only been required to obtain an "environmental authorisation" and are not required to obtain a building permit. An analysis of the administrative judge's case law provides an understanding of the current procedures for exercising appeals in relation to proposed wind farms.

II.1.1. Tendency to simplify litigation

France has put in place measures to simplify and speed up litigation processes in relation to onshore and offshore wind. These measures have consequences for contentious appeals.
Litigation in relation to onshore wind farms was simplified by the law of 29 November 2018. The litigation system applicable to certain decisions pertaining to offshore wind farms, as well as to other offshore renewable energy production facilities, was amended by a law passed on 8 January 2016.

a. Simplification of onshore wind farm litigation

Between October 2017 and January 2018, a working group led by Sébastien Lecornu, former secretary of state for the Minister for the Ecological and Inclusive Transition Nicolas Hulot, met to work on simplifying and shortening lead times for wind farm projects. This working group on wind power was made up of parliamentarians, associations of elected representatives, representatives of wind and electricity professionals, non-governmental organisations (NGOs), lawyers and the administrations serving the Ministry for the Ecological Transition[7].

In January 2018, it submitted ten proposals for changes to the legislative framework to achieve this objective. The working group found that almost 70% of wind farm authorisations give rise to appeals and that for the most part an appeal is lodged[8], with the result that developing projects takes "*7 to 9 years on average, as opposed to 3 to 4 years in Germany*". The working group's first two proposals are therefore designed to speed up and simplify the litigation procedure. The first proposal involves abolishing part of the jurisdiction and the second involves establishing an automatic crystallisation of resources after two months.

The law of 29 November 2018 no. 2018-1054 on onshore wind turbines, environmental authorisation and various provisions for simplifying and clarifying environmental law was published in the Official Journal on 1 December 2018. It does not incorporate all the working group's proposals but introduces articles to the Administrative Justice Code establishing the administrative appeal courts as having exclusive jurisdiction at first and last instance, as well as the automatic crystallisation of resources.

Jurisdiction of the administrative appeal courts

The law of 29 November 2018 no. 2018-1054 on onshore wind turbines created article R. 311-5 of the Administrative Justice Code, which lists administrative decisions, including their refusal, for which the administrative appeal courts have jurisdiction at the first and last instance. These include disputes relating to the environmental authorisations provided for in article L. 181-1 of the environmental code or to authorisations to operate an electricity production plant provided for in article L 311-1 of the energy code. As with offshore wind turbines[9], applicants can no longer refer the matter to an

[7] Press release on setting up the working group (link)
[8] Ministry for the Ecological Transition, Conclusions of the wind power working group, 18 January 2018 (link)
[9] See I. 1. 1. b. below

administrative tribunal in the first instance. A similar measure has also been implemented in other sectors, for example in retail and in shopping centres, so that delivering projects does not take too long[10].

In order to avoid the risk of a bottleneck, all administrative appeal courts have jurisdiction. Article R. 311-5 of the Administrative Justice Code stipulates that the administrative appeal court with regional jurisdiction is the one in whose jurisdiction the administrative authority which issued the decision is based.

By a judgment of 8 October 2019[11], the *Conseil d'Etat* interpreted the list given in article R. 311-5 of the Administrative Justice Code, stating that appeals against orders of formal notice taken under article L. 171-7 of the environmental code and against orders suspending work or suspending the operation of an installation made pursuant to article L. 181-16 of the environmental code also came under the jurisdiction of the administrative appeal courts for the first and last instance. These decisions are police measures and do not appear on the list established by article R. 311-5 of the Administrative Justice Code. However, the *Conseil d'Etat* found in this decision that article R. 311-5 of the Administrative Justice Code sets out to "*reduce the time required to process appeals which may delay the completion of onshore wind farm projects by entrusting the administrative appeal courts with the first and last instance ruling for all litigation in relation to decisions required for the installation of these wind turbines. These provisions imply that the administrative appeal courts are also aware of those police measures implemented on the basis of articles L. 171-7 and L. 181-16 of the environmental code, which are the direct consequence of one of the authorisations mentioned in article R. 311-5, of the modification of one of these authorisations or of the refusal to take one of those decisions*". In this particular case, a wind farm operator asked the *préfet* of the Haute-Marne region to amend the authorisation they had in order to take into account a change in the structure of the wind turbine masts. The *préfet* considered that the change in the structure of the masts was substantial enough to justify a new application for an environmental authorisation being required and so refused to modify the operating authorisation already granted. Through subsequent decisions, the *préfet* took police action on the basis of articles L. 171-7 and L. 181-16 of the environmental code to demand that the company responsible for the project apply for a new authorisation and to suspend the work that had already commenced.

However, the powers of the administrative appeal courts do not extend to appeals against planning documents, which also have an impact on the development of wind power[12]. Appeals against such decisions are always in first instance the responsibility of the administrative courts.

This reform to the litigation process was greatly appreciated by the wind sector. Its main objective was to save time, since, in practice, before the reform, the rulings of administrative courts did not function as a filter: most appeals were then brought before the administrative appeal courts and the *Conseil d'Etat*, with the applicants making use of all the legal remedies available in a bid to save as much time as possible. The reform may also eventually standardise case law and lead to a better understanding of it. This will only be produced by the nine existing administrative appeals courts[13] across France.

Automatic crystallisation of pleas

Article 24 of the 2018 law creates article R. 611-7-2 of the Administrative Justice Code, which stipulates that, for appeals against decisions listed in article R. 311-5 of the Administrative Justice Code, the parties may no longer invoke new pleas after a period of two months starting when the first statement of defence was communicated. Pleas are legal arguments on the basis of which a party wishes to have its claim or defence recognised.

This is not simply a faculty for the administrative judge, but an automatic crystallisation of pleas. This time limit is subject to communication to the parties of the first statement of defence in accordance with article R. 611-3 para. 2 of the Administrative Justice Code.

The automatic crystallisation of pleas constitutes a derogation from the general rule set forth in article R. 611-7-1 of the Administrative Justice Code, according to which a non-automatic crystallisation of pleas may be established by order of the president of the formation of the court or the president of the chamber in charge of the investigation.

However, article R. 611-7-2 of the Administrative Justice Code, paragraph 2, provides a temperament to the automatic crystallisation of pleas after two months. It stipulates that the presiding judge may at any time set a new date for the

[10] Ministry for the Ecological Transition, Conclusions of the wind power working group, 18 January 2018 (__)
[11] CE 8 Oct 2019 No. 432722, Sté FE Sainte-Anne (link)
[12] Arnaud Gossement, blog, December 10, 2018, on the law of November 29, 2018 (link)
[13] The ninth administrative appeals court will be created in Toulouse at the end of 2021

crystallisation of pleas if the case so warrants. By a judgment issued on 4 April 2020[14], the *Conseil d'Etat* specified that this option must be exercised in compliance with the requirements of the adversarial procedure and that it did not authorise the president of the formation of the judgement to set a date for the crystallisation of pleas before the end of the two-month period set out in the first paragraph of the article.

Furthermore, the *Conseil d'Etat* considers that the constraint posed by the crystallisation of pleas in a context that is as technical as that of onshore wind turbines is compensated for by the various procedures allowing the litigants to have access to the application before the decision is taken and to participate in the process whereby decisions are made which have an impact on the environment[15].

b. Simplification of offshore wind power litigation by the law of 8 January 2016

France does not yet have offshore wind farms in operation. Offshore wind is facing numerous legal proceedings against the administrative acts which delay bringing such installations into service. Legislation has tried to remedy this situation by simplifying litigation rules, as well as simplifying the process for obtaining authorisations[16].

The law of 8 January 2016 no. 2016-9 reformed offshore wind power litigation procedures. The law of 26 January 2017, no. 2017-81 requires that a single environmental authorisation be obtained for installing offshore wind turbines[17], grouping together the permits and authorisations required for compliance with the Water Act and the authorisation to operate. The license to use the public maritime area must therefore always be covered by a separate authorisation. Offshore wind turbines, on the other hand, do not require building permits. In addition, the ESSOC law of 10 August 2018 – which sets out to simplify the relationship between local government and the electorate – created the concept of the "envelope permit"[18] which allows authorisations to contain variables so as to give more flexibility to projects.

With regard to simplifying litigation, the law of 8 January 2016 introduces two measures in particular:

Competence of the Nantes administrative appeals court in the first and last instance

Article 1 of this law created article R. 311-4 of the Administrative Justice Code. This article gives jurisdiction to the Nantes administrative appeals court in the first and last instance for disputes pertaining to several listed decisions relating to offshore renewable energy production facilities and their associated infrastructure.
These decisions include authorisations to occupy the public domain and environmental authorisations granted to project initiators. The Nantes administrative appeals court also has jurisdiction in the first and last instance for disputes pertaining to decisions concerning public electricity network infrastructure, at least part of which is located offshore, and decisions pertaining to port infrastructure which is required for the construction, storage and pre-assembly of installations[19]. The administrative appeals court shall have jurisdiction over appeals lodged since 1 February 2016.

Assigning jurisdiction to the Nantes administrative appeals court serves several purposes. Firstly, since it was not always easy to determine which court had jurisdiction to hear disputes pertaining to offshore installations. Assigning all disputes to the Nantes administrative appeals court overcomes this problem. Moreover, this measure is in line with the justice system specialising, which must enable a more uniform and rapid handling of the technical issues brought before the Court. Furthermore, by cutting out a layer of jurisdiction, the time saved in proceedings is an estimated 2 to 3 years.

Crystallisation of pleas

Article 4 of the law of 8 January 2016 stipulates that the administrative judge before whom an appeal is lodged against a decision mentioned in article R. 311-4 CJA may set a date for crystallising pleas, that is to say a date after which the parties may no longer invoke new pleas.

[14] EC 3 April 2020 no. 426941 (link)
[15] EC 3 April 2020 no. 426941 (link)
[16] The OFATE has produced a summary report on the legal framework for the procedures for planning and authorising offshore wind farms in France and Germany, published in October 2019 (link)
[17] Offshore wind turbines are not classified facilities – the law of 23 August 2011 no. 2011-984 only applies to onshore wind turbines. They are subject to authorisation under articles L. 214-1 et seq. of the environmental code
[18] Article 58 of the ESSOC law, codified in article L. 181-28-1 of the environmental code
[19] Article R. 311-4 of the Administrative Justice Code

If the judge uses this option, the parties may no longer invoke new pleas beyond the date set by the judge, but may still submit new documents in support of the pleas invoked at the start of the judicial proceedings.

II.1.2. Procedures for exercising contentious appeals

Litigation arising from proposed wind farms is relatively organised in France and has evolved with the various reforms that have been implemented since 2017. Indeed, since onshore wind turbine litigation is now the first and last jurisdiction of the administrative appeals courts, it is mandatory to enlist the services of a lawyer[20] under articles R. 311-5 and R. 431-11 of the Administrative Justice Code.

a. Various appeals

i. Administrative appeals

In France, in the case of onshore wind, the requirements contained in an environmental authorisation may be contested by means of an administrative appeal prior to the lodging of a contentious appeal before an administrative appeals court. An administrative appeal against an administrative act such as an environmental authorisation may take the form of an ex gratia claim before the *préfet* who issued the ruling or a hierarchical appeal to the *préfet's* superior, namely the Minister Responsible for Classified Facilities. Such a procedure is also provided for in relation to offshore wind by the 2016 law. The *préfet* to whom the matter is referred by a third party may modify their requirements by making a supplementary order. In the event of an administrative appeal lodged by a third party, the authority to whom the matter is referred must inform the beneficiary of the decision to appeal so that they may submit written or oral observations[21].

The time limit for filing an administrative appeal is 2 months[22]. For operators, this period commences on the day on which they were informed of this decision and for third parties on the date on which the decision was posted in the town hall or published on the Internet.

ii.Full remedy actions concerning environmental authorisations

Disputes over building permits, which represented a large proportion of all appeals against proposed wind farms, were covered by the appeals procedure on the grounds of abuse of power. The powers of the judge ruling over issues to do with abuse of power shall be limited to cancelling or confirming the contested decision.

Whether it is a dispute relating to an installation classified for the protection of the environment or, since 1 March 2017, in application of article L. 181-17 of the environmental code, disputes pertaining to environmental authorisations, these actions are within the scope of full jurisdiction proceedings[23]. The judge hearing legal proceedings has much broader powers that are more suited to litigation in relation to proposed wind farms. In fact, the judge can organise, more easily than by means of an appeal for an abuse of power, the settlement of a vitiated authorisation, thus avoiding the annulment of decisions that can be settled, or order an only partial cancellation, but above all issue the authorisation itself or modify the requirements[24].

Absence of suspensive effect and interim measures

In administrative law, the principle is that contentious appeals have no suspensive effect[25]. However, it is possible to request that execution of a decision be suspended.

On the one hand, after lodging an action for annulment, the judge hearing the application may be entrusted with a request to suspend execution of the contested decision. The judge must then check that the conditions of the interim suspension are fulfilled, namely that there is an emergency and a serious doubt as to the legality of decision[26]. Where the interim

[20] According to Hélène Gelas, while enlisting the services of a lawyer can render the proceedings more professional, in practice, when it comes to disputes in relation to proposed wind farms, more often than not, applicants were already using a lawyer, and most of the appeals went up to the invitation to tender phase. From this point of view, the litigation reform has not profoundly changed practices.
[21] A. 181-51 of the environmental code
[22] Article R. 181-50, last paragraph, of the environmental code
[23] The single authorisation being tested since 2014 was also subject to full jurisdiction proceedings.
[24] See below for the analysis of the powers of the full jurisdiction proceedings judge in respect of proposed wind farms.
[25] Article L. 4 of the Administrative Justice Code
[26] Article L. 521-1 of the Administrative Justice Code

suspension is pronounced, article L. 521-1 paragraph 2 of the Administrative Justice Code stipulates that the request to have the decision annulled or reversed must be decided on as soon as possible. The suspension of the enforcement of the contested decision shall be lifted when the action for annulment is decided at the latest.

On the other hand, the ruling judge may decide to suspend the execution of the authorisation while the action for annulment is being investigated[27].

The powers of the full jurisdiction proceedings judge

The *Conseil d'Etat* confirmed the powers of the environmental authorisation judge in a litigation opinion of 22 March 2018[28]. These same powers were already those of the judge for installations classified as being for the protection of the environment

First, the judge may, during the course of the proceedings, defer their ruling in order to allow the authorisation to be settled within a period that they themselves set[29]. The judge then delivers a summary judgement[30] finding the defect able to be settled and may specify the procedures for settling the identified defect. The judge shall decide on the appeal only after notification of the amended authorisation by the competent authority[31]. If they find that the defect has been rectified, they may reject the action brought before them, otherwise they shall cancel the authorisation.

For settling technicalities and procedural defects affecting the legality of the authorisation, the competent authority must apply the provisions in force at the time the contested decision was made, while for settling fundamental defects, it must apply the provisions in force when the supplementary decision was made[32]. The opinion of the *Conseil d'Etat* of 27 September 2018[33] illustrates the option that the judge has to defer proceedings pending settlement of the contested authorisation. This was the procedural irregularity resulting from the irregularity of the opinion delivered by the region's *préfet* in their capacity as an environmental authority.

The judge may also annul the authorisation decision in whole or in part[34]. A partial annulment may relate to one of the previous authorisations now grouped together under the single environmental authorisation or to a section that can be separated from the rest of these authorisations. The option to issue a partial annulment, namely one that is limited to only a section of the authorisation, simplifies the administrative procedure. Indeed, the competent authority may resume the investigation on the basis of the non-vitiated elements. Where the judge annuls a decision, whether for a procedural, substantive or fundamental defect, the competent authority shall apply the provisions in force on the date on which it issues the new decision[35].

If the judge finds a procedural defect affecting one of the three stages of the investigation into the authorisation application, namely the examination, the public inquiry or the decision[36], the judge may cancel this phase, clearly identifying it, as was specified by the *Conseil d'Etat* in its opinion of 22 March 2018. The *Conseil d'Etat*, on the other hand, states that it is not within the judge's remit to specify the procedures according to which the investigation must be resumed.

Settling an authorisation always involves adopting a supplementary decision. After a partial annulment of a divisible element making up an authorisation, the authority shall adopt a new decision pertaining to that element only.
In addition, in accordance with article L. 181-18 II of the environmental code, when the judge orders a partial annulment or defers the decision on only part of the decision, they may order the suspension of the execution of the non-vitiated parts of the environmental permit, pending the administration's new decision in relation to the annulled parts[37]. In the event of a reprieve to be ruled on, the judge's right to suspend execution of the authorisation shall apply to both the vitiated section and the non-vitiated section.

[27] Regarding this point, see the section on the powers of the full jurisdiction proceedings judge
[28] EC, Opinion, 22 March 2018, No. 415852, Novissen Assoc. (link)
[29] Article L. 181-18, I, 2° of the environmental code.
[30] A summary judgment law does not settle the dispute and does not take the judge off the case.
[31] Settling an environmental authorisation shall give rise to a supplementary decision.
[32] EC, Opinion, 22 March 2018, no. 415852, point 16 (link)
[33] EC, Opinion, 27 Sep 2018, no. 420119 (link)
[34] Article L. 181-18, I, 1° of the environmental code
[35] EC, Opinion, 22 March 2018, no. 415851, point 16 (link)
[36] Article L. 181-9 of the environmental code
[37] When the judge orders a total annulment, the disputed authorisation no longer exists .

As mentioned above, unless there is an exception, appeals for an administrative decision to be annulled have no suspensive effect. For example, the beneficiaries of an environmental permit may continue to build or operate wind power plants even though an appeal has been filed. They then incur a risk in the event of their authorisation being annulled[38]. In the above-mentioned opinion of 22 March 2018, the *Conseil d'Etat* states however that the full jurisdiction judge, when pronouncing a total or partial annulment of an environmental authorisation, may also authorise, on a provisional basis, the continued operation or the continuation of works in progress pending the issuing of the new authorisation by the competent authority. In this context, they may also set forth additional requirements[39].

Full remedy actions therefore offer several options for settling administrative acts. This system should avoid a number of disputes associated with environmental authorisations and so provide more legal certainty for project initiators.

Changes to the system for managing authorisations issued before 1 March 2017

In 2018, the question was asked of the *Conseil d'Etat*[40] as to whether the fact that projects authorised after 1 March 2017 were exempt from building permits could have consequences on appeals against building permits or single experimental authorisations, as they also served as building permits, issued before the law of 26 January 2017 came into force. It was therefore more generally a question of the timely application of the provisions pertaining to environmental authorisations, as the single experimental authorisation has been considered an environmental authorisation since 1 March 2017[41].

With regard to the rules of procedure not being retroactive, the *Conseil d'Etat* described in this opinion of 26 July 2018 that the full jurisdiction proceedings judge assesses compliance with the rules of procedure governing the authorisation application in the light of the factual and legal circumstances in force on the date that the authorisation was issued. However, they shall assess compliance with the substantive rules in light of the factual and legal circumstances in force on the date on which they issue their ruling.

In that opinion, the *Conseil d'Etat* deduced from article 15 of the law of 26 January 2017 that this law "***has neither the purpose nor the effect of retroactively modifying the rules pertaining to the procedure for the issue of single authorisations provided for in the law of 20 March 2014***." The *Conseil d'Etat* then applied the rules of full jurisdiction proceedings and concluded that, since the rules of procedure had been determined when the authorisation was issued, the rules of procedure of the law of 26 January 2017 did not apply to single experimental authorisations.
On the other hand, the *Conseil d'Etat* states that, where the full jurisdiction proceedings judge considers that a single authorisation has been issued in breach of the rules of procedure applicable on the date of its issue, they may take into account the circumstances under which the procedural defect is rectified on the date on which the ruling is made, provided that the irregularities recorded have not prevented the public from being informed. If the defect is not rectified, the judge may defer proceedings pending the adoption of the amending decision.

With regard to appeals against a single authorisation functioning as a building permit, the *Conseil d'Etat* considered that the single experimental authorisation, although to be regarded as an environmental authorisation, continued to have an effect as long as it was a building permit and remained subject to urban planning law. In the context of an appeal, the judge was therefore required to rule in their capacity as a judge ruling on an abuse of power in relation to the legality of that part of the authorisation[42], i.e. taking into account the legal and factual circumstances applicable at the date of the decision. However, with the coming into force of the ESSOC law of 10 August 2018, article 15 of the law of 26 January 2017 was amended. Building permits valid as of March 1 2017 for a proposed wind farm are now also considered environmental authorisations and are subject to the same legal system. Building permits for wind farms are therefore subject to a litigation system that is different from urban planning authorisations.

The Bordeaux administrative appeals court specified in a judgment of 7 March 2019[43] that full remedy rules in application of article L. 181-17 of the environmental code applied to building permits and operating authorisations henceforth considered

[38] In practice, project initiators still have to wait for the end of the litigation process before they can start building and operating wind farms, because the existence of contentious appeals has consequences on their being granted financing. Some insurance companies, however, will agree to insure projects under appeal.
[39] Arnaud Gossement's blog, analysis of the opinion of EC, 22 March 2018, no. 41585 (link)
[40] EC, Opinion, 26 July 2018, no. 416831 (link)
[41] Article 15 of the law of 26 January 2017 no. 2017-80
[42] Arnaud Gossement's, blog, August 1, 2018, analysis of the opinion, EC no. 416831 of 26 July 2018 (link)
[43] Bordeaux administrative appeals court, 7 March 2019, no.17BX00719 (link)

environmental authorisations. The rules of procedure are therefore assessed in the light of the factual and legal circumstances prevailing on the date of the decision and the substantive rules are those which apply on the date on which the judge issues their ruling. The Bordeaux administrative appeals court has thus sought to the unify way in which appeals are handled. However, the scope of this decision is limited in practice, since as far as building permits are concerned, there is already a rule which stipulates that the legality of a building permit must be assessed in light of the rules in force on the date that the authorisation was issued. The assessment of the legality of these building permits will therefore change very little in practice[44].

Timeframes for appeal

The 2016 law sets out the timeframes for contesting a decision on offshore renewable energy production infrastructure before the administrative judge. Operators must therefore appeal against these authorisations within four months of the date on which they were notified of the decision. Third parties, interested communities or their consortia shall also have a period of four months starting on the date that the final formality was completed for the publication or posting of these decisions. The posting and publication must mention the obligation to notify the authority which made the decision and the beneficiary of the authorisation of any administrative recourse or contentious appeal, otherwise the appeal may be inadmissible.

For proposed onshore wind turbines, the authorisation decision may be brought before an administrative judge by the project initiators within two months of the decision being notified, while third parties have four months from the authorisation's publication on the *préfecture's* website or the posting of the decision in the town hall[45]. An excerpt of the environmental authorisation or refusal order must be posted in the town hall of the municipality where the project is located for at least one month[46], while it must be published on the *préfecture's* website for at least four months[47]. This four-month period during which it must be on the Internet is consistent with the four-month appeal period available to third parties. The police measures provided for in articles L. 171-7 and L. 171-8 I C. of the environmental code must be published on the *préfecture's* website for a minimum period of two months[48].

The Douai administrative appeals court had considered, in a judgment of 29 November 2018[49], that under the former provisions of the environmental code, the administrative action taken against an authorisation to operate did not interrupt the time limit for contentious appeals, which was then six months for third parties regarding wind turbines[50] . The Limoges administrative appeals court took the opposite position on the same day, applying the rule according to which an administrative appeal extended the time limit for contentious appeals. However, this rule had been discarded for full litigation in relation to installations classified by case law. Article R. 181-50, last paragraph of the environmental code[51] expressly provides that, in the event of an administrative appeal, the time limits for contentious appeals are extended by two months[52].

FOCUS ON COVID-19: Article 2 of law no. 2020-306 of 25 March 2020 on the extension of time limits during the pandemic and on the adaptation of procedures during that period stipulates that the time limits for appeals which expired between 12 March 2020 and 24 June 2020 shall be extended by up to two months from 25 June 2020. The law also specifies that periods that had not expired as of 12 March 2020 are suspended and will resume once the state of emergency has ended.

iii. Appeals once an installation has been brought into service

For onshore wind turbines, an appeal for an out-of-court settlement to the *préfet* may be lodged by third parties once the installation has been brought into service with a view to adjusting the applicable requirements. The *préfet* is obliged to reply to this appeal, and to include reasons for whatever response they give.

[44] Arnaud Gossement's blog, March 25, 2018, analysis by the of Bordeaux administrative appeals court no. 17BX00719 of 7 March 2019 (link)
[45] Article R. 181-50 of the environmental code. For third parties, the later of the two dates must be taken as the start of the appeals period.
[46] Article R. 181-44 of the environmental code, modified by article 9 of the law of 29 November 2018
[47] Article R. 181-44 of the environmental code
[48] Article R. 171-1 of the environmental code
[49] Douai administrative appeals court, 29 Nov 2018, no. 18DA01230 (link)
[50] Former article L. 553-4 of the environmental code
[51] This article came into force on March 1, 2017 but was not applicable to the case ruled on by the Douai administrative appeals court on 29 November 2018.
[52] Article R. 181-50, II, last para.

Third parties may also take action once the installation has been brought into service on the basis of article 544 of the civil code and the theory of abnormal neighbourhood disturbances. "Abnormal neighbourhood disturbances" is a concept developed by jurisprudence based on article 544 of the civil code, which states that "*ownership is the right to enjoy and dispose of things in the most absolute manner, provided that it is not used in a manner prohibited by law or regulations*". The abnormal nature of a disturbance is the sovereign judgment of the ruling judge. It is not a fault-based liability, but a strict liability, so that proof of the abnormality of the disturbance is sufficient to induce the author to take responsibility. For wind turbines, neighbours may take action on this basis against the project initiator or the builder. This action shall be barred within five years of the disturbance being discovered. Actions taken against facilities already in service are quite rare and occur mainly in situations where there is very strong opposition to the project[53].

However, the judicial judge may not order the dismantling of a wind turbine subject to an ICPE authorisation on the basis of the theory of abnormal neighbourly disturbances[54]. The Court of Cassation considers that the principle of keeping administrative and judicial authorities separate precludes the judicial judge from substituting their assessment for that of the administrative authority, in application of its special administrative police power, on the disadvantages that could arise from wind installations.

b. Assessment of the utility of applicants taking action

Remedies shall be open to third parties affected by disturbances caused by the wind farm, to communities part of whose territory is located within the area in which the installation has been built, to environmental protection associations and to the operators themselves, subject to their demonstrating their specific interest in taking action.

With regard to building permits, the *Conseil d'Etat* considers that the party lodging the appeal must demonstrate that the visibility of the facilities, taking into account the distance and the way in which the premises are laid out, directly affects the conditions under which they are able to enjoy their property. It is therefore an *in concreto* assessment of the utility of the applicants taking action. Some large photovoltaic power plants and methanisation facilities still require planning permission and the administrative judge checks the utility of the applicants taking action against these authorisations[55]. There are some examples of appeals against wind farms having been rejected on the grounds of it not being in the applicants' interest to take action. For example, the judgment of the *Conseil d'Etat* of 16 May 2018[56], in which it considers that the mere fact that the applicants can see the wind turbines from the property they occupy is not sufficient grounds for them to take action[57]. In this particular case, the applicants' castle was located 2.5 km from the project, but it was not simply a question of establishing whether or not the wind turbines were visible from the occupied property.

Since the submission of projects for authorisation as installations classified for the protection of the environment and with the transition to an environmental authorisation and the exemption the requirement to be granted a building permit, the conditions of the utility of an appeal are not significantly different. Third parties must also demonstrate a direct interest, connected to the defence of interests protected by legislation on classified facilities: under article R. 181-50 of the environmental code, they may take action against an environmental authorisation if they are affected as a result of the disadvantages or dangers to the interests mentioned in article L. 181-3 of the same code, namely the inconvenience for the neighbourhood, health, security, public safety, agriculture, the protection of nature, the environment and landscapes, the rational use of energy or the conservation of sites and monuments making up the archaeological heritage[58]. The applicants' circumstances and the way in which the premises are laid out must be taken into account. Article L. 514-6, III of the environmental code states, however, that third parties who have acquired, built or leased buildings located in the vicinity of a listed installation after the decision to authorise installation has already been posted or published or loosening the requirements initially imposed are not entitled to take action against that decision. On the other hand, these newly established third parties may ask the *préfet* to take additional protective measures and then contest any refusal.

A restrictive assessment of the utility in taking action or the application of filters to the admissibility of appeals would limit the number of appeals against proposed wind farms. But such measures would be difficult to implement in practice, particularly insofar as they would be seen by opponents of the projects as a restriction on their right to appeal and their

[53] Interview with Hélène Gelas
[54] Court of Cassation, 1st civil, 25 January 2017, no. 15-25.526 (link)
[55] Arnaud Gossement, blog, January 14, 2019 (link) about the no. 16BX01586 of 30 November 2018 of the Bordeaux administrative appeals court
[56] EC, 16 May 2018, no. 408950 (link)
[57] On the other hand, the Bordeaux administrative appeals court recognised the utility in the owners of a property located 900 metres from a project involving 149 m high masts taking action: Bordeaux administrative appeals court, 18 February 2020, 18BX01453 (link)
[58] Article L. 511-1 of the environmental code.

opportunities to access justice. It is for this reason that judges tend to dismiss appeals on merits, rather than declare the claimants inadmissible on the basis of there being no utility in their taking action[59].

The utility of an environmental protection association taking action is assessed in the light of the social purpose given in the statutes. The statutes also define the geographical scope of the association, which must correspond to the scope of the contested decision in order for the association to be admissible to take action[60]. There has been extensive case law concerning appeals against building permits. An overly wide and imprecise social purpose made it impossible to take action against an urban planning permit, however the *Conseil d'Etat* closely examined the utility in associations taking action, factoring in the project's specific circumstances. These conditions are similar for authorisations granted for installations classified as being for the protection of the environment and have not changed with the transition to the environmental authorisations. It is quite rare in practice for associations applying to take action to be declared inadmissible on the grounds of their having an overly broad social purpose, as they are generally constituted at the local level[61].

Certain associations may be approved under article L. 141-1 of the environmental code. They shall then be automatically recognised as having benefits in taking action against any administrative decision taken after the date of their approval which is directly related to their purpose and which has harmful effects on the environment in all or part of the territory for which they are approved[62].

As the *Conseil d'Etat* also stated in a judgment of 16 October 2017 in relation to a building permit, it is important to distinguish between a lack of utility or quality to take action and the abusive nature of an appeal. Indeed, an abusive appeal is an appeal taken by an applicant under conditions that go beyond purely defending their own legitimate interests, one which is not characterised by the mere lack of utility in taking action. However, in order to do everything possible to prevent abusive appeals against proposed wind farms, case law may have to evolve in relation to this particular point.

[59] Interview with Hélène Gelas
[60] In the absence of any specific geographical information in the association's statutes, the administrative judge must rely on a cluster of indices to determine the applicant association's scope of action, EC, 8 July 2016, 376344 (link)
[61] Interview with Olivier Fazio
[62] Article L. 142-1 of the environmental code

III.2. France

III.2.1. Authors of appeals against proposed wind farms

In France, most appeals are filed by associations fighting against the development of wind energy at local level. It is very common for a few private persons, particularly residents, to join the appeal[63].

III.2.2. Main pleas invoked

In 2002, the *Conseil d'Etat* issued its first decision on wind turbines. As in Germany, the inadequacy of the impact assessment is frequently invoked in disputes over proposed wind farms. Indeed, inaccuracies or inadequacies in an impact assessment may vitiate the procedure and result in the illegality of an administrative decision when they prevent the public from being informed in full[64]. An analysis of the *Conseil d'Etat's* jurisprudence shows that the substantive issues mainly invoked in support of contentious appeals regarding proposed wind farms concern damage to landscapes or protected species and disruption caused to surveillance radar or air navigation systems[65].

Assessment of technical and financial capacities

One major dispute was related to the assessment of the technical and financial capacities of the project initiator submitted in their application to be granted the status of an installation classified as being for the protection of the environment. However, this point has been relaxed and, henceforth, the project initiator can demonstrate that it has sufficient technical and financial capacities up to when the installation is brought into service[66], so that litigation related to this plea is now destined to cease[67]. In this regard, the *Conseil d'Etat* clarified the procedures for checking these capacities in an opinion issued on 26 July 2018[68]. So when the judge rules on the authorisation's legality before the installation is brought into service, they must verify the suitability of the arrangements for building up the technical and financial capacities. When issuing a ruling once it has already been brought into service, they must ensure that these capacities really do exist and that they are suitable.

Damage to landscapes

In a judgment of 13 July 2012,[69] , the *Conseil d'Etat* identified a method for analysing the impact of a wind farm on the landscape. It states, first of all, that the administrative authority may refuse to issue a building permit if the planned constructions affect the surrounding natural landscapes[70]. It then specifies that, in order to determine whether a natural landscape may suffer damage – which would give rise to a refusal to grant planning permission – the administrative authority must first assess the nature of the site on which the wind farm is to be built and then assess the impact that the construction, taking into account its nature and its effects, could have on the site. Assessing the quality of the site involves identifying the elements forming part of its natural character, as well as those which diminish its interest. In order to assess the impact of the project on the site, judges must examine whether the project damages or transforms the site's essential characteristics.

This method of analysis was used, for example, by the Nantes administrative appeals court in a judgment of 9 January 2017[71]. This particular case dealt with the damage that wind turbines did to the view of the Cathedral of Chartres which is listed as a UNESCO World Heritage Site. The administrative appeals court did not deem co-visibility to constitute sufficient grounds for refusing a building permit. However, the presence of a protected historical monument is widely taken into account in the assessment of the quality of the site[72].

[63] Interview with Hélène Gelas
[64] For example, Bordeaux administrative appeals court, 24 Jan. 2013, no. 12BX00095
[65] Bulletin du Droit de l'Environnement Industriel, no. 85, 1 December 2019, Onshore wind power: legal framework and challenges for the sector.
[66] Articles L. 181-27 and D. 181-15-2 of the environmental code
[67] Interview with Hélène Gelas
[68] EC, opinion, 26 July 2018, no.416831 (link)
[69] EC, 13 July 2012, no. 345970 (link)
[70] A. 111-27 of the urban planning code.
[71] Nantes administrative appeals court, January 9, 2017, no. 15NT03122 (link)
[72] Douai administrative appeals court, 7 March 2013, no. 12DA00065 (link). In this particular case, the administrative appeals court considered that the ten wind turbines were to be built within 3 km of a church that was classified as a historical monument and would have interfered with the church, such that its value and nature would have been compromised.

Even more recently, in a judgment of 18 February 2020[73], the Bordeaux administrative appeals court was considering an appeal against a permit to build five wind turbines on a ridge line. The administrative appeals court notes that the impact assessment itself underlines the "typical" and "iconic" character of the site on which the turbines are to be built. The administrative appeals court considers that, despite the efforts planned for harmoniously integrating the wind turbines, they would have been too visible and "***likely to ruin views over the surrounding landscapes, which are a distinctive feature of the Limousine countryside***". In its judgement, the administrative appeals court confirms the first instance judgement and the decision of the *préfet* to refuse to grant a building permit for this project.

On 28 February 2020, the Nantes administrative appeals court ruling in the first and the last instance refused to cancel one particular single authorisation. The administrative appeals court gave a reminder of the provisions of article L. 511-1 of the environmental code which states the interests which must be protected as part of the procedure for granting an environmental authorisation[74] and under which the landscapes must be protected. It also cites the provisions of article R. 111-27 of the urban planning code since the single authorisation serving as a building permit is subject to urban planning rules. The administrative appeals court also notes that the area of the proposed installation is a landscape and sensitive heritage environment. However, it considers that the project will be largely obscured by vegetation and angles, and that any features which are visible will not be sufficiently prominent for the project to be seen as prejudicial to the interests mentioned in the article L. 511-1 of the environmental code.

The concept of "landscape saturation" is also increasingly used when taking action against projects to build wind farms. For example, in a judgment of 17 January 2013[75], the Douai administrative appeals court annulled a first instance ruling which rejected the application for annulment of three building permits granted by the *préfet*. It considered that the disputed project would further saturate the landscape, particularly as 98 wind turbines were already located in the area and 28 were authorised. However, the concept of "landscape saturation" has not yet been clearly defined[76].

Protected species derogation

If operating a wind farm harms a protected species, a request for a derogation from article L. 411-1 of the environmental code must be formulated. Under article L. 411-2, 4° of the environmental code, a derogation may be granted if three distinct conditions are met together[77]. Firstly, there must be no other satisfactory solution, secondly, the derogation must not prevent the species populations concerned from being maintained under favourable conditions within their natural area, and finally, the derogation must meet one of the five objectives set out in article[78].

In the case of proposed wind farms, the *Conseil d'Etat* established, in a recital establishing the principle featuring in a ruling of 25 May 2018[79], that the derogation may only be granted to a project if it meets a compelling major public interest requirement. The Nantes administrative appeals court – in a judgment of 5 March 2019[80] – considered that the global energy context constituted a major public interest and could justify the granting of a derogation for the construction of a wind farm. The ruling judges strike a balance on a case-by-case basis between the major public interest of the global energy situation and the importance of developing renewable energies while at the same time protecting species. This can be a source of uncertainty for project initiators[81].

[73] Bordeaux administrative appeals court, 18 February 2020, no. 18BX00738 (link)
[74] Article L. 181-3C of the environmental code: " I. - The environmental authorisation may be granted only if the measures it contains ensure the prevention of dangers or disadvantages for the interests mentioned in articles L. 211-1 and L. 511-1, as the case may be. (...)"
[75] Douai administrative appeals court, 17 January 2013, no. 11DA01541 (link)
[76] The general council for the environment and sustainable development requests a definition of this concept in its report no. 012062 of May 2019 – "Audit of the implementation of the policy on the prevention of natural and technological risks in the Hauts-de-France region"(link)
[77] For example EC, 24 July 2019, no. 414353 (link)
[78] " [...] (a) In the interest of protecting wild fauna and flora and conserving natural habitats; b) To prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property; c) In the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment; d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants; e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities... […] "
[79] EC, 25 May 2018, no. 413267 (link)
[80] Nantes administrative appeals court, March 5, 2019, #17NT02791 and #17NT02794 (link)
[81] Bulletin du Droit de l'Environnement Industriel, no. 85, 1 December 2019, Onshore wind power: legal framework and challenges for the sector

Disruption to radar systems

This includes disruptions to civil aviation radar systems, military equipment or weather radars.

For example, in a judgment of 15 October 2019, the Douai administrative appeals court considered that installing wind farms within 20 km of a military radar was likely to create masking effects and generate parasitic signals likely to reduce its effectiveness and in some cases could lead to a significant reduction in the area over which detection was possible. The *Conseil d'Etat* State censors certain decisions pertaining to radar, especially when the wind turbines do not respect the minimum radar safety altitude. The *Council of State* was able to confirm that the minimum altitude alone was capable of guaranteeing aircraft safety[82].

III.2.3. Duration of procedures

For offshore windfarms, giving jurisdiction to the Nantes administrative appeals court, avoiding a level of jurisdiction, the time saved in proceedings is an estimated 2 to 3 years. In addition, in order to reduce the period during which a project is threatened, the 2016 law introduced a deadline for processing appeals. Under article A. 311-4 of the Administrative Justice Code, the Nantes administrative appeals court must issue a ruling within 12 months of the appeal being filed. However, this period is indicative. It can be seen that, to date, this deadline has always been met.

For onshore wind turbines, the litigation reform was desired by the industry because the abolition of a degree of jurisdiction saves a significant amount of time on proceedings. Prior to the reform, it was noted that most of the first instance decisions were appealed against, so there was no filter effect created by the Administrative Tribunal's ruling, and almost exactly the same questions were put before the Court of Appeal. Thus, once an appeal was filed, the litigation could last at least 5 years[83]. With the first and last resort jurisdiction of the administrative appeals courts, the time saved is an estimated two years on average (or sometimes four years). Since the reform is quite recent, it is not yet possible to determine what its effects have been. However, it is acknowledged that the measure is not likely to lead to bottlenecks at the administrative appeals courts, since the matters in question had been referred to them by these appeals anyway.

[82] EC, 26 June 2019, no. 419103 (link)
[83] The average length of time required for the first instance, including appeal periods, was two to three years and two years on average for appeals.