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**Green energy transition vs other aspects of
environmental acquis in light of the proposal for the
RePower Directive (COM/2022/222 final)**

ELNI webinar

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- Member of the Permanent Court of Arbitrage in the Hague (2001-2016)
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- Member of the State Environmental Council in Poland (2014-2019)
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Content

- Climate change and Green Energy transition vs other environmental policies – fundamental questions
- Issues of concern under the draft Re-Power Directive
 - Some proposals for „simplifying” permitting
 - Some features of plans regarding „renewables go to areas”
 - Relations with tools protecting biodiversity and waters
- Legitimate methods

Climate change and Green transition vs other environmental policies – fundamental questions

- Climate change as fundamental threat and need for a green transition
- Key issues – debate in USA and (?) in EU
 - time for „trriage” (prioritisation)?
 - climate protection as a priority or business as usual
 - from „climate denial” to „tradeoff denial”
 - is a third way possible?
- Key aspects
 - Biodiversity
 - Water protection
 - Public involvement/scrutiny
 - Access to justice
 - International obligations
- Green Deal declarations and reality

Policy agenda - European Green Deal

Com (2019) 640 final

- Set of transformative policies (including climate neutrality by 2050) for mainstreaming sustainability in all EU policies
- Three main principles as conditions for successful implementation:
 - „active public participation and confidence in the transition is paramount if policies are to work and be accepted”
 - „The Commission and the Member States must also ensure that policies and legislation are enforced and deliver effectively”
 - a green oath: ”do no (significant) harm”

The European Green Deal

Com (2019) 640 final -cd

- „The Commission will consider revising the Aarhus Regulation to improve access to administrative and judicial review **at EU level** for citizens and NGOs who have concerns about the legality of decisions with effects on the environment. The Commission will also take action to **improve their access to justice before national courts in all Member States.**

Communication (2020)643 on improving access to justice

- „The public is and should remain a driving force of the green transition and should have the means to get more actively involved in developing and implementing new policies” (para 2)
- „Individuals and NGOs play a crucial role in identifying potential breaches of EU law by submitting complaints to administrations or taking cases to courts” (para 9)
- At EU level – existing system already needs to be complemented by EC proposal to amend Aarhus Regulation to improve internal review (paras 3,10 and 17)
- Five priority actions at MS level to be undertaken by EC, including announcing inclusion of access to justice provisions in „legislative proposals for new or revised EU law concerning environmental matters” (para 33)

Proposal for a directive fostering green transition in energy (RePower Directive (COM/2022/222 final))

- Did we have a real political and academic debate regarding proposals fostering green transition in energy?
- Declared goals vs concrete proposals
 - What means Aarhus „remain applicable, **where relevant**” (preamble recital 12) - shall openness, participation and access to justice be treated as impediments to green transition
 - Application of DNSH principle?

„Simplifying” permitting

- Replacing EIA with SEA in „renewables go-to areas” - art. 16a (3)
 - limited public participation
 - no more access to justice for the public (only for applicants!)
 - No requirements for transparency and public participation in determining compliance with the rules
- Screening - art. 16a (4) and (5)
 - no requirements for transparency and public participation (only positive screening decisions shall be made available to the public)

Plans regarding „renewables go to areas”

- Public participation
 - Requirement under art.7 Aarhus? – only reference to make plans public (art15c (3))
 - Limitations of applying SEA remain (small areas? Periodical reviews?)
- Level of SEA
 - SEA at national level
 - SEA at EU level – as required by UNECE SEA Protocol
- Access to justice
 - Requirements of art.9.3 Aarhus
 - Proclamation in Improving Access to Justice Communication

Relations with tools protecting biodiversity and waters

- Appropriate assessment only for those plans „including artificial and built surfaces located in Natura 2000 sites” (art. 15c (2))
- Appropriate assessment excluded in permitting for plants included in plans for „renewables go-to areas” (art. 16a (3))
- No clear reference to the assessment under WFD
- Consequences of providing (art. 16d) deemed „overriding public interest” under WFD, Habitat and Birds Directives

Legitimate methods

- Provided in the proposal
 - Timelimits for permitting
 - Capacity of administration
- Not provided in the proposal
 - Assuring timely justice
 - Specialized judicial bodies
 - Technical expertise provided to courts