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Introduction

David Langlet

Welcome to the thirty-sixth regular issue of the Nordic Environmental Law Journal (NELJ). This time, the issue includes five articles on a broad variety of topics.

The quick expansion of renewable energy is creating tensions with other 'green' interests protected by EU law. In 'Balancing Interests in Green Versus Green Conflicts' Anton Eklund engages in a case study on the balancing of renewable energy promotion and biodiversity protection under EU law. He specifically looks at the significance of the RED III directive mandating that renewables be considered of 'overriding public interest' in permit-granting and introducing so-called renewable acceleration areas. In such areas it should be possible to establish renewable energy installations more quickly, but the streamlined permit processes arguably come at the price of making it more difficult to determine a project's environmental implications. While Eklund sees the RED III as an attempt to reconcile different environmental interests he also points to risks that the pursuit of renewable energy may weaken biodiversity protection.

Continuing on the theme of 'green transition', Christina Allard and Aleksi Heinilä take an interest in how this transition has caused intensified competition over land and natural resources, not least in areas in northern Sweden and Finland traditionally used for Sámi reindeer herding. In 'Contrasting Strategic Spatial Planning in Sweden and Finland: Managing Mineral Extraction, Competing Land-Uses and the 'Green Transition' in Sámi Territories' they look at the capacity of national planning systems to deliver rapid yet sustainable decisions. Drawing on a comparison of the markedly different ways in which Sweden and Finland address strategic spatial planning and land-use coordination they find that recent EU legislation increases the need for strong strategic and supra-municipal planning frame-

works capable of coordinating competing land uses and integrating Indigenous rights and cumulative impact assessments into long-term land-use governance.

In 'The Interface Between Waste and Non-waste: Legal Preconditions for Reutilization of Sewage Sludge', Oskar Johansson takes a close look at some of the challenges that the circular economy poses for waste management, or waste management for the circular economy. Using sewage sludge as a case study, Johansson notes that in terms of legal requirements it makes a lot of difference if something is considered a waste or a non-waste when incinerated. It can be permitted to incinerate non-waste that result in higher environmental impacts than it would if the same substances were incinerated according to requirements for waste incineration. The waste legislation's prioritization of environmental protection in the short-term together with a lack of clear cessation of waste status rules are found to create obstacles to the utilization of resources.

The following article deals with the coherence of legislation on agricultural nutrient emissions. In 'Horizontal Coherence for Agricultural Nutrients Emissions Mitigation Policy' Eerika Albrecht looks at key EU rules and also makes a comparison of Denmark, Finland, Sweden, Poland and Norway in terms of how they promote changes in agricultural practices through mandatory or incentivized mitigation measures. She concludes that coherent policies with clearly defined and binding targets are needed to mitigate nutrient emissions from agricultural sources. However, this if often lacking, with national implementation characterized by heterogeneous and constantly changing rules for farmers and priorities that differ across countries.

In the final article of this issue, the Swedish language 'Anslutningsskyldighet, anslutningstid och andra särskilda skäl – Några reflektioner om anslutning av anläggningar till elnätet med anledning av Tesla-målen', Emil Ellervik uses court cases linked to a labour dispute to analyse the tension between the EU's mandate for third-party access (TPA) to the electricity grid and national exceptions for extraordinary circumstances. Ellervik specifically investigates the distinction between an outright refusal to connect and a delay and argues that an indefinite delay should be treated as a de facto refusal, in order to prevent the right to TPA from becoming illusory. He also scrutinises the compatibility of the Swedish Electricity Act's exception for "other special reasons" with relevant EU law, an issue that Swedish courts have so far dodged.

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Balancing Interests in Green Versus Green Conflicts: A Case Study on Renewable Energy and EU Biodiversity Protection Rules*

*Anton Eklund***

Abstract

The quick expansion of renewable energy in the European Union is creating tensions with other environmental (or green) interests in EU law. The EU has amended the Renewable Energy Directive (RED III) to reduce greenhouse gas emissions and dependence on fossil fuel imports. In doing so, RED III provides for two mechanisms to promote renewable energy that indicate a change in how the EU balances different green interests. The first concept is that RED III presumes that renewables are of "overriding public interest" in the permit-granting procedure. Overriding public interest is a strict exception clause under EU environmental law to permit potentially harmful plans or projects on protected sites. The second concept is the creation of so-called renewable acceleration areas, where the idea is to deploy renewable energy installations more quickly by reducing the time required to obtain all permits and by changing the assessment procedures for renewables. Renewable energy installations in those areas shall adopt mitigation measures, and if implemented correctly, they are presumed to comply with the EU's habitats and species protection rules. This article argues that the EU's rules on habitats, species, and water protection are not always aligned with climate and energy objectives. RED III indicates an attempt to reconcile these different environmental interests with each other.

Keywords: Renewable Energy Directive, EU Environmental Law, Green on Green Conflicts, Overriding Public Interest

1. Introduction

Climate change is causing global temperatures to rise. At the same time, the ongoing war in Ukraine has highlighted the need for energy independence from fossil fuel imports. It is against this background that a rapid increase in renewable energy is seen as one of the best ways to mitigate the effects of climate change and increase energy independence. Among the various renewable technologies, offshore wind has been pointed out by the European Commission as necessary to reach the EU's climate goals as set out in the European Climate Law.[1] The Commission sees an increase of up to 300GW in offshore wind by 2050 as realistic and achievable.[2] To reach that goal, it is estimated that the offshore wind industry will require a 30-fold increase in the current installed capacity.[3]

However, the quick growth of renewable energy (e.g., offshore wind farms) can risk col-

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[1] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality 2021 (OJ L 243).

[2] European Commission, An EU Strategy to Harness the Potential of Offshore Renewable Energy for a Climate Neutral Future COM (2020) 741 Final'. The current capacity is 12GW.

[3] Ibid.

liding with other environmental goals, such as biodiversity protection. For instance, the Baltic Sea's unique biodiversity is sensitive to human-induced change. The biodiversity of the Baltic Sea has worsened over the years, which threatens the sustainable use of species and the function of ecosystems.[4] In the specific case of offshore wind farms, there is also evidence that the rapid increase in offshore energy development will intensify underwater noise, alter seabed sediments, and increase the risk of collision with bird and marine species.[5]

To promote the development of renewable energy, the EU has adopted the Renewable Energy Directive (RED). The RED has been amended twice; therefore, the current RED is commonly referred to as RED III.[6] RED III aims to, *inter alia*, set a common target for the overall share of energy from renewable sources and to make administrative burdens associated with developing renewable energy projects easier.[7] However, the promotion of renewable energy projects under RED III may give rise to so-called green versus green conflicts when those interests are balanced against the EU's extensive biodiversity legislation. EU environmental law is based on, *inter alia*, the prevention principle,[8] which aims to prevent environmental damage through the designation of protected areas, the prohibition on killing or disturbance of species, and the prevention of pollution or the deterioration of ecosystems. Key to this approach is the prior assessment of possible harmful activities for the environment.[9] RED III introduces two features that at first sight seem to contradict these high environmental safeguards. First, RED III declares in Article 16f that renewable energy is presumed to be in the "overriding public interest" in the permit-granting procedure when interests are balanced against the Habitats,[10] Birds,[11] and Water Framework Directive (WFD).[12] Second, RED III Article 15c establishes rules on so-called renewable acceleration areas (RAAs), where the deployment of renewable energy installations is subject to a changed and reduced impact assessment procedure to expedite their deployment.[13]

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[4] Lena Bergström and Jannica Haldin (eds), HELCOM (2023): State of the Baltic Sea. Third HELCOM Holistic Assessment 2016–2021. Baltic Sea Environmental Proceedings, n 194. <https://helcom.fi/wp-content/uploads/2023/10/State-of-the-Baltic-Sea-2023.pdf> accessed 2 April 2024.

[5] Ibon Galparsoro Iza and others, 'Mapping Potential Environmental Impacts of Offshore Renewable Energy' (European Topic Centre on Inland, Coastal and Marine Waters 2022) <https://doi.org/10.13140/RG.2.2.16137.72801> accessed 22 November 2024.

[6] Directive (EU) 2023/2413. However, in this text, the author will use the consolidated version named "Directive (EU) 2018/2001". This consolidated version includes the amendments made to the previous REDs.

[7] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) 2023 (OJ L 328), art. 1.

[8] See, for instance, Consolidated version of the Treaty on the Functioning of the European Union 2012 (OJ C 326), art. 191(2).

[9] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 on the assessment of the effects of certain public and private projects on the environment amending Directive 2011/92/EU 2012 (OJ L 26), art. 1(1); Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment 2001 (OJ L 197), art. 1.

[10] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora 1992 (OJ L 206).

[11] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20).

[12] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy 2000 (OJ L 327); Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), art. 16f.

[13] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), art. 15c.

The term "overriding public interest" is not defined in the EU's statutory legislation, and there exists no uniform interpretation of the term. The Court of Justice of the EU (CJEU) has interpreted it on a case-by-case basis, allowing plans and projects to operate on a protected site if they meet a few threshold requirements. The CJEU has, *inter alia*, interpreted that a plan or project must be more beneficial to the public than to biodiversity protection to be classified as an "overriding public interest".[14] Before derogations can be applied, the national authorities must conduct an appropriate assessment under Article 6(3) of the Habitats Directive and exclude any alternatives that could achieve the same results as the proposed project. After applying a derogation for a project, necessary compensatory measures must be implemented to maintain the overall coherence of Natura 2000.[15] The Court has been strict in its rulings, permitting only a handful of projects (e.g., a hydropower plant).[16] The CJEU has also established a broad and strict protection for species,[17] which can be difficult to reconcile in wind energy development.[18] The purpose of framing renewable energy development as being in the "overriding public interest" under RED III is to expedite the authorization of renewables.[19]

The establishment of the so-called renewable acceleration areas (RAAs) will see changes to both procedural (e.g., assessment of plans and projects) and substantive (e.g., species and habitat protection) rules for renewable energy projects. An area plan must be created for these areas. The area plan will be screened in accordance with the Strategic Environmental Assessment (SEA) Directive. An environmental impact assessment (EIA) under the EIA Directive is no longer required of individual projects. In addition, the area plan must include mitigation measures that aim to avoid or reduce negative impacts on the environment to ensure compliance with the EU's biodiversity protection rules.[20] However, the mitigation measures seem problematic in two instances. First, the CJEU has ruled that mitigation measures cannot be proposed at the screening stage, before an assessment of the project's impact on the environment has been assessed.[21] Second, to only rely on mitigation measures appears to pose challenges to the high level of species protection ruled by the CJEU.[22] Moreover, (although not discussed in more detail in this article) RAAs are advertised as *fast-track* areas in which the necessary permits shall be obtained within 24 months. Obtaining the necessary permits for a renewable energy project could, before the adoption of RED III, last up to nine years.[23] The newly introduced strict time limit in the permit-granting procedure runs

[14] Case C-182/10 *Marie-Noëlle Solvay and Others v Région wallonne*.

[15] See, for instance, Case C-239/04 *Commission of the European Communities v Portuguese Republic*.

[16] Case C-346/14 *European Commission v Republic of Austria*.

[17] Case C-103/00 *Commission of the European Communities v Hellenic Republic*.; Case C-221/04 *Commission of the European Communities v Kingdom of Spain*, para. 71.

[18] Helle Tegner Anker and Birgitte Egelund Olsen, 'EU Species Protection Law and Wind Energy: Current Challenges and Danish Experiences' (2023) 32 *European Energy and Environmental Law Review* 36, p. 46.

[19] See, for instance, Ruben Rehage and Alba Forns Gómez, 'Accelerating Authorizations vs. Public Participation in the Decision-Making Chain of Renewable Hydrogen in Germany and Spain: A Dilemma' (2024) 21 *Journal for European environmental & planning law* 297, p. 308.

[20] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), art. 15c(1)(b).

[21] C-323/17 *People Over Wind and Peter Sweetman v Coillte Teoranta*.

[22] See, for instance, Joined Cases C-473/19 and C-474/19 *Föreningen Skydda Skogen and Others v Länsstyrelsen i Västra Götalands län and Others*.

[23] See, for instance, European Commission, 'REPowerEU Plan COM (2022) 230 Final', p. 11.

the risk of neglecting relevant environmental impacts.

The aim of this research article is to determine what the generalized assumption of presuming that all renewables are of "overriding public interest" and the elimination of individual environmental impact assessments under RED III will entail for the legal protection of biodiversity.

The article is structured into five parts. The second section analyzes how the concept of "overriding public interest" has been interpreted by the CJEU before the adoption of RED III to show how the Court has balanced interests between habitat, species, and water protection against potentially damaging projects. The third section analyzes the establishment of renewable acceleration areas and the changed procedural requirements in those areas. In section four, these green versus green conflicts are discussed in a broader context. Section five concludes the main findings of the article.

2. The Interpretation of Overriding Public Interest in EU Environmental Law

2.1 Introduction

Overriding public interest is a strict derogation clause to permit plans or projects to operate despite having been assessed to be potentially harmful to environmentally protected areas. The term "overriding public interest" is found in the areas of environmental protection, the free movement of goods,[24] and public access to classified documents.[25] In environmental law, the requirements for classifying something as an overriding public interest are laid out, with slightly different wording, in the Habitats Directive, Birds Directive, the WFD, and the Marine Strategy Framework Directive (MSFD). However, RED III declares that the planning and construction of renewable energy is presumed *ex lege* over conflicting interests. More specifically, Article 16f of RED III provides:

> By 21 February 2024, until climate neutrality is achieved, Member States shall ensure that, in the permit-granting procedure, the planning, construction and operation of renewable energy plants […] are presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in individual cases for the purpose of Article 6(4) and Article 16(1), point (c), of Directive 92/43/EEC, Article 4(7) of Directive 2000/60/EC and Article 9(1), point (a), of Directive 2009/147/EC.[26]

The CJEU has extensively discussed "overriding public interest" over the decades. At the beginning of the 21st century, most court cases were the result of infringement procedures brought by the Commission against a Member State for failure to transpose the relevant provisions into its domestic legislation. Later, national courts requested preliminary rulings from the CJEU on the applicable provisions. In most court cases, the plans or projects have often concerned infrastructure projects (e.g., motorways, wind farms, or port development) to be balanced against en-

[24] The "imperative requirement" has been developed by the CJEU as an exception to the principle of free movement of goods. The Court has recognized that public health, environmental protection, and the pursuit of legitimate goals of economic and social policy are among the requirements to justify the restriction on the free movement of goods. See, for instance, Case C-573/12 *Ålands Vindkraft v Energimyndigheten*.

[25] See, Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

[26] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), art. 16f.

vironmental protection. To understand what the impact of classifying all renewables as an overriding public interest will entail for biodiversity protection, it is necessary to analyze previous case law on the subject. The case law analysis in the following sub-chapters concerns the interpretation of the derogation clauses under the Habitats, Birds, and the WFD Directives. Although 14 of the MSFD allows the Member States to derogate from the requirement to achieve "good environmental status of the seas" for reasons of overriding public interest if it outweighs the negative effects on the environment,[27] there has so far been no interpretation of said article by the CJEU.

2.2 The Substantive Requirements of the Habitats Directive Article 6(4)

Article 6(4) of the Habitats Directive provides:

> If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, […] the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.[28]

This article in the Habitats Directive is to be understood as a derogation clause from the requirement to conduct an appropriate assessment of plans or projects likely to have a significant effect on Natura 2000 protected sites. The plan or project does not have to be located on a protected site for it to be considered harmful to the site. The CJEU said in the cases of *Waddenzee* and *Commission v United Kingdom* that an assessment is required when there is a probability or risk that a plan or project will have a significant adverse effect on a protected site.[29] Additionally, the assessment "may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned".[30] Article 6(4)(2) of the Habitats Directive adopts a stricter approach to what constitutes plans or projects of overriding public interest when the concerned site hosts a priority habitat or species. Human health, public safety, and beneficial consequences of primary importance to the environment are mentioned as the only reasons for which derogation from a negative assessment under Article 6(3) is allowed.[31] Moreover, the Commission needs to formulate an opinion in those circumstances.[32] The opinions from the Commission are optional to implement. Still, they can influence how EU law is applied in the Member States.[33]

One of the requirements to authorize plans or projects as an "overriding public interest" under Article 6(4) of the Habitats Directive is to demonstrate the absence of alternative solutions that can achieve the same result. This was con-

[27] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy 2008 (OJ L 164), art. 14.

[28] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora 1992 (OJ L 206), art. 6(4).

[29] Case C-127/07 *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, para. 57 and 61.; Case C-6/04 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, para. 54.

[30] Case C-164/17 *Edel Grace and Peter Sweetman v An Bord Pleanala*, para. 39.

[31] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, art. 6(4)(2).

[32] Ibid.

[33] Consolidated version of the Treaty on the Functioning of the European Union, art. 288.

firmed by the CJEU in the case of *Castro Verde*, which concerned the construction of a motorway through a Special Protection Area (SPA) for birds under the Birds Directive.[34] The protected SPA region is home to 17 Annex I protected species. The Commission argued that there were alternative solutions to the proposed project that would have had a lesser impact on the SPA. However, the Portuguese authorities rejected the alternatives presented by the Commission and did not examine other options outside the SPA. Because Portugal did not examine the options outside the SPA, it "did not demonstrate the absence of alternative solutions within the meaning of that provision".[35] Therefore, the Court ruled that by implementing a motorway project that crossed a SPA, which did not undergo an environmental impact assessment, and failed to demonstrate the absence of solutions, Portugal breached Article 6(4) of the Habitats Directive.[36]

In the case of *Commission v Italy*, an infringement procedure was initiated by the Commission against Italy for failing to adequately assess the impact of a project on a protected site. The issue in the proceeding concerned the creation of a ski corridor in a forest and the construction of a cable car for the World Alpine Ski Championship. The site hosted, *inter alia*, natural meadows and plants of "great natural quality".[37] A Special Protected Area (SPA) for birds was also designated within the proposed project area. The proposed project involved splitting the SPA to make room for ski runs.[38] The Commission brought Italy before the CJEU for breaching Articles 6(2) and (4) and 7 of the Habitats Directive and Article 4(1) and (2) of the Birds Directive.

Article 6 of the Habitats Directive must be applied in a sequential order, meaning there exists an obligation to assess the adverse environmental impacts under Article 6(3) of the Habitats Directive before a derogation under Article 6(4) can be granted. The CJEU said in this case that although the Habitats Directive does not specify a particular method for conducting the assessment, the assessment must nonetheless be carried out so that the authorities are certain that the proposed plan or project will not harm the integrity of the site. The plan or project must be refused if there are any uncertainties.[39] The best scientific knowledge in the field must be used to ensure that no doubt remains. A weighing up against the damage caused to a site by a plan or project is required to assess imperative reasons of overriding public interest.[40] More specifically, the Court said that "[k]nowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for application of Article 6(4)".[41] The authorities may only decide whether to allow a derogation from Article 6(3) of the Habitats Directive *after* determining that a proposed plan or project will have an adverse effect on the proposed site. Furthermore, the Italian authorities did not consider alternative solutions and did not adequately present compensatory measures in this case. Therefore, the CJEU ruled that Italy did not conduct a proper assessment in accordance with Article 6(3) of the Habitats Directive, and a derogation under Article 6(4) could not be authorized.

[34] Case C-239/04 *Commission of the European Communities v Portuguese Republic*.
[35] Ibid., para. 39.
[36] Ibid., para. 40.
[37] Case C-304/05 *Commission of the European Communities v Italian Republic*, para. 24.
[38] Ibid., para. 35.
[39] Ibid., para. 57–58.
[40] Ibid., para. 83.
[41] Ibid.

2.3 The Birds Directive Article 9(1) and the Habitats Directive Article 16: Derogations from Species Protection Rules

EU environmental law distinguishes between direct species protection (e.g., the prohibition on the deliberate killing or disturbance of species) and indirect species protection (e.g., protection of essential habitats). The CJEU has ruled that the killing or disturbance of species is deliberate if it is "proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing".[42] This ruling means that the prohibition of killing or disturbing a species is broad, and developers must consider it if, for instance, wind farms might interfere with protected species.[43]

The CJEU case of *Skydda Skogen* concerned the felling of trees in a forest that would lead to the disturbance or killing of, *inter alia*, birds. The CJEU ruled for increased protection against deterioration for breeding and resting sites for species, by extending the prohibition to include non-intentional acts.[44] Moreover, the strict protection of species "applies regardless of the number of specimens of the species concerned that are present in the area".[45] However, there is no clear definition of what a "breeding or resting site" is. Advocate-General Kokott said in an opinion in case C-383/09 (*European Hamster*) that breeding and resting sites not only extend to the burrows, but also to the habitats surrounding the sites.[46] The main aim of protecting breeding and resting sites is to safeguard the ecological functionality of the sites. Therefore, associated structures and abandoned sites might be important if there is a "sufficiently high probability" that the species will return.[47] When assessing the potential deterioration of a breeding or resting site, the site's continuous ecological functionality is the decisive criterion. Precautionary measures can be taken to prevent loss of ecological functionality from harm, destruction, or deterioration.[48]

However, if the continuous ecological function cannot be ensured, a potentially damaging project on species protection can be authorized under Article 16 of the Habitats Directive. Article 16 of the Habitats Directive provides an exemption from the species protection rules of Articles 12 to 15 of the Habitats Directive, provided that the derogation fulfills at least one of the justifications listed in Article 16(1)(a–e), the absence of a satisfactory alternative, and that the derogation is not detrimental to the maintenance of the population of the species concerned.[49] In the context of renewable energy, Article 16(1)(c) is relevant, namely, "in the interests of public health and safety, or for other imperative reasons of overriding public interest".[50] Although RED III states that renewable energy is in the overriding public interest and serves public health and safety until climate neutrality is achieved, it does not address the remaining derogation require-

[42] *Commission of the European Communities v Hellenic Republic* (n 17).; *Commission of the European Communities v Kingdom of Spain* (n 17), para. 71.

[43] Sanne Akerboom and others, 'Wind Energy Projects and Species Protection Law: A Comparative Analysis of the Application of EU Law in Five Member States' (2019) 28 *European Energy and Environmental Law Review* 144, p. 146.

[44] *Föreningen Skydda Skogen and Others v Länsstyrelsen i Västra Götalands län and Others* (n 22), para. 82.

[45] Ibid., para. 83.; Case C-441/17 *European Commission v Republic of Poland*, para. 237.

[46] Case C-383/09 *Opinion of Advocate General Kokott delivered on 20 January 2011 European Commission v French Republic (European hamster)*, para. 36.

[47] Case C-477/19 *IE v Magistrat der Stadt Wien*, para. 36.

[48] *Föreningen Skydda Skogen and Others v Länsstyrelsen i Västra Götalands län and Others* (n 22), para. 86.

[49] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, art. 16.

[50] Ibid., art. 16(1)(c).

ments. It seems reasonable to assume that the other requirements also must be met.

Wind energy development will have implications for EU species protection rules, particularly on birds and bats. Following the ruling in the *Skydda Skogen* case, the direct species protection rules may be a greater obstacle to wind energy development than Natura 2000 sites, given the wide scope for protecting individual specimens of Annex IV species and birds. The decisive criterion for Natura 2000 sites is the maintenance of the favorable conservation status. For breeding and resting sites, it is the continuous ecological functionality that is decisive. Both can provide some flexibility. However, a general non-intentional prohibition on the killing or disturbance of all wild birds is broad and difficult to mitigate when applied to wind energy installations. Given that there are usually alternative locations, especially for small-scale projects, a general derogation that applies to all renewables (i.e., overriding public interest) has been found to be an unsuitable option.[51]

2.4 The Water Framework Directive Article 4(7): Deterioration of a Water Body's Status

The EU Member States are prohibited from deteriorating the status of a water body. However, Article 4(7) of the WFD provides that the Member States will not breach the obligation to prevent deterioration from a "high" to "good" water body status when it is the result of "new sustainable development activities".[52] The following steps must be taken by the Member States' authorities not to breach the WFD: practical steps to mitigate the adverse impact on the water body, explain those reasons in the river basin management plans, the modifications or alterations must be of overriding public interest, and the activities cannot be achieved by other means.[53]

The definition of "deterioration" of a water body's status is not found in the WFD. And so, the CJEU was asked to give an interpretation of what is meant by a deterioration in the so-called *Weser Case*.[54] This case concerned the dredging of the river *Weser* in Germany. The Bund für Naturschutz Deutschland challenged the planning approval for the dredging because it believed that dredging would lead to a deterioration of the river's surface water. The Federal Administrative Court of Germany (*Bundesverwaltungsgericht*) decided to ask the CJEU for an interpretation of what is meant by "deterioration" in Article 4 of the WFD. The CJEU interpreted the deterioration of a water body's status to mean that "as soon as the status of at least one of the quality elements, within the meaning of Annex V […], falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole".[55] Further, Member States are always required to prevent deterioration when implementing a project. However, as mentioned, an exception to that is when the deterioration results from new sustainable development activities and all requirements for an exemption under Article 4(7) of the WFD are met.

[51] Anker and Olsen (n 18), p. 46.

[52] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy 2000 (OJ L 327), art. 4(7). However, this makes the exception somewhat limited in scope since few water bodies are classified as "high" in the EU.

[53] Ibid., art. 4(7)(a)–(d).

[54] Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland*.

[55] Ibid., para. 70.

2.5 The CJEU's Balance of Environmental Interests

In this chapter, examples of cases from where the CJEU has balanced different scenarios deemed to be of overriding public interest are presented. The scenarios include, *inter alia*, renewable energy development and irrigation, highlighting how the CJEU has reasoned before the adoption of RED III.

In the case of *Marie-Noëlle Solvay and Others*, the CJEU provided a preliminary ruling to the Belgian Constitutional Court (*Cour constitutionnelle*) on questions related to, *inter alia*, Article 6(3) and (4) of the Habitats Directive. The Belgian Constitutional Court had several actions brought before it, seeking the annulment of a decree ratifying building consents based on "overriding reasons in the public interest" for construction work on Liège-Bierset Airport, Brussels South Charleroi Airport, and the Brussels-Charleroi railway. The Constitutional Court decided to stay the proceedings and refer six questions to the CJEU for interpretation. Question five of the preliminary ruling referred to the CJEU was whether Article 6(3) of the Habitats Directive could be interpreted to permit a legislative authority to authorize the abovementioned projects, even though the impact assessment was deemed to be incomplete by the Council of State and contradicted by the authorities of the Walloon Region. If answered positively, the Constitutional Court further inquired (question six) whether Article 6(4) of the Habitats Directive should be interpreted to permit the creation of infrastructure designed to host the management center of a private company and many employees to be regarded as an overriding public interest.[56]

The CJEU answered the fifth question that Article 6(3) of the Habitats Directive must be interpreted as meaning that no authority may authorize a plan or project if it is unsure of the adverse effects it will have on a protected site.[57] To the sixth question, the CJEU answered that for a plan or project to constitute an overriding public interest, within the meaning of Article 6(4) of the Habitats Directive, it must be both public and overriding. More precisely, the plan or project "must be of such an importance that it can be weighed up against that directive's objective of the conservation of natural habitats and wild fauna and flora".[58] Meaning that there is a balance of interests to be conducted on a case-by-case basis to determine which plans or projects are more important than the protection of habitats and species. Plans or projects for private companies can only be of such a nature in exceptional circumstances.[59] Whether a plan or project meets such criteria depends on an economic and social context, and on there being no alternative solutions that could achieve the same result.[60] Considering this, the CJEU ruled in this case that infrastructure construction to host a management center "cannot constitute an imperative reason of overriding public interest within the meaning of Article 6(4) of the Habitats Directive".[61]

An instance where the Court has considered the balancing of interests to justify derogations from the environmental protection rules is the diversion of a river for irrigation and to supply drinking water to the region of Thessaly, Greece. The national proceedings in Greece ruled that the diversion of a river constitutes a large project, rendering it insufficient to consider

[56] *Marie-Noëlle Solvay and Others v Région wallonne* (n 14), para. 20–24.

[57] Ibid., para. 70.
[58] Ibid., para. 75.
[59] Ibid., para. 76.
[60] Ibid., para. 77.
[61] Ibid., para. 78.

each project in isolation. Instead, an overarching study was required to assess the environmental impacts. In 2006, Law 3481/2006 was adopted, approving the river diversion project despite it was annulled. Environmental NGOs sought the annulment of the project, challenging Law 3481/2006 before the Greek Supreme Administrative Court (*Simvoulio tis Epikratias*). The Greek Supreme Administrative Court referred, *inter alia*, the question whether projects for the diversion of water for irrigation and drinking water can constitute imperative reasons of overriding public interest under Article 6(4) of the Habitats Directive to the CJEU.[62]

The CJEU ruled that irrigation and the supply of drinking water "meet, in principle, those conditions [public and overriding] and are therefore capable of justifying the implementation of a project for the diversion of water in the absence of alternative solutions".[63] However, the Court made a notable distinction that where there are priority habitats or species, only grounds relating to human health or public safety, or beneficial consequences of primary importance to the environment, can justify an exemption. On the one hand, the Court did not consider irrigation to be related to human health or public safety. Still, it could, in some circumstances, be seen as of primary importance to the environment.[64] On the other hand, the CJEU considers the supply of drinking water to relate to human health.[65]

An example where "overriding public interest" has been used to justify the construction of renewables is the CJEU case *Schwarze Sulm*.[66] The Governor of Styria, Austria, approved the construction of a hydropower plant in 2007 and issued a decree, citing Article 4(7) of the WFD, to justify the project. In October of the same year, the Commission claimed that the Governor of Styria had decided to authorize the project under Article 4(7) of the WFD without first determining whether the project would cause a deterioration of the water body's status. Austria responded that the use of Article 4(7) of the WFD was justified for renewable energy production.[67] Despite additional information provided by Austria to the Commission over the years to follow, the Commission was not satisfied with Austria's response. A reasoned opinion was given to Austria in late 2013, reiterating the complaints that the proposed hydropower plant would breach Article 4(1) of the WFD. The Commission was again not satisfied with Austria's response and decided to initiate an infringement procedure against Austria before the CJEU.

The Commission argued, on the one hand, that the hydropower plant caused a deterioration of a surface water body from "high" to "good", and that Austria should have considered alternative sites and other forms of renewable energy sources before applying Article 4(7) of the WFD. The Commission argued that Austria had breached Articles 4(1) and (7) of the WFD.[68] On the other hand, Austria argued that the decision to authorize the project was based on specific regional and local factors, which justified the hydropower plant as a matter of overriding public interest. The Austrian authorities based their assumptions on a study conducted by the University of Graz, which outlined the objectives, advantages, and environmental impact of the project.[69]

[62] Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others v Ipourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others*, para. 30–40.
[63] Ibid., para. 121–122.
[64] Ibid., para. 125.
[65] Ibid., para. 126.
[66] *European Commission v Republic of Austria* (n 16).
[67] Ibid., para. 7–9.
[68] Ibid., para. 27–33.
[69] Ibid., para. 37.

The CJEU found that the hydropower plant caused a deterioration of the water body's status from "high" to "good" (and the Austrian governor did not contest this). However, for a project to justify a derogation under Article 4(7) of the WFD, it must be determined that all practicable steps were taken to mitigate the adverse effects on the water body, the reasons behind the project were clearly explained, whether the project serves an overriding general interest or if the project's benefit on human health, human safety, or sustainable development outweighs environmental protection, and if the objectives of the project cannot be achieved by other means which are a significantly better option for the environment.[70] All the mentioned conditions must be met to justify a derogation.

The Court ruled that the reasons behind the project are "clearly satisfied in the present case",[71] because the Austrian decision from 2007 provides a detailed explanation of the reasons behind the project, its environmental impact, and the advantages it offers. The Austrian authorities conducted a weighing of the expected benefits, in which they found that the hydropower plant contributed to sustainable development, all practical steps had been taken to mitigate the adverse impacts, and the project's objectives could not be achieved by other means.[72] Therefore, the Court was of the opinion that the Governor of Styria had analyzed the project as a whole, including both the direct and indirect impacts of the WFD. The Court found that the advantages of the project outweighed the negative impact on the water body. The public interest "clearly outweighed the negative impact on the objective of non-deterioration pursued by Directive 2000/60".[73] Moreover, the Court said Member States must be allowed a certain margin of discretion to determine whether a project is of overriding public interest. The WFD establishes a framework for water protection by coordinating, integrating, and developing the overall principles and structures for water protection in the EU. The Member States are required to adopt individual measures to implement these principles and the framework of the directive. The Court added that the WFD does not aim for complete harmonization of the water rules across the Member States.[74]

Another instance where the Court has weighed the balance of interests in favor of potentially environmentally damaging projects was in a case to ensure the security of the electricity supply. In the case of *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen*, the Court was asked to interpret whether Article 6 of the Habitats Directive, in conjunction with Articles 3 and 4 of the Birds Directive, applies to "the postponement of the date of deactivation and of the end of the industrial production of electricity of a nuclear power station […]".[75] If the answer to this question is positive, the CJEU would need to answer whether Article 6(4) of the Habitats Directive could be interpreted to include the security of a country's electricity supply to be considered an imperative reason of overriding public interest.

The Court ruled that "the objective of ensuring the security of electricity supply in a Member State at all times" meets the conditions of demonstrating a public and overriding purpose.[76] However, the Court further clarified that the only grounds capable of justifying a derogation from the protection of priority habitats and

[70] Ibid., para. 61–66.
[71] Ibid., para. 68.
[72] Ibid., para. 74.
[73] Ibid., para. 80.
[74] Ibid., para. 70.
[75] Case C-411/17 *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres*, para. 58.
[76] Ibid., para. 157.

species under Article 6(4)(2) of the Habitats Directive are, for instance, a public safety ground that aims to "nullify a genuine and serious threat of rupture".[77]

Earlier case law before the CJEU regarding "overriding public interest" has more often concerned balancing economic interests against environmental protection rather than competing environmental interests (e.g., motorways, infrastructure construction for a management center, and modifications to a ski run). However, legal conflicts between different environmental interests are becoming more probable as the effects of climate change and biodiversity loss become more visible. Based on the case law analyzed, the prioritization of renewable energy projects over other competing interests has been noticed before the adoption of RED III. Particularly, in the case of *Schwarze Sulm*, the Court said that the promotion of renewable energy "is a high priority" for the EU.[78] Projects of a "public" nature seem to refer to projects that benefit a large proportion of the civilian population, for example, by supplying a region with drinking water, constructing sustainable development activities, or securing the electricity supply in a Member State. Parallels can be drawn to renewable energy projects, given their contributions, *inter alia*, to mitigating climate change, creating job opportunities, and securing access to green energy. Because of their contribution to several key areas of public interest, renewable energy projects are seen as "overriding" over purely environmental protection interests. However, because the exemptions under RED III are framed as lasting until climate neutrality is achieved, they are becoming more normalized. Advocate-General Kokott noted in the *Inter-Environnement Wallonie* case that predictable developments (e.g., climate change or an increase in energy demand) cannot be claimed retroactively to justify derogations because they do not meet the required threshold of urgency.[79]

3. Renewable Acceleration Areas and Their Legal Implications on EU Environmental Law

RED III obliges Member States to accelerate the deployment of renewable energy,[80] with the aim of expediting the green transition. First, Member States need to identify the regions that contribute to the EU's 2030 energy goal. Second, the national authorities shall designate one or more sub-areas for the installation of renewable energy infrastructure by 21 February 2026. RED III identifies two types of sub-areas. One area is referred to as Renewable Acceleration Areas (RAAs). One or more renewable energy sources (e.g., offshore wind) can be deployed on these RAAs. The acceleration areas have different assessment requirements and stricter time limits (e.g., the gathering of all necessary permits for offshore wind development shall not exceed 24 months)[81] to facilitate the deployment of renewable energy installations.[82]

[77] Ibid., para. 158–159.

[78] *European Commission v Republic of Austria* (n 16), para. 73.

[79] *Case C-411/17 Opinion of Advocate General Kokott delivered on 29 November 2018 Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres Request for a preliminary ruling from the Cour constitutionnelle*, para. 152.; Alessio Devis, 'The Renewable Energy Directive III and the Streamlining of Environmental Procedures: A Paradigm Shift in EU Environmental Policy?' (2025) 37 *Journal of Environmental Law* 443, p. 22.

[80] See, for instance, Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), art. 3(1).

[81] Ibid., art. 16a(1).

[82] The other area is called grid and storage areas, which aim to support and complement RAAs. This text focuses on RAAs.

RED III defines RAAs as "sufficiently homogenous land, inland water, and sea areas where the deployment of […] renewable energy sources is not expected to have a significant environmental impact".[83] The designation process shall consider land, inland waters, and sea areas. Priority shall be given to artificial and built islands, and all necessary tools and datasets shall be utilized to identify areas where renewable energy projects would have a minimal environmental impact.[84] This includes all Natura 2000 areas, areas under national protection schemes, and major migratory routes for birds and mammals.

According to Article 16a(3) of RED III, the plans for the RAAs are subject to a Strategic Environmental Assessment (SEA) under the SEA Directive rather than an Environmental Impact Assessment under the EIA Directive. The difference between a SEA and an EIA is the aim and scope for how renewables are deemed to affect the environment. The SEA screens the area plan,[85] while an EIA assesses the environmental implications for individual projects.[86] RED III stipulates in Article 15c(1)(b) that the plans designating RAAs shall contain appropriate mitigation measures to avoid, or, where this is not possible, reduce the adverse environmental impacts significantly. Those measures shall be targeted to the area's specificities, the type of renewable energy technology used, and the area's identified environmental impact. It is mandatory under RED III to establish mitigation measures for plans designating RAAs.[87] If the mitigation measures are implemented correctly, renewable energy projects are exempted from an EIA under the EIA Directive, and it is presumed that they comply with, *inter alia*, the prohibition on the deliberate killing or disturbance of species.[88]

There exists no case law regarding RAA's yet, but the implementation of mitigation measures at the screening stage appears to pose challenges regarding earlier case law. In the case of *People Over Wind & Sweetman v Coillte*, which concerned the laying of cables connecting a wind farm to the electricity grid in the catchment of a Special Area of Conservation (SAC) in Ireland, had so-called protective measures to the SAC been proposed by the defendant (Coillte). As a result of these protective measures, Coillte determined that an appropriate assessment under Article 6(3) of the Habitats Directive was not required. The Court drew an analogy between "protective measures" and "mitigation measures" by interpreting those concepts as "denoting measures that are intended to avoid or reduce the harmful effects of the envisaged project on the site concerned".[89] In its judgment, the Court said that measures intended to avoid or reduce the harmful effects of a project on a protected site should not be considered at the screening stage.[90] Doing so would risk depriving the appropriate assessment of its purpose and risk circumvent the safeguards provided by the Habitats Directive.[91] However, as mentioned,

[83] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), art. 15c.

[84] Ibid., art. 15c(1)(a)(i)-(iii).

[85] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, art. 2(a).

[86] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 on the assessment of the effects of certain public and private projects on the environment amending Directive 2011/92/EU, art. 2(1).

[87] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), art. 15c(1)(b).

[88] Ibid.

[89] *People Over Wind and Peter Sweetman v Coillte Teoranta* (n 21), para. 26.

[90] Ibid., para. 40.

[91] Ibid., para. 37.

RED III Article 15c obliges Member States to establish mitigation measures for renewables when the plan is adopted.[92] This obligation requires that mitigation measures are proposed before an assessment of the project's implication on the environment has been established. RED III reverses the order established by the Habitats Directive and the case law cited by considering mitigation measures at such an early stage.

Because individual EIAs are no longer required, only anticipated risks are considered under RED III. An EIA would be a more suitable instrument for addressing a project's environmental effects, as it is tailored to the specific project. Under the SEA procedure, the area plan must be sufficiently detailed to cover all aspects. However, the plan needs to be approved by the permit-granting authority, who can request an EIA, and an appropriate assessment (if applicable), to be conducted for individual renewable energy projects if it deems the plan to be "highly likely to give rise to significant unforeseen adverse effects in view of the environmental sensitivity […] that cannot be mitigated by the measures identified in the plans designating acceleration areas or proposed by the project developer".[93] Conducting an EIA after the developer submits the application will create longer timelines to complete the project application, because the location that the developer chose might not be suitable.[94] RAAs are advertised as *fast-track areas* for implementing renewables. It is difficult to see how sending the application back and forth will make the speeding-up process for renewables more time efficient.

The changed environmental assessment procedures shall not apply if the RAA is likely to have a significant effect on another Member State's land or sea territory, or where a Member State that is likely to be affected, so requests, according to Article 7 of the EIA Directive.[95] The Commission recommends that Member States avoid identifying RAAs that can cause cross-border conflicts.[96] This is to ensure compliance with public international law. The due diligence obligation to prevent environmental harm requires Member States to conduct an EIA if an activity is likely to cause significant transboundary environmental damage to other EU Member States or third states.[97]

4. Balancing Interests in Green Conflicts

Drawing on the analysis above, protecting habitats and species has previously been the focus for the EU. Recent legislative developments indicate a prioritization of climate action and renewable energy target goals. Conflicts among different environmental objectives (i.e., how best to achieve environmental protection) are becoming more common than conflicts between environmental and, for instance, economic objectives. The ongoing crises stemming from the changing geopolitical landscape and climate change

[92] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), art. 15c.

[93] Ibid., art. 16a(5).

[94] Melina Malafry, 'Renewable Energy Activities – Overriding the Interest of Biodiversity?' in Mattias Dahlberg and others (eds), *De Lege: Hållbarhet ur ett rättsligt perspektiv* (Iustus förlag 2022).

[95] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), art. 16a(3).

[96] Directorate-General for Energy, 'Commission Staff Working Document – Guidance on Designating Renewables Acceleration Areas' <https://energy.ec.europa.eu/document/download/af3927a5-3b82-42f0-89547b9fdc567e43_en?filename=SWD_2024_333_2_EN_autre_document_travail_service_part1_v1.pdf> accessed 11 June 2025.

[97] For instance, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226*, para. 29; *Pulp Mills on the River Uruguay (Argentina v Uruguay) [2010] ICJ Rep 4*, para. 101.

have raised tensions between the interests of the green transition and biodiversity protection. On the one hand, Article 191(2) TFEU provides that EU environmental policies "shall aim at a high level of protection" based on, *inter alia*, the preventive and precautionary principles.[98] The principles in Article 191(2) TFEU aim to prevent specific sources of environmental damage (e.g., GHG emissions) but impede the alignment with climate change mitigation infrastructure development.[99] The Habitats Directive does not distinguish between projects that reduce CO_2 emissions and other projects. The Habitats Directive treats all projects the same, even when some also promote environmental interests. Laws protecting the local environment are more directly applicable to project applications.[100] On the other hand, Article 191(1) TFEU also provides that the EU's environmental policies shall contribute, *inter alia*, to combating climate change, which has given the EU a strong mandate to adopt far-reaching policies in this field.[101] To this end, the European Climate Law and RED III have different aims than biodiversity protection rules: to achieve an overall target for limiting temperature increases and to promote the use of renewable energy, respectively.[102]

RED III institutionalizes the strict derogation regimes in EU environmental law by presuming all renewables are of overriding public interest and serve public health and safety. Despite this presumption, it is only one of the requirements for permitting damaging projects. An exemption from the appropriate assessment under Article 6(3) of the Habitats Directive still requires a thorough assessment,[103] the exclusion of other feasible alternatives, and the adoption of compensatory measures.[104] The CJEU has applied similar reasoning to derogations granted under the Birds Directive and the WFD.[105] The Nature Directives and the WFD and their respective provisions remain in force. For sites hosting priority habitats or species, only projects relating to human health, public safety, or beneficial consequences of primary importance for the environment are mentioned in the second subparagraph of Article 6(4) of the Habitats Directive as grounds for derogation.[106] In the context of renewable energy development, the CJEU has ruled that only a serious and genuine threat to the minimum energy supply qualifies as grounds for such derogation.[107] The derogation clauses in said directives are intended as a last resort when all other options have been exhausted.

Article 6(4) of the Habitats Directive sets a high threshold for classifying plans and projects of overriding public interest. The CJEU ruled in the case of *Marie-Noëlle Solvay and Others* that

[98] Consolidated version of the Treaty on the Functioning of the European Union, art. 191(2).

[99] Alison Hardiman, 'Climate, Energy – and Environment? Reconciliation of EU Environmental Law with the Implementation Realities of EU Climate Law' (2022) 12 *Climate Law* 242, p. 249.

[100] See, for instance, ibid.

[101] Consolidated version of the Treaty on the Functioning of the European Union, art. 191(1).

[102] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality. However, it is mentioned in the recitals of the regulation that climate mitigation and adaptation targets also help to protect biodiversity, indicating a link between the different environmental interests.

[103] *Commission of the European Communities v Italian Republic* (n 37).

[104] *Commission of the European Communities v Portuguese Republic* (n 15).

[105] *European Commission v Republic of Austria* (n 16).; *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others v Ipourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others* (n 62), para. 120.

[106] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, art. 6(4). The Commission also needs to formulate an opinion in those circumstances.

[107] *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres* (n 75), para. 157–159.

plans or projects for private companies may be considered only if a public interest is demonstrated.[108] RED III provides that renewable energy projects serve *public* health and safety. In this instance, one can assume that private energy companies fulfill the requirement to demonstrate a public purpose. However, the requirement to exclude all alternatives that achieve the same result will likely prove the most challenging for renewable energy developers. Small-scale energy projects typically have alternatives, as they can be achieved using other renewable energy sources (which are plentiful). As earlier court cases in this context have concerned large projects, it is safe to say that large projects will benefit from the relaxed derogation regime.

Green conflicts typically center around where to place a renewable energy project. For example, many factors contribute to the location of a renewable energy project at sea, including defense, fishing activities, shipping lanes, and mining for raw materials. The obligation to exclude all alternatives at sea might be different because certain activities are difficult to relocate.[109] Because some renewable energy projects, for example, wind farms, require significant physical space, it is not evident that such space at such a scale will be readily available. To this end, strategic planning is essential for balancing diverse interests. RED III emphasizes the importance of maritime spatial planning (MSP) by encouraging Member States to build upon their existing MSPs. Integrating renewable energy into MSPs has been pointed out as a tool to, *inter alia*, balance different uses of the sea.[110] However, the large degree of discretion given to the Member States in the MSP Directive, although in line with the principle of subsidiarity, risks signaling a weak legal protection for the marine environment.

The notion behind the changed assessment procedure for renewable energy installations inside acceleration areas is to deploy renewables faster. Areas should be identified where the deployment of renewables would not pose a significant environmental risk. Mitigation measures aim to ensure compliance with the Nature Directives and the WFD. Therefore, at first glance, it might seem that nature is not at risk. However, because mitigation measures are to be established at the screening stage, it implies a reversed order for when such measures should be considered. The broad species protection rules might make it difficult to apply appropriate mitigation measures for wind energy installations. Also, it would have been easier to anticipate the possible environmental impacts if an EIA remained applicable in RAAs. A change in legal reasoning to prioritize renewable energy development can be noticed in this regard.

The Commission identifies slow environmental assessments across the SEA, EIA, Habitats, Birds, and Water Framework Directives as a central obstacle to increasing the amount of renewable energy installations in the EU. To that end, the Commission has recently presented a proposal for a regulation to speed up environmental assessments for renewable energy installations.[111] The logic of the proposal is similar to that of RED III, where simplified environmental

[108] *Marie-Noëlle Solvay and Others v Région wallonne* (n 14), para. 76–77.

[109] Jan Darpö, 'Will European Biodiversity Be Sacrificed on the Green Transition Altar…?' (2024) 2 *Nordisk Miljörättslig Tidskrift* 7, p. 21.

[110] Niko Soininen, Kaisa Huhta and Seita Vesa, 'Offshore Wind Power through the Lenses of EU Climate, Energy and Environmental Law – Between Climate Aspirations, Market Competition and Environmental Impact' (2025) 56 *Ocean Development & International Law* 505, pp. 523–524.

[111] European Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Speeding-up Environmental Assessments COM/2025/984/Final'.

assessment procedures, strict time limits, and mitigation measures to comply with species protection rules shall ensure that renewable energy installations are deployed faster to mitigate the effects of climate change.[112] This proposal makes it clear that the EU's priorities are increasingly focused on climate change mitigation rather than biodiversity conservation.

By declaring all renewables as an "overriding public interest" and changing the assessment procedures for renewables inside acceleration areas, the EU legislator hopes to reconcile the inconsistencies in the environmental directives (in particular, the Habitats and EIA Directives) with climate and energy goals. However, there are a few examples where a notion of alignment with the different environmental interests can be noticed. The Nature Restoration Regulation (NRR) emphasizes in recital 68 that biodiversity restoration should consider the need to deploy renewable energy (and vice versa).[113] Other notable examples include the Soil Monitoring Law, the Forest Regulation, and the Land Use, Land Use Change and Forestry (LULUCF) Regulation, all of which provide for the intrinsic link between climate change and biodiversity loss.[114] The framing of renewables to be "overriding" indicates an urgency to meet the EU's energy targets of 2030 and 2050. The Green Transition will not have the desired effects if it undermines other green interests. Climate change mitigation and halting biodiversity loss are two intertwined objectives. One should not be prioritized over the other.

5. Conclusions

This article has analyzed how the term "overriding public interest" has been interpreted to apply to plans or projects deemed to conflict with the high level of environmental protection for habitats, species, and water provided by, *inter alia*, the precautionary principle. Balancing green interests is becoming more common in environmental litigation. It is no simple task to prioritize one green interest over the other, but the changed realities of Russia's invasion of Ukraine and the looming threat of climate change served as the cataclysm for the EU to prioritize renewable energy development over biodiversity protection. The term "overriding public interest" has been a strict, case-by-case exception that allows projects deemed to harm the local environment to operate. However, this exemption is in force "until climate neutrality has been achieved",[115] making the derogation practically permanent. Because renewable energy provides directly applicable benefits to humans and biodiversity, the EU legislator assumes that renewable energy serves an overriding public interest.

The establishment of Renewable Acceleration Areas is an attempt to reconcile environmental protection with renewable energy development by obligating Member States to prioritize the deployment of renewable energy in areas with minimal environmental impacts. However,

[112] Ibid., art. 4, 7, and 8.

[113] Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration 2024 (OJ L 2024/1991), recital 68.

[114] Directive (EU) 2025/2360 of the European Parliament and of the Council of 12 November 2025 on soil monitoring and resilience (Soil Monitoring Law) 2025 (OJ L 2025/2360), art. 1; Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation 2023 (OJ L 150), recital 4; 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, land use change and forestry in the 2030 climate and energy framework 2023 (OJ L 107), recital 12.

[115] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), art. 16f.

the way renewable energy is treated in said areas differs from how the CJEU has interpreted the establishment of environmental safeguards. RED III obliges Member States to adopt appropriate mitigation measures at the screening stage, but case law has ruled that such measures should be proposed only after an assessment of the project's environmental implications.[116] Moreover, the revised assessment requirements make it more challenging to determine a project's environmental implications.

[116] *People Over Wind and Peter Sweetman v Coillte Teoranta* (n 21).

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Contrasting Strategic Spatial Planning in Sweden and Finland: Managing Mineral Extraction, Competing Land-Uses and the 'Green Transition' in Sámi Territories

*Christina Allard & Aleksi Heinilä**

Abstract

The accelerating 'green transition' in northern Sweden and Finland has intensified competition over land and natural resources, particularly in areas traditionally used for Sámi reindeer herding. Large-scale mineral extraction and renewable energy projects, reinforced by recent EU initiatives such as the Critical Raw Materials Act (CRMA) and the revised Renewable Energy Directive (RED III), place increasing pressure on national planning systems to deliver rapid yet sustainable decisions. This raises fundamental questions about the capacity of strategic spatial planning to manage cumulative effects, prioritise competing land-uses, and safeguard Indigenous rights. This article undertakes a legal-comparative analysis of strategic spatial planning instruments in Sweden and Finland. It examines, trends, the function and legal effects of regional plans, the role of the state and the responsible authority for regional planning, and the interaction with mining law and EU requirements. The analysis demonstrates that Sweden and Finland currently pursue fundamentally different approaches to strategic spatial planning. Finland retains a more integrated and legally structured planning hierarchy, where regional plans have a coordinating role in relation to mining and competing land uses, including Sámi reindeer herding. Sweden, by contrast, relies more heavily on sectoral legislation and permitting procedures. The article further shows that cumulative land-use pressures and landscape-scale conflicts are difficult to manage through municipal planning alone. It argues that recent EU legislation increases the need for stronger strategic and supra-municipal planning frameworks capable of coordinating competing land uses and integrating Indigenous rights and cumulative impact assessments into long-term land-use governance.

Keywords: strategic spatial planning, green transition, mineral extraction, Indigenous rights, Sámi livelihoods

1. Introduction

Today, a large-scale transformation of Sweden's industrial landscape is underway, driven by the transition to green production. A significant share of this transformation is taking place in the counties of Norrbotten and Västerbotten, involving both established industries and new industrial projects. National interests are therefore substantial in the ongoing transformation of northern Sweden, while the high pace of change poses major challenges for spatial planning at multiple governance levels and for a wide range of actors.[1] In 2024, the government appointed

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[1] See e.g. Boverket, 'Ramverk för nationell planering – Förslag till utvecklad nationell planering i Sverige' (Rapport 2022:05, 2022) 48–9; Klimat – och näringslivsdepartementet, 'Strategi för Nyindustrialiseringen och

the Acceleration Office, to facilitate industrial transition and to support the government in strengthening the competitiveness of companies in Sweden.[2] A similar rapid industrial expansion is ongoing in Northern Finland. The boom in renewable energy and mining activities is generating land-use conflicts and challenging the planning system in rural areas of Arctic Finland in unprecedented ways.[3] The OECD has recognised, inter alia, the strain this place on regional planning.[4]

Amid rapid climate change and global pressures, the call for a 'green transition' has placed mineral resources at the forefront of green technologies. The bedrock in Sweden and Finland – including the traditional Sámi territory in the North – contains critical metals and minerals.[5] Mineral extraction is of strategic importance for the two countries as it is for the EU, particularly in light of shifting global security dynamics.[6] The European Green Deal – introduced in 2019 as the EU's overarching growth and climate strategy – anchors the Union's commitment to climate neutrality by 2050.[7] The sustainable supply of critical raw materials is viewed as a prerequisite for achieving this objective,[8] a priority further emphasised by the Critical Raw Materials Act (CRMA), adopted in 2024.[9]

Speed and urgency increasingly shape climate policy and the governance of the 'green transition'. Research on Swedish mineral extraction shows that reforms framed through acceleration tend to simplify complex trade-offs and risk weakening deliberation, justice, and long-term sustainability.[10] Acceleration thus becomes not only an administrative tool but a governing logic that reshapes authority and democratic engagement. By prioritising speed and certainty, these reforms risk sidelining deliberative processes essential for managing trade-offs among climate mitigation, biodiversity protection, social justice, and Indigenous rights.[11]

Reindeer herding is a traditional, collective, semi-nomadic livelihood and cultural practice of the Indigenous Sámi people that transmits traditions and language across generations. The livelihood's reliance on geographically extensive and interconnected grazing and migration areas, frequently spanning several municipalities, makes

samhällsomvandlingen i Norrbottens och Västerbottens län' (KN2024/01434, 2024) 4–5.

[2] Dir. 2024:57. See their webpage at <https://accelerationskontoret.se/> (accessed 2026-02-18).

[3] Maija M Lassila, 'Reindeer herders in the green sacrifice zone: The cumulative impacts of past extractivist dispossessions and recent mining expansion in Sodankylä, Finland' (2025) 32(1) Journal of Political Ecology 1; Emma Luoma, et al. 'Luonnonvarahallinnan uudet tuulet: tuulivoiman ja poronhoidon välinen yhteistoiminta rakentaa oikeudenmukaisempaa energiasiirtymää' (2023) 52(2) Alue ja ympäristö 121.

[4] OECD, *OECD Economic Surveys: Finland 2025* (OECD Publishing 2025) 118. The OECD is a multi-disciplinary inter-governmental organization with member countries which engages in its work. OECD's core mission today is to help governments work together towards a stronger, cleaner, fairer global economy.

[5] Pasi Eilu et al., 'The Nordic Supply Potential of Critical Metals and Minerals for a Green Energy Transition' (Nordic Innovation Report 2021) 6–7; Pasi Eilu (ed.), 'Mineral deposits and metallogeny of Fennoscandia' (Special Paper 53, Geological Survey of Finland 2012).

[6] Swedish Ministry of Enterprise, Energy and Communications, 'Sweden's minerals strategy. For sustainable use of Sweden's mineral resources that creates growth throughout the country' (Government Offices of Sweden 2013); Ministry of Employment and the Economy, 'National Mineral Strategy of Finland' (Publications of the Finnish Government 2024:65, 2024) 9–11.

[7] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'The European Green Deal' (COM 2019 640 final) 2.

[8] Ibid., 8.

[9] Regulation (EU) 2024/1252.

[10] Åsa Nilsson Dahlström, et al., 'It's about time: Governing through acceleration under the critical raw materials act in Sweden' (2026) 26 The Extractive Industries and Society 1.

[11] Ibid., 6.

it particularly sensitive to fragmented land-use planning and cumulative land-use pressures.

Both Sweden and Finland have been found by UN monitoring bodies to have violated the rights of the Sámi people to culture and land, by granting mineral concession and exploration permits without adequate impact assessment or participation in accordance with the free, prior and informed consent (FPIC).[12] A report by Amnesty International and the Saami Council highlights these risks in mineral extraction and delivers recommendations to the governments of Norway, Sweden and Finland, chiefly that the states need to recognise the human rights of the Sámi as Indigenous peoples to secure a just transition.[13]

As EU member states, Sweden and Finland operate within a multi-layered legal framework in which environmental laws and national planning must align with EU law. For Sweden and Finland, this means that national planning systems must not only manage domestic land-use pressures but also support EU-level objectives that incentivize rapid deployment of low-carbon energy projects and infrastructure. Within the traditional Sámi territory, this adds a supranational layer to already complex governance arrangements: the drive for EU-wide climate action intersects with Indigenous land-uses and rights, further reinforcing the need for planning instruments capable of balancing long-term sustainability with the protection of traditional livelihoods. This EU dimension is also significant in the context of strategic spatial planning because climate, energy, biodiversity, and industrial policies increasingly shape how land-use priorities are framed and justified.

Such complex and interconnected (systemic) issues that need to be dealt with in environmental, including land-use, governance in our current world – climate change, biodiversity loss, other planetary boundaries and the social systems tied to them in innumerable ways – requires integrated governance approaches.[14] These issues cannot be approached solely as, for example, conflicts between 'green transition' projects and Sámi culture and livelihoods, because the 'green transition' also generates intra-environmental conflicts, such as those between climate and biodiversity goals.[15] Furthermore, climate change also affects reindeer herding.[16]

In the land-use context, the kind of integrated approach needed may only be achieved through proactive, cross-sectoral planning, as reactive and fragmented governance instruments are ill-equipped to address cumulative effects. Planning, thus, has significant potential in dealing with the environmental multicrises and the new land-use conflicts, even if this potential has so far been somewhat untapped.[17]

There is a substantial body of literature on land-use conflicts affecting Sámi reindeer

[12] *Lars-Anders Ågren et al. v. Sweden*, CERD 54/2013 (2020) 16; *JT et al. v Finland*, CESCR 251/2022 and 289/2022 (2024), 15–17; *MEV et al. v Finland*, CRC 172/2022 (2024), 15.

[13] Amnesty, 'Just transition or 'green colonialism''? (Amnesty international 2025).

[14] William J Ripple, et al., 'The 2025 state of the climate report: a planet on the brink' (2025), 75(12) *BioScience* 1016; IPBES, 'The Thematic Assessment Report on the Interlinkages among Biodiversity, Water, Food and Health – Summary for Policymakers' (IPBES 2024) 9, 16.

[15] E.g. Mikkel F Eskjær, Anders Horsbøl, 'New Environmental Controversies: Towards a Typology of Green Conflicts' (2023) 15(3) Sustainability 1914, 1–3.

[16] Sirpa Rasmus, et al., 'Porotalouden sopeutuminen ilmastonmuutokseen – miten haitalliset vaikutukset voidaan minimoida' (2023) 64 Arktisen keskuksen tiedotteita; Gunhild C Rosqvist, et al., 'Impacts of climate warming on reindeer herding require new land-use strategies' (2022) 51(5) Ambio 1247.

[17] Aleksi Heinilä, 'Maankäytön suunnittelu ja turvallisuus' (2019), Oikeustiede – Jurisprudentia LII 5, 91–3.

herding,[18] much of it focusing specifically on mining-related disputes.[19] Some studies also address rural spatial planning, but these tend to concentrate on municipal planning processes.[20] By contrast, legal scholarship examining spatial planning as a strategic instrument for managing land-use conflicts – particularly in relation to Indigenous rights – remains limited.[21] This gap is especially evident in comparative analyses of Nordic jurisdictions, and this article seeks to address that gap.

With the Swedish planning context as its focal point, the article analyses the specific provisions governing strategic spatial plans in Sweden and Finland at the regional level and comparatively examines the strengths and weaknesses of existing planning frameworks and their capacity to steer land-use decisions at a landscape scale, beyond the single municipality. The aim includes an examination of the role of EU law anchored in the European Green Deal and the correlation between national and EU strategic planning. Particular attention is given to mineral extraction and Sámi reindeer herding, which represent an intractable land-use conflict with potentially significant cumulative land-use effects. From a *de lege ferenda* perspective, the article also engages in a normative discussion, drawing on lessons from Finland, of what may be required for Swedish strategic spatial planning legislation to better handle trade-offs between mineral development and Indigenous reindeer herding.

The comparison offers insights into how Swedish and Finnish planning legislation addresses spatial planning at a landscape-level with a focus on similarities *and* differences.[22] Even if there are similarities due to common

[18] E.g. Jerbelle Elomina and Ivana Živojinović, 'Systematic Literature Review of Land-use Conflicts in Northern Sweden—Lessons Learned and Ways Forward' (2024) 13(6) Resources 77, see the articles included here; Åsa Össbo, 'On Colonial Past and Present in Sápmi – Considering Ideas of the Land of the Future in Northern Sweden' (2025) 17(1) Journal of Northern Studies 13; Dorothée Cambou and Øyvind Ravna (eds) *The Significance of Sámi Rights Law, Justice, and Sustainability for the Indigenous Sámi in the Nordic Countries* (Routledge 2023); Tim Horstkotte, et al., (eds), *Reindeer husbandry and global environmental change – Pastoralism in Fennoscandia* (Routledge 2022).

[19] E.g. Lassila (n 3); Laura del Duca et al., 'Knowledge Gaps about Mining Impacts on Sami Lands – A Call for Epistemic Justice in European Minerals Extraction' (2025) 17(1) Journal of Northern Studies 30; Daniel Fjällborg and Karin Beland Lindahl, 'Division of labour in social movements: the interplay between legal mobilization and public protest in Swedish mining resistance' (2025) 52(4) Journal of Law and Society 650; Rasmus Kløcker Larsen et al., 'The impacts of mining on Sámi lands: A knowledge synthesis from three reindeer herding districts' (2022) 9 The Extractive Industries and Society 101051; Carl Österlin and Kaisa Raitio, 'Fragmented Landscapes and Planscapes – The Double Pressure of Increasing Natural Resource Exploitation on Indigenous Sámi Lands in Northern Sweden' (2020) 9(9) Resources 2; Leena Suopajärvi and Anna Kantola, 'The social impact management plan as a tool for local planning Case study: Mining in Northern Finland' (2020) 93 Land Use Policy, 104046; Kaisa Raitio, et al., 'Mineral extraction in Swedish Sápmi: The regulatory gap between Sami rights and Sweden's mining permitting practices' (2020) 99 Land Use Policy.

[20] E.g. Ismo Pölönen, et al., 'Finnish and Swedish law on mining in light of collaborative governance' (2020) 2 Nordic Environmental Law Journal 99; Therese Bjärstig et al., 'The Institutionalisation of Sami Interest in Municipal Comprehensive Planning: A Comparison Between Norway and Sweden (2020) 11(2) International Indigenous Policy Journal 1; Therese Bjärstig et al., 'Between protocol and reality – Swedish municipal comprehensive planning' (2018) 26(1) European Planning Studies 35; Emilia Rönkkö and Eeva Aarrevaara, 'Towards strength-based planning strategies for rural localities in Finland' (2017) 9(3) European Countryside 397.

[21] E.g. Aron Westholm, 'Planeringens roll för lokaliseringen av ny vindkraft i Sverige' (2024) 2 NMT 45; Henrik Josefsson, 'Vad är en plan? – En analys av Sveriges implementering av direktivet om strategisk miljöbedömning' (2019); 2 NMT 47; Maria Forsberg, 'Landskapsplanering för naturvård och virkesproduktion – särskilt med koppling till ersättningsrätten' (2018) 1 NMT 81.

[22] E.g. Gerhard Dannemann, 'Comparative Law – Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook od Comparative Law* (2nd edn, OUP 2019) 405, 407, 421.

historical roots in the Swedish Kingdom and the East Nordic legal tradition, there are also significant differences.[23] The differences here relate to the states' constitutional and legislative frameworks concerning the Sámi and their respective approaches to regional planning.

In addition, we employ a functional method of comparative law,[24] which focuses on studying the specific functions of legal rules, in this case spatial planning provisions. This article examines how each jurisdiction addresses the following aspects linked to strategic spatial planning: i) current trends in the planning legislation, ii) the function and legal effects of regional plans within the planning system, iii) the role of the state and the authority responsible for regional planning, iv) the link between spatial plans and mineral development, v) how planning-related requirements under CRMA and RED III influence planning in Sweden and Finland, and vi) the 'strategic' potential of existing regional planning.

The analysis relies on primary legal sources, that is, legislation, preparatory works and, to some extent, case law, as well as legal doctrine. These legal sources are complemented by academic literature, policy materials and reports from ministries, state agencies and organisations. The main focus of the article is not in the thorough analysis of a set of individual provisions concerning planning; the analysis generally takes place on a more systemic level, based on legal analysis undertaken elsewhere, by the authors of this article and other scholars.

After this introduction, Section 2 sets out the context of strategic planning and land-use conflicts in northern Sweden and Finland, with particular attention to Sámi reindeer herding, constitutional and human rights frameworks. Section 3 outlines the relevant EU legal developments, notably the CRMA and RED III. Sections 4 and 5 analyse the Swedish and Finnish spatial planning systems respectively, focusing on regional planning instruments and their interaction with mineral extraction. Section 6 presents the comparative analysis and, finally, Section 7 concludes by summarising the main findings and discusses Swedish landscape planning *de lege ferenda*.

2. Context

2.1 The concept of strategic planning

In general terms, planning legislation governs land and water areas and regulates how they may be used for development, primary industries, recreation, and similar purposes, as well as for conserving valuable cultural environments, cultural heritage sites, or ecological values. Within this type of legislation, a wide range of divergent interests must be taken into account and balanced through relatively broad assessments. Planning legislation – in particular strategic spatial planning instruments, such as those under municipal or regional control – interacts with and permeates other parts of the environmental law system, mainly through permitting procedures.[25]

Future-oriented planning in this kind of systemic context must, however, also deal with change, uncertainty and relationality, for exam-

[23] Jaakko Husa, *Nordic Law: Between Tradition and Dynamism* (Intersentia 2007) 5; Johanna Niemi, 'Sverige och Finland – lika eller olika?' (2010) 33 Retfærd 95, 96.

[24] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 347–48.

[25] Gabriel Michanek and Charlotta Zetterberg, *Den svenska miljörätten* (6 edn, Iustus 2025) 539; Gabriel Michanek, *Svensk miljörätt* (2 edn, Iustus 1993) 29; Ranja Hautamäki, et al., 'Ekologinen kytkeytyvyys ja luonnon monimuotoisuus alueidenkäytön suunnittelussa' (2024) Finnish Academy of Science and Letters 41.

ple. In planning-theoretical literature, the capacity to deal with such attributes has been linked to the concept of strategic planning.[26]

Within this article, strategic spatial planning is viewed as a cross-sectoral, long-term framework for guiding territorial development and priorities in line with collectively defined objectives.[27] The need for strategic planning has been identified particularly in phases of deep and rapid change.[28] Such change is taking place in the setting examined in this article, as the reindeer herding areas are increasingly becoming sacrificial zones legitimated by the 'green transition'.[29] There is an increasingly competitive planning landscape in rural or peripheral areas, which may strain the existing planning systems, traditionally focused on urban development.

In planning theory, however, 'strategic' planning has often been associated with informal and 'soft' planning instruments and juxtaposed against the typical characteristics of statutory planning. Mäntysalo et al. have challenged this dualism and argued for utilising the statutory planning system as a strategic planning tool.[30] Furthermore, in this kind of highly conflictual setting with distrust and mutually exclusive land-use interests, there is an evident need for certain features of statutory plans, such as effectively limiting the freedom of project plans and permits to ensure that the cumulative effects of 'green transition' projects combined with other forms of land-use do not imperil Sámi livelihoods.[31] The effectiveness of soft strategic planning instruments relies on the commitment of the stakeholders to adhere to the plans which in practice may be lacking, and such arrangements can neither be regarded as sufficient from a human rights perspective.

From the soft/hard perspective, the two countries examined display certain differences. In addition to the fact that supra-municipal planning in Sweden lacks legal effects compared to Finland, the landscape level of planning in Sweden is not tied to an administrative regional level and territory in the way it is in Finland. The landscape level of planning in Sweden is softer both territorially and in legal effects. However, individual regional plans in Finland often do not cover the whole administrative region (even if the combination of them eventually does), and the territorial scope of regional plans can be determined based on land use needs and interests. Also, despite its legally binding nature, regional planning in Finland is soft in the sense that its steering is characterised by flexibility.[32]

2.2 Intractable land-use conflicts and Indigenous livelihoods

As noted above, mining developments in Northern Sweden and Finland must be balanced against Sámi livelihoods, in particular reindeer herding. Mining and other land-intensive activities – such as industrial forestry, hydropower,

[26] E.g. Louis Albrechts and Alessandro Balducci, 'Practicing strategic planning: In search of critical features of to explain the strategic character of plans' (2013), 49(3) disP 21.

[27] Cf. Louis Albrechts, 'Strategic (spatial) planning reexamined' (2004) 31(5) Environment and Planning B: Planning and Design 743, 747–48.

[28] Albrechts and Balducci (n 26) 17.

[29] Lassila (n 3) 2–3.

[30] Raine Mäntysalo, et al., 'The paradox of strategic spatial planning: A theoretical outline with a view on Finland' (2015) 16(2) Planning Theory & Practice 170, 175–76.

[31] In the Finnish Supreme Administrative Court decision KHO 2022:12, a project plan for a wind farm was repealed on the grounds that it did not comply with the planning regulations set in a regional plan concerning the acknowledgement of the requirements of reindeer herding in more detailed planning.

[32] Regarding "soft places" and "soft planning", see Hanna Mattila and Aleksi Heinilä, 'Soft spaces, soft planning, soft law: Examining the institutionalisation of city-regional planning in Finland' (2022) Land Use Policy 119, 106156, 3–4, 7–8.

transport infrastructure and wind energy – produce cumulative land-use effects on increasingly shrinking and fragmented grazing lands.[33] This generates tensions not only between Sámi communities and private or state-owned companies, but also between the Sámi and the State. These are characteristic intractable land-use conflicts: long-standing and deeply rooted disputes over land that resist conventional resolution and often entail significant social and environmental harm.[34] They typically reflect fundamental value conflicts, such as extraction versus conservation, and structural power asymmetries between companies and Sámi right-holders.[35]

Sámi culture and livelihoods enjoy constitutional protection in both Sweden and Finland, although protection is stronger and more explicitly rights-based in Finland. The Finnish Constitution recognises the Sámi as an Indigenous people with the right to maintain and develop their language and culture.[36] The Swedish Instrument of Government instead obliges the State to promote the Sámi people's opportunities to preserve and develop their cultural and social life.[37] Although not framed as an enforceable right, the Swedish Supreme Court in Girjas (2020) confirmed that this provision, read in light of international human rights law, is relevant in the balancing of interests,[38] including in land-use decisions. Moreover, the reindeer herding right is a constitutionally entrenched property right.[39]

In Finland, the Constitution further guarantees linguistic and cultural self-government within the Sámi Homeland, as regulated by legislation,[40] a principle reiterated in the Sámi Parliament Act (974/1995, SPA).[41] Sámi culture encompasses, in addition to traditional livelihoods and language, cultural heritage, *duodji* (handicraft) and the gathering of natural products.[42] Sámi culture is thus multifaceted and dynamic.

Both states are bound by international human rights and environmental treaties, as well as by instruments concerning Indigenous rights, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Neither has ratified ILO Convention No. 169,[43] although Finland has expressed an intention to do so. Nevertheless, in Girjas the Swedish Supreme Court held that Article 8(1) of ILO 169, concerning Indigenous customs and customary law, is binding on Sweden.[44] In Finland, the prohibition against

[33] E.g. Tim Horstkotte, et al., 'Pastures under pressure – Effects of other land-users and the environment' in Tim Horstkotte et al. (eds), *Reindeer husbandry and global environmental change – Pastoralism in Fennoscandia* (Routledge 2022); Jon Moen, et al., 'Final reflections' in Tim Horstkotte et al. (eds), *Reindeer husbandry and global environmental change – Pastoralism in Fennoscandia* (Routledge 2022).

[34] Andreas Johansson, et al., 'Exploring prospects of deliberation in intractable natural resource management conflicts' (2022) 315 Journal of Environmental Management; Stanely T Asah et al., 'Diagnostic reframing of intractable environmental problems: case of a contested multiparty public land-use conflict' (2012) 108 Journal of Environmental Management; Marta Conde, 'Resistance to Mining. A Review' (2017) 132 Ecological Economics 80.

[35] Lassila (n 3) 2–3.

[36] Constitution of Finland, 731/1999, s. 17 para. 3.

[37] Instrument of Government (1974:152), ch. 1 s. 2 para. 6; Prop. 2009/10:80, 189.

[38] NJA 2020 p. 3, paras. 92–94; Christina Allard and Malin Brännström, 'Girjas reindeer herding community v. Sweden: Analysing the merits of the Girjas case' (2021) 12 Arctic Review on Law and Politics 56, 63–64.

[39] Instrument of Government ch. 2 s. 15; NJA 1981 s. 1 (Skattefjäll case), 248.

[40] Constitution of Finland, 731/1999, s. 121 para. 4.

[41] This is a designated area in the northernmost Finland, and roughly comprises of the three northernmost municipalities Enontekiö, Utsjoki, and Inari.

[42] SOU 2023:46, 173–174; RP 100/2025 rd, 85; RP 167/2014 rd, 29–30.

[43] International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 1989.

[44] NJA 2020 p. 3, para. 130; Christina Allard and Malin Brännström, 'Girjas reindeer herding community v. Sweden: Analysing the merits of the Girjas case' (2021) 12 Arctic Review on Law and Politics 56, 64.

measures that significantly weaken Sámi culture derives from Article 27 of the ICCPR,[45] and Section 17 of the Constitution.[46] This prohibition is also codified in environmental legislation, albeit in different wording. Unlike in Sweden, the ICCPR is incorporated into Finnish law and directly applicable.[47]

In Sweden, reindeer herding is organised into reindeer herding communities (*sameby*) under the Reindeer Herding Act (1971:437, SRHA). These are autonomous legal entities with defined geographical areas,[48] and Sámi hold an exclusive right to herd reindeer. In Finland, by contrast, reindeer may be owned by citizens of countries within the European Economic Area if he or she has permanent residence in the Finnish reindeer herding area. An important prerequisite for the right to herd reindeer is that a person needs to be part of a reindeer herding cooperative (*paliskunta*).[49] The Finnish Reindeer Herding Act (848/1990, FRHA) therefore applies to all herders, and cooperatives manage reindeer herding activities.[50]

The Swedish Minerals Act (1991:45, SMA) contains no explicit reference to Sámi rights. By contrast, the Finnish Mining Act (621/2011, FMA) expressly incorporates the prohibition on weakening Sámi culture.[51] Safeguarding Sámi culture and traditional livelihoods within the Sámi Homeland is one of the Act's commitments.[52] This is operationalised through (1) a mandatory impact assessment of how exploration, mining or gold panning permits may affect the rights of the Sámi as an Indigenous people, including cumulative impacts,[53] and (2) an absolute bar on granting a mining permit if the project would substantially undermine the conditions for traditional Sámi livelihoods or otherwise maintaining and developing Sámi culture.[54] The Finnish Mining Act saw a significant partial reform in 2023 (505/2023), one of the objectives of which was to clarify the Sámi rights under the FMA. Key measures to achieve this goal included clarifying the permit applicant's obligation to provide information and the cooperation procedure for investigating the matter, as well as harmonizing the status of reindeer herding cooperatives with regard to provisions on information and participation.[55]

In Sweden, trade-offs under the Minerals Act are mediated through the Environmental Code's (EC) provisions on 'areas of national interest' (Chapters 3 and 4).[56] Within this framework, reindeer herding receives comparatively

[45] The International Covenant on Civil and Political Rights, 1966. Significant harm must be weighed on a case-by-case assessment, taking into account the previous, present and planned activities.

[46] Leena Heinämäki, 'The prohibition to weaken the Sámi culture in international law and Finnish environmental legislation' in Dorothée Cambou and Øyvind Ravna (eds) *The Significance of Sámi Rights Law, Justice, and Sustainability for the Indigenous Sámi in the Nordic Countries* (Routledge 2023), 89.

[47] Ibid., 88–9.

[48] SRHA ss. 6, 8 and 10.

[49] FRHA s. 4 and 6 para. 1.

[50] FRHA ss. 6–7.

[51] In relation to the amendment, it was said that the threshold of 'significant harm' cannot be set very high. See Heinämäki (n 46) 89–90; RP 273/2009 rd, 210–211; KHO1999:14.

[52] FMA s. 1 para. 4.

[53] FMA s. 38. Cumulative impacts must be taken into consideration in this assessment, see the Supreme Administrative Court cases KHO 2014:111 and KHO 2020:124. The latter case concerned the environmental permit for mechanical gold mining, and in the case the court somewhat expanded the scope of the Environmental Protection Act (527/2014, EPA), specifically its prohibition to cause essential harm to Indigenous livelihoods or culture when granting an environmental permit (s. 49), on the basis of the Finnish Constitution and ICCPR to cover also other harms than those resulting from polluting emissions (which is the primary scope of the EPA).

[54] FMA s. 50 para. 1 item 1. Note that this provision also includes permits for exploration (FMA s. 9) and gold panning (s. 22).

[55] RP 126/2022 rd, 55.

[56] Raitio et al., 'Mineral extraction in Swedish Sápmi' (n 19) Section 6.1.

weak protection and is treated primarily as a commercial interest rather than as an Indigenous livelihood.[57]

Both countries impose procedural duties to consult the Sámi. In Finland, the revised Sámi Parliament Act (974/1995, SPA) establishes a duty for authorities at state, regional and local level to 'cooperate and negotiate' with the Sámi Parliament in matters affecting the Sámi.[58] The reform is intended to align domestic law with Article 27 ICCPR, UNDRIP and the principle of FPIC.[59] Decisions on mineral prospecting and extraction fall within its scope. Sweden's Consultation Act (2022:66, CA) similarly requires consultation in mining permit cases under the Minerals Act with the Sámi parliament, affected reindeer herding communities and sometimes Sámi organisations.[60] However, neither the Act nor its preparatory works incorporate FPIC as such.[61]

Most Swedish mines (10 of 13) operate within the reindeer herding area.[62] In Finland, exploration within the Sámi Homeland has so far been limited and no mining permits have been granted there.[63] However, in light of EU law obligations – particularly concerning critical raw materials – the number of mining projects is likely to increase also in Finland, and mineral prospecting has been a source of conflicts in the Sámi Homeland.[64]

3. Relevant EU law – CRMA and RED III

3.1 The European Green Deal

The EU is increasingly embedding land-use into multiple cross-sectoral legal and policy regimes – from climate and biodiversity to agriculture and soil health. This reflects a shift from treating land as merely an economic input toward recognizing its role in ecosystem services, climate mitigation, and sustainable development. Although spatial planning remains primarily a competence of the Member States, EU legislation in areas such as environment, climate, energy and biodiversity increasingly shapes national land-use decisions. In this regard, the European Green Deal (EGD) has acted as a key strategic framework, driving a new generation of EU measures that affect how land is governed and allocated at national level.

The EGD is a comprehensive strategy to transform the EU's economy towards a more sustainable future and to address serious climate and environmental challenges. A core objective of the EGD is achieving climate neutrality by 2050, operationalised through the European Climate Law with legally binding targets.[65] The EGD is also intended to implement the United Nation's 2030 Agenda and the sustainable devel-

[57] EC ch. 3 s. 5. For review on mining cases up til March 1, 2020, see Raitio et al., 'Mineral extraction in Swedish Sápmi' (n 19), table 1, s. 6. The controversial mining case Kallak was approved by the government in March same year, see Government of Sweden, Decision No. N2017/04553, 22 March 2022. Between 2021 and March 2026 14 mining permits was approved, all within the Sámi reindeer herding area (manual control), see Mining Inspectorate <https://www.sgu.se/bergsstaten/statistik/bearbetningskoncessioner/> (accessed 2026-05-11).

[58] SPA ss. 9–9 b, and s. 9 include a non-exhaustive list of matters to cooperate and negotiate about.

[59] RP 100/2023 rd, 52, 82, 88.

[60] CA s. 7. However, many land-use decisions are decided by land and environmental courts or a specific body within the country administrative boards – these are exempted from consultations with the Sámi.

[61] Christina Allard, 'Samers rätt till inflytande i beslut – En analys av lagstiftningen och dess begränsningar' (2025) SvJT 2026 p. 7, 13.

[62] See map at the SGU website <www.sgu.se/en/mining-inspectorate/mines/mines-in-sweden/#:~:text=Subpages%20*%20Mines%20in%20Sweden.%20*%20Old%20mining%20maps.%20*%20Mineral%20permits%20mapviewer.> (accessed 2026-02-20).

[63] The Sámi Homeland comprises only the northern part of Finland's reindeer herding area, while several mines are situated in its southern parts.

[64] Maija M Lassila, 'Mapping mineral resources in a living land: Sami mining resistance in Ohcejohka, northern Finland' (2018) 96 Geoforum 1–9.

[65] Regulation (EU) 2021/1119.

opment goals.[66] The EGD emphasises that 'this transition must be just and inclusive'.[67] However, although the EGD has a strong emphasis on justice, equality and inclusion, the document contains no explicit references to Indigenous peoples or their rights.

As a strategy, the Green Deal drives climate, biodiversity, agricultural, water, and soil legislation and policy within the EU. Implementation of the EGD thus relies on a mix of binding legislation, sectoral strategies and financial instruments. Although this strategy does not create a specific EU competence in spatial planning, it indirectly reshapes national land-use governance by linking climate neutrality, ecosystem restoration, sustainable mobility, and resource efficiency to sectoral policies that Member States must operationalise through their planning, environmental assessment, and land management systems. The Commission states that it will work with the Member States to ensure that legislation and policies connected to the Green Deal are enforced and effectively implemented.[68]

This strategy has functioned as a transformative meta-framework, setting long-term climate neutrality and biodiversity objectives that are operationalised through binding sectoral instruments. Together, these measures reshape the strategic context of national land governance by introducing quantified targets, restoration obligations and infrastructure priorities that Member States must accommodate within their planning systems.

Particularly relevant to the theme of this article, two relatively new EU legal instruments are influencing long-term land-use governance in Member States, the Critical Raw Materials Act (CRMA)[69] and the revised Renewable Energy Directive (RED III).[70] We will turn to them next.

3.2 The Critical Raw Materials Act

The European Green Deal explicitly links climate ambition with the secure and sustainable supply of raw materials required for green technologies (and defence applications).[71] This connection has been formalised through the Critical Raw Materials Act (CRMA),[72] adopted in 2024, which aims to reduce the EU's dependency on external suppliers and accelerate domestic extraction, processing, and recycling of materials deemed essential for the 'green transition', such as rare earth elements, nickel, cobalt, and graphite.

The CRMA's objective, stated in Article 1, is to ensure the Union's access to a secure, resilient and sustainable supply of critical raw materials, including fostering efficiency and circularity throughout the value chain. The identification of particularly important materials and the implementation of concrete projects are essential. The CRMA therefore contains two lists: one comprising *17 strategic raw materials* and another listing *34 critical raw materials*.[73] These lists form the foundation of the legal and practical measures set out in the Regulation; they serve as guidance for Member States' planning and investments in the raw materials sector.

Since 2011 the European Commission has published lists of critical raw materials, reviewing and updating them every three years. It was not until 2023 that the Commission introduced the category of strategic raw materials. These are of particular importance for the green and digital transitions, as well as for the defence and

[66] European Green Deal COM(2019) 640, 3.
[67] Ibid., 2, 19.
[68] Ibid., 4.
[69] Regulation (EU) 2024/1252.
[70] Directive (EU) 2023/2413.
[71] EGD (n 66) 8.
[72] Regulation (EU) 2024/1252.
[73] (EU) 2024/1252, Art. 3.1 and 4.1; Annex I, s. 1 (strategic raw materials) and Annex II, s. 1 (critical raw materials).

aerospace sectors.[74] The assessment of a material as strategic is based on its relevance for future technologies, expected growth in demand, and potential supply constraints.[75] A number of the Regulation's most far-reaching legal measures apply exclusively to strategic raw materials.

Although the Regulation expresses a clear political ambition to establish structural conditions for an efficient and sustainable supply of *all* critical raw materials within the EU – including enhanced administrative guidance, coordination and potentially financial support – additional binding legal simplifications and advantages apply specifically to strategic raw materials.[76] One of the central instruments is the designation of 'strategic projects' and the criteria governing their classification. The Commission *shall* recognise a project as a strategic project where it fulfils the specified selection criteria.[77] Such projects may concern, inter alia, the extraction of strategic raw materials and may be implemented both within EU Member States and in third countries.

Strategic projects benefit from accelerated permitting procedures; the statutory time limits for the permitting process apply exclusively to such projects.[78] Under the CRMA, the permitting process for raw material extraction shall not exceed 27 months, or a maximum of 24 months where the permitting process has already commenced.[79] The concept of 'permit-granting process' encompasses all relevant authorisations required to construct and operate a critical raw material project. The time period runs from the moment an application is deemed complete until a comprehensive decision has been issued.[80]

In the Swedish context, the time frame, based on a report from Ministry of Climate and Enterprise, would in practice apply from the application for a mining permit under the Minerals Act until the environmental permit has been granted, if the applications are submitted collected.[81] No legislation is in place yet. In Finland, the corresponding time limit entails primarily permits similar in function to those in Sweden: the mining permit under the FMA and the environmental permit under the EPA.[82] It should also be noted that the time limits established under Articles 11.1–11.2 CRMA concerning the duration of the permit-granting process do not affect obligations arising under Union and international law (Art. 11.10). Arguably, this may encompass Sweden's and Finland's obligations towards the Indigenous Sámi, including duties to consult in relation to specific permit applications concerning mineral developments.

There are a few strategic raw materials projects recognised in the Swedish and Finnish North.[83] These strategic projects receive coor-

74 Regulation (EU) 2024/1252, Annex I, s. 2.
75 Ibid., preambel at 6.
76 Ibid., preamble at 2.
77 Ibid., Art. 6, 7 and Annex III.
78 Ibid., Art. 10.3.
79 Ibid., Art. 11.1–11.2.
80 Ibid., Art. 2.18.

81 Klimat- och näringslivsdepartementet, 'Kontaktpunkter, tillstånd och tidsfrister enligt EU-förordningen om kritiska råmaterial och EU-förordningen om nettonollindustri' (KN2025/02439, 12 January 2026) 115–17. The term "permit" should encompass all procedures concerning permits, exemptions, or notification requirements that the proponent will need, and will be assessed on a case-by-case basis, see ibid. 108, 114, 118.
82 In addition to these, a strategic project may also need other case-dependent permits, such as a building permit under the Building Act and a permit for large-scale industrial processing and storage of hazardous chemicals under the so-called Chemical Safety Act (390/2005). These are not excluded from the time limits, see RP 41/2025 rd, 163–64.
83 Sweden: the LKAB's REEMap project that include the Per Geijer deposit in Kiruna and the Talga AB's Natural Graphite ONE project in Nunasvaara, between Vittangi and Kiruna. Leavas, Gabna, Talma and Gällivare forest RHCs are negatively impacted. In Finland, the only strategic project located in the Arctic Finland (Lapland) is the Anglo American's Sakatti mining and processing project in Sodankylä. The other strategic projects thus far in Finland are also located outside the reindeer herding

dinated administrative procedures, accelerated timelines, and more predictable regulatory pathways. In effect, the CRMA operates as a form of EU-level strategic planning, signalling territorial priorities and shaping national planning expectations, particularly in resource-rich regions such as northern Sweden and Finland.

Additionally, the CRMA embeds raw material extraction as a planning consideration across all levels of the spatial planning system, thereby influencing land-use allocations and potentially reshaping planning priorities at the landscape scale.[84] The provision effectively requires national, regional and local planning authorities to consider to integrate the potential development of critical raw materials projects into spatial planning instruments, including zoning schemes, regional spatial plans and municipal land-use plans. In practice, this entails that strategic and physical planning processes must proactively assess and, where appropriate, allocate land for such projects. When doing so, planning authorities are directed to prioritise artificial and already built-up surfaces, industrial areas, brownfield sites, and active or former mining areas, including identified mineral deposits.

3.2.1 The CRMA and Indigenous peoples

Even if all mining operations may significantly affect Sámi reindeer herding, prioritised strategic projects are likely to have particularly far-reaching consequences because fast-track procedures and political prioritisation increase the likelihood of rapid implementation while reducing the practical opportunities for affected Sámi communities to influence decision-making. Very little attention is paid to Indigenous peoples in the CRMA as a whole. The preamble mentions Indigenous peoples and respect for human rights in general a few times.[85] A particularly significant criterion for the designation of strategic projects is found in Article 6.1(c), which requires project promoters to ensure that such projects are implemented in a sustainable manner; the proponent must meet the following criteria: '(…) the prevention and minimisation of socially adverse impacts through the use of socially responsible practices including respect for human rights, indigenous peoples (…), in particular in the case of involuntary resettlement (…).'

Annex III, which sets out the criteria for assessing strategic projects under Article 6, provides no specific guidance on how the Commission is to determine whether a project within the EU is implemented with due respect for Indigenous rights. Instead, the Commission is required to undertake an overall assessment of the project's compliance with applicable Union law, national law and other relevant documentation, with particular regard to its location.[86]

Although Annex III refers to the principles of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), this reference applies only to projects located in third countries outside the EU. In that context, international instruments operate as minimum standards where national law in the country concerned does not provide sufficient safeguards.

By contrast, for projects within the EU, including those located on Sámi traditional lands, Annex III contains no corresponding reference. The wording suggests that the EU presumes national legal systems – such as Swedish law – to provide adequate protection of Indigenous rights. In this light, international instruments

area. See 'Selected strategic projects' (European Commission) <https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/critical-raw-materials/strategic-projects-under-crma/selected-projects_en> (accessed 2026-02-20).

[84] Regulation (EU) 2024/1252, Art. 13.1.

[85] Ibid., preamble at 17 and 20.

[86] Ibid., Annex III, point 5.

such as UNDRIP appear either redundant or subordinated in the assessment of strategic projects within the Union.

3.3 The Renewable Energy Directive

While this article focuses on mineral extraction, from a planning perspective EU's Renewable Energy Directive (RED) is highly interesting because of its spatial planning approach. Like the CRMA this directive is also created as a part of the European Green Deal and the REPowerEU Plan.[87]

The first renewable energy legislation dates from 2009,[88] and the directive establishes in Article 1 a common framework for stimulating renewable energy sources. The RED implements certain administrative procedures including financial support mechanisms for renewable energy projects and measures encouraging collaboration between Member States and between Member States and third countries.[89] The directive has been updated twice, in 2018[90] and most recently in 2023 – RED III.[91]

This subsection briefly addresses the highlights from RED III relevant to this article. This directive mandates significant changes to speed up the development of wind power and solar power projects, which require land including in areas of the Swedish and Finnish North where reindeer herding is carried out.

The RED III constitutes a crucial component of the EU's climate strategy, setting a binding target of 42.5% (with an aspiration to 45%) for renewable energy in the EU's gross final energy consumption by 2030.[92] It introduces several provisions with direct implications for the spatial planning systems of Member States. This includes, for instance: (1) renewables acceleration areas (RAAs); (2) permitting deadlines; and (3) status as 'overriding public interest'.

Under the directive Member States are required to designate RAAs (for one or more types of renewable energy sources),[93] often referred to as 'go-to areas', which are highly relevant for wind and solar energy developments. Under Article 16a.1, the main rule regarding permit-granting procedure is that it shall not exceed 12 months for (onshore) renewable energy projects in RAAs. This constitutes significant fast-tracking of renewable energy projects, including wind power. The longest timeframe for permitting is 3 years for large offshore projects. Moreover, RED III mandates that renewable energy projects 'are presumed to be in the overriding public interest'.[94] This status is critical for accelerating the legal process, particularly if permit decisions are appealed.

A central mechanism of RED III is the designation of RAAs: geographically defined zones where renewable energy projects are presumed to involve lower conflict and are subject to streamlined permitting procedures. By requiring Member States to prioritise these areas, the directive introduces explicit spatial differentiation into EU energy governance and shifts expectations of strategic spatial planning from reactive project assessment to proactive allocation of space for renewable development. In doing so, RED III is likely to recalibrate national planning practices and expedite the Union's transition to renewable energy.

[87] REPowerEU Plan, COM(2022) 230 final. This was a response due to Russia's military aggression against Ukraine.
[88] Directive 2009/28/EC.
[89] Directive (EU) 2018/2001, Art. 1.
[90] Directive (EU) 2018/2001 (RED II).
[91] Directive (EU) 2023/2413. It entered into force in November 2023.
[92] Directive (EU) 2023/2413, Art. 3.1.
[93] Ibid., Art. 15c.
[94] Ibid., Art. 16f.

How these RAAs are assessed and selected in Sweden and Finland is another matter.[95] Although each plan for RAAs should be subject to an environmental assessment pursuant to Directive 2001/42/EC to ensure public participation at an early stage, RED III, like CRMA, does not specify how Sámi rights and livelihoods should be reconciled; indeed, it does not mention Indigenous peoples at all. After designation, RAAs are presumed to serve an overriding public interest and to benefit from streamlined permitting deadlines.

4. Analysing Swedish spatial planning instruments

4.1 Introduction: current trends

Driven by climate change, intensifying competition for land and natural resources, and heightened security concerns, the need for a clearer national framework for spatial planning – incorporating stronger state coordination and a common strategic direction – has become increasingly evident. The Swedish planning framework is currently under review, exemplified by the government's 2022 request for a pilot study on national spatial planning.[96]

In that request, the government acknowledged that the system of areas of national interest under the Environmental Code remains a central instrument of state governance, yet it must evolve to address shifting land- and water-use priorities. Greater clarity in state prioritisation was considered necessary, particularly in situations of overlapping claims. The expansion of total defence has further intensified state land-use claims. Vertical coordination has also been criticised, particularly regarding the accommodation of national interests in municipal comprehensive planning.[97]

The pilot study, delivered in 2023,[98] identified widespread expectations of structural reform.[99] It concluded, first, that renewed spatial planning is required to manage the state's claims to land and water. Second, a more holistic perspective is needed, particularly in situations involving trade-offs between competing land-uses.[100] Third, the study proposed mandatory regional spatial planning across all counties, including sectoral plans for energy supply, water supply and climate adaptation. In regions where Sámi reindeer herding is practiced, an additional

[95] In Sweden the Energy Agency is mandated to map potential RAAs but geographical areas are not yet proposed. See Energimyndigheten, 'Potentiella områden för fossilfri energi' (ER 2024:22, 2024). A bill suggests amendments to provisions for the permitting timelines relevant for RED III, see prop. 2025/26:118. In Finland, the selection of RAAs coincided with a major administrative overhaul of state authorities. The selection process has been started by the new Finnish Supervisory Authority (FSA), to which municipalities may propose RAAs. The first selection round has been limited only to solar energy projects. See FSAs announcement 2026-02-10: <https://lvv.fi/-/lupa-ja-valvontavirasto-on-kaynnistanyt-uusiutuvan-energian-nopean-kehittamisen-alueiden-nimeamismenettelyn#:~:text=Uusiutuvan%20energian%20nopean%20kehitt%C3%A4misen%20alueiden%20nime%C3%A4misen%20tavoitteena,alueet%20tukevat%20energia-%20ja%20ilmastostrategian%20tavoitteiden%20saavuttamista> (accessed 2026-03-02).

[96] Regeringskansliet, Promemoria Fi2022/02246, 2022-07-07, 1–3.

[97] Ibid. Within the Government Offices of Sweden, directives for a public inquiry are currently being prepared for, tasked with reviewing the existing regulatory framework governing state claims to land and water areas, as several inquiries have concluded that there is a lack of a coherent national policy framework and clarity regarding the prioritisation of conflicting interests. The system of areas of national interest forms part of this review. The Government Offices have requested consultations with the Sámi Parliament and the Sámiid Riikkasearvi/Swedish Sámi Association. See Landsbygds- och infrastrukturdepartementet, 'Förfrågan om konsultation' (LI2026/00733, 16 April 2026).

[98] Ds 2023:28.

[99] Ibid., 102.

[100] Ibid., 103.

sectoral plan for reindeer husbandry was recommended.[101] According to the study, such reforms could be implemented without fundamentally undermining municipal self-government or the municipal planning monopoly.

Parallel to this, the Swedish Environmental Objectives Council[102] initiated an inquiry in 2020, presenting in 2022 a proposal for a national spatial planning framework.[103] The proposal sought to strengthen coordination among state agencies and improve vertical interaction between national, regional and municipal planning actors, inter alia through the establishment of a coordinating council and dedicated arenas for dialogue.

The report diagnoses structural weaknesses in Sweden's spatial planning system. It concludes that Sweden lacks a tradition of cross-sectoral national spatial planning comparable to that found in several other Nordic and European countries. National-level spatial planning has long been debated but is consistently characterized as weak, a pattern mirrored at the regional level where geographical coordination is often insufficient.[104] State steering instead operates through a multitude of national and EU objectives, economic instruments, legislation and sectoral planning. While the system of areas of national interest constitutes a key mechanism for safeguarding national concerns, it is regarded as insufficient for coordinating and prioritizing such interests across governance levels; the practical balancing of sectoral interests remains concentrated at the municipal level.[105]

According to the report, the national level lacks a coherent overarching vision for spatial development. The multiplicity of objectives – national, European and global – are diverse in character and often difficult to reconcile when trade-offs must be made. It remains unclear how national interests should be addressed and prioritised across different planning levels. The report therefore calls for enhanced collaboration, the development of a shared knowledge base concerning the landscape as a whole, and integrated assessments of competing interests and synergies grounded in a national overview and coordinated planning data.[106]

Taken together, these investigations point to fragmented governance, weak cross-sectoral coordination and the absence of a landscape-scale strategic framework capable of guiding land-use prioritisation beyond individual municipalities.

Reform efforts remain ongoing. For instance, in 2024, the Ministry of Rural Affairs and Infrastructure commissioned the Swedish Agency for Economic and Regional Growth (Tillväxtverket), the National Board of Housing, Building and Planning (Boverket), the Swedish Transport Administration (Trafikverket) and the County Administrative Boards to provide interested regions with methodological and knowledge-based support for strategic planning within regional development policy.[107] In February 2026 an interim report was published including conditions and tools for analysing cumulative land-use effects with a focus on reindeer herding and

[101] Ibid., 103 and 141. It should be noted that the study was not taken forward.

[102] The Council (*miljömålsrådet*) comprises the heads of nineteen strategically significant national agencies, whose roles are essential for securing the conditions necessary to achieve the environmental goals.

[103] Boverket, 'Ramverk för nationell planering' (n 1) 6–9. See also ibid., Section 4.

[104] Ibid., 17 and 24.

[105] Ibid., 17–8, 21 and 23.

[106] Ibid., 23–4.

[107] Government decision, 'Uppdrag att erbjuda stöd om strategisk planering i det regionala utvecklingsarbetet' (LI2024/01013, 2024-05-02).

Sámi culture.[108] It is connected to the 2022 report initiated by the Swedish Environmental Objectives Council.

Outside governmental and state agencies' initiatives, the OECD has identified shortcomings in Swedish spatial planning in relation to extractive industries.[109] In its study of Västerbotten and Norrbotten the organisation highlighted increasing contestation surrounding mineral extraction, not least in relation to Sámi reindeer herding. The report recommended stronger integration between regional development policy, land-use and natural resource planning. It emphasised the potential of regional spatial plans and to provide strategic guidance for both regional and municipal planning, including the management of cumulative land-use impacts.[110]

Overall, Sweden's planning tradition remains heavily oriented towards urban development and the built environment, especially housing supply.[111] Mechanisms for addressing land-use conflicts at a broader landscape scale, beyond the municipal level, remain underdeveloped.

4.2 Outline of the Swedish planning system

This section outlines the main characteristics of Sweden's planning system and identifies several structural weaknesses; regional planning is examined in greater detail in Section 4.4.

The primary function of the Planning and Building Act (2010:900, PBA) is to establish the legal framework for the physical planning of land and water areas and to regulate development, primarily through statutory plans and building permit procedures.[112] The four types of spatial plans – comprehensive plans, regional plans, detailed development plans and area regulations – has different scale, function and legal effect. Comprehensive and regional plans, applicable at the municipal and regional levels respectively, may encompass all forms of land and water use but are non-binding,[113] whereas detailed development plans and area regulations are legally binding and regulate land and water use in relation to buildings and other structures.[114]

There are statutory requirements mandating detailed development plans in defined situations.[115] If a municipality fails to comply with such requirements, the government may order it to adopt, amend, or repeal a detailed development plan (or area regulations) within a specified time frame (a planning order). Should the municipality fail to comply with the planning order, the County Administrative Board is tasked with fulfilling the order at the municipality's expense.[116]

Municipalities are responsible for spatial planning under the PBA, with one exception: regional spatial planning, where the region is designated as the competent planning authority. Otherwise, the PBA declares that planning of land and water use is a municipal responsibili-

[108] Eli Larsdotter and Elin Olsson (eds), 'Ramverk för nationell planering. Delrapport: Förutsättningar och verktyg att analysera kumulativa effekter med fokus på renskötsel och samisk kultur' (Sametinget, SLU, Länsstyrelsen Västerbotten, Trafikverket 2026).

[109] This particular study supports countries in implementing better regional development policies in a mining and extractive context.

[110] OECD, *Mining Regions and Cities Case of Västerbotten and Norrbotten, Sweden* (OECD Publishing 2021) 126.

[111] E.g. Bjärstig et al., 'Between protocol and reality' (n 20). This is also reflected in guidelines by the advisory agency.

[112] Cf. Michanek and Zetterberg (n 25) 539.

[113] PBA ch. 3. For regional plans see Section 4.4.

[114] PBA chs. 4–5; PBA ch. 1 s. 4; Michanek and Zetterberg (n 25) 540–41.

[115] PBA ch. 4 s. 2.

[116] PBA ch. 11 ss. 15–16. See also ch. 11 s. 10 para. 2 and item 1–2, significantly matters that regard designated areas of national interests based on provisions in EC chs. 3–4.

ty.[117] Although each municipality determines its priorities and decides when, where, and whether a spatial plan should be developed, there are important limitations to this planning monopoly, such as that a comprehensive plan needs to be 'current'.[118] This requirement means that the municipal council must adopt a planning strategy and assess whether the comprehensive plan remains up to date based on specified criteria, inter alia, how areas of national interest under Chapters 3 and 4 of the Environmental Code (1998:808, EC) are to be accommodated and how environmental quality standards under Chapter 5 EC are to be observed.[119]

Municipal comprehensive planning constitutes *the* primary instrument for dialogue between the state and the municipality regarding 'areas of national interest'.[120] These national planning provisions, set out in Chapters 3 and 4 of the EC, apply both in spatial planning and in permitting procedures.[121] Sector-specific legislation, such as the PBA and the MA, refer directly to these provisions. The provisions in the EC function as general guidelines for resolving land-use and resource management priorities in areas where the state has identified significant public interests, such as conservation, reindeer herding, mineral deposits, wind energy, and other interests.[122]

As noted above, municipalities must in their comprehensive plans identify areas of national interest pursuant to Chapters 3 and 4 EC and indicate how these areas are to be safeguarded.[123] Under Chapter 3 of the EC, combined land-uses are, in principle, preferred, and an a priori assumption that, for example, mining and reindeer herding should coexist is institutionalized.[124]

Areas important for Sámi reindeer herding, areas with high natural or cultural values (including outdoor recreation), areas suitable for wind power development, and areas containing valuable minerals may all be designated as areas of national interest.[125] In practice, however, such designations frequently overlap, resulting in competing land-use claims – for example, between mineral extraction and reindeer grazing areas. In such situations, the open-ended wording of Chapter 3 limits its effectiveness in managing or prioritizing competing land-uses;[126] decisions tend to become politicized, particularly when applications for mining permits are decided by the Swedish government.[127] Moreover, areas of national interest for reindeer grazing are not regularly updated, which creates legal uncertainty and evidentiary difficulties in individual permit cases.

In cases of conflict – where one public interest must be prioritized over another – priority shall be given to the purpose or purposes that best promote the long-term management of land, water, and the environment as a whole.[128] To understand this formulation, reference must be made to the preparatory works. In accordance with the objective of the EC (to promote sustainable development)[129] the balancing of public interests shall take into account ecological, social, cultural, and socio-economic considerations.[130]

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[117] PBA ch. 1 s. 2. See also Instrument of Government (1974:152) ch. 14 s. 2 (municipal self-government).
[118] PBA ch. 3 s. 1.
[119] PBA ch. 3 ss. 23–25 that e.g. refer to PBA ch. 3 s. 4 para. 2 and item 1–2.
[120] Prop. 1985/86:3, 154.
[121] See also Michanek and Zetterberg (n 25) 152–54.
[122] Prop. 1997/98:45 Part 1, 244–5; prop. 1985/86:3, 46.
[123] PBA ch. 3 s. 4.
[124] Cf. prop. 1985/86:3, 47; Raitio, et al., 'Mineral extraction in Swedish Sápmi' (n 19) Section 6.2.
[125] EC ch. 3 ss. 5–7, paras. 2.
[126] When areas of national interests are conflicting, one of them shall be prioritized, see EC ch. 3 s. 10.
[127] Raitio, et al., 'Mineral extraction in Swedish Sápmi' (n 19) Section 6.1.
[128] EC ch. 3 s. 10, cf. EC ch. 3 s. 1.
[129] EC ch. 1 s. 1.
[130] Prop. 1997/98:45 Part II, 244–5; prop. 1985/86:3, 160.

Moreover, the assessment should consider Sweden's international commitments.[131] At the same time, the preparatory works clearly state that employment and economic growth must be accorded significant weight.[132]

In a majority of decisions concerning mining permits under the MA, socio-economic interests – primarily employment and regional growth associated with the planned mine – have trumped Sámi reindeer herding interests.[133] In rural Sweden, particularly in the northern regions, designated areas of national interest frequently overlap, making prioritization challenging both in municipal planning and in permitting procedures.

Nevertheless, a comprehensive plan with clearly articulated positions is intended to provide guidance and facilitates more detailed planning and, inter alia, permitting under sectoral legislation.[134] As a strategic guiding document it has a central function in a municipality's work to formulate strategies for sustainable development. Yet, in Sweden's hierarchical planning system, the linkage between planning levels is *legally* weak, particularly in contrast to the Finnish planning system; municipal plans are in Sweden not binding and serve only as guidance. A permitting authority, for instance the Mining Inspectorate, is not legally bound by statements or priorities expressed in the comprehensive plan, and no legal consequences follow from disregarding it.

4.3 Spatial plans and mineral development

In most cases, mineral development in Northern Sweden takes place in rural areas that lack detailed development plans or area regulations. Consequently, the only applicable planning instrument is the municipal comprehensive plan.

The question of coordination with municipal planning under the PBA is therefore complex – a difficulty already emphasized in the preparatory works to the Swedish Minerals Act in 1989. A decision on the use of land for mineral development is normally not taken until alternative uses can be weighed against each other, particularly once the nature and extent of the mineral deposit are known.[135] The preparatory works further argued that a comprehensive plan can never represent a definitive municipal position on land-use, but must instead be subject to continuous review. The discovery of a new mineral deposit constitutes new circumstances.[136]

In addition, research on rural comprehensive planning in Swedish mountain municipalities – where significant mineral deposits are located – indicates that comprehensive planning procedures often suffer from limited resources and low political status. This, in turn, constrains stakeholder involvement and weakens implementation in relation to sustainable development objectives.[137]

In the Swedish context, municipal planning in relation to mining development typically occurs at a relatively late stage. In practice only after the mining company has obtained the necessary permits to operate the mine.[138] Subsequent planning – usually through the adoption of a detailed development plan – addresses infrastructure, buildings, tailings dams and related

[131] Prop. 1997/98:45 Part 1, 35. It is not explained which international commitments, but should include environmental law and human rights commitment over the Sámi as an Indigenous people.
[132] Prop. 1985/86:3, 152.
[133] See above Section 2.2 (n 57).
[134] Cf. PBA ch. 3 ss. 1–2. Where appropriate, the municipality may adopt a detailed in-depth (non-binding) comprehensive plan for a specific area, see PBA ch. 3 s. 27, ch. 3 s. 2 para. 3.
[135] Prop. 1988/89:92, 77.
[136] Ibid.
[137] Bjärstig, et al., 'Between protocol and reality' (n 20).
[138] Pölönen, et al., 'Finnish and Swedish law on mining' (n 20) 110.

installations. It primarily concerns the built environment and is confined to limited geographical areas.

Unlike Finnish mining legislation, the Swedish Minerals Act does not require any form of spatial planning prior to the granting of a mining permit. At that stage, the only planning-related requirement is that the Mining Inspectorate must ensure that the permit decision does not conflict with existing legally binding plans.[139] This regulatory structure helps explain why case law specifically addressing the interaction between spatial planning and mineral development is virtually non-existent.

An important exception to this general pattern emerged in 2025. In January of that year, the government issued a planning order to Kiruna municipality, requiring it to adopt a detailed development plan to enable the Nunasvaara mining project. The plan was adopted one year later, in January 2026.[140] Owing to initial municipal resistance and delay,[141] the county administrative board of Norrbotten was authorised to act in the municipality's stead.

The deposit area is designated as an area of national interest for the extraction of valuable substances and materials. The government considered the graphite deposit 'Nunasvaara South' in Vittangi to be of strategic importance for Sweden's and the EU's supply of natural graphite – critical for battery and steel production – and the operator, Talga, had already obtained the necessary mining permits. The project has also been classified as a 'strategic project' under the CRMA.[142] Whether the government will make use of this exceptional power in future cases remains uncertain.

Nevertheless, the Nunasvaara case does not alter the structural features of the Swedish planning system. Detailed development plans and area regulations continue to be adopted late in the decision-making process and focus primarily on the regulation of buildings, infrastructure and related installations. The Swedish municipal planning tradition is fundamentally oriented towards regulating the built environment, rather than proactively managing and balancing competing land uses and natural resource interests across broader landscapes.

Consequently, the national interest provisions in Chapters 3 and 4 of the EC do not, within comprehensive planning, provide clear prioritisation criteria when conflicts arise between, for example, mineral extraction and reindeer herding.

4.4 The regional plan and its (potential) function

Like municipal comprehensive plans, regional plans are strategic insofar as they cover extensive geographical areas, may encompass all forms of land and water use, and lack legally binding effect. Since the grazing areas of many Sámi reindeer herding communities extend across two or more municipalities, the regional level is particularly significant because it may accommodate the numerous competing land-use interests affecting the reindeer herding livelihood. Never-

[139] SMA ch. 4 s. 2 para. 6. The Mining Inspectorate cannot allow an application that 'counteracts' legally binding plans; however, smaller discrepancies are acceptable.

[140] See the government's press release at <www.regeringen.se/pressmeddelanden/2026/01/regeringen-antar-detaljplan-for-ny-grafitgruva-i-kiruna-kommun/> (accessed 2026-02-02).

[141] Samuel Abrahamsson and Per Carlsson, 'Grönt ljus för Talgas omdiskuterade grafitgruva' *SvT Sápmi* (31 October 2024) <www.svt.se/nyheter/sapmi/gront-ljus-for-omdiskuterad-grafitgruva> (accessed 2026-02-02). Note that particularly Talma and Gabna RHCs will be negatively affected.

[142] Talga Natural Graphite ONE project, decided 2025-03-25, see 'Commission Decision recognising certain critical raw material projects as Strategic Projects under Regulation (EU) 2024/1252 of the European Parliament and of the Council', C(2025) 1904 final.

theless, regional planning remains relatively underdeveloped in Sweden.

Provisions on regional planning were first introduced in Swedish planning law through the 1947 Building Act. Regional planning was subsequently carried out in several metropolitan regions, including Stockholm and Gothenburg.[143] In 1968, a specific act regulated regional planning in Stockholm County, and, with the 1987 PBA, regional planning there became obligatory through a supplementary act.[144] In the rest of Sweden, municipalities could apply to establish a regional planning body and prepare a regional plan under Chapter 7 of the 1987 PBA.[145] These optional provisions were later incorporated into Chapter 7 of the current Planning and Building Act (2010:900).[146]

In 2015, an inquiry proposed stronger coordination between selected planning sectors and the introduction of regional spatial planning nationwide. The proposals were subsequently presented in a bill, and in 2019 new provisions on regional spatial planning were introduced into the PBA.[147] The preparatory works emphasised regional planning as a means of enhancing national uniformity while maintaining municipal self-government.[148] Importantly, regional planning was framed not as a restriction on municipal autonomy but as a mechanism for coordination across a broader territorial scale.[149]

Chapter 7 of the PBA includes the rather few provisions concerning regional planning.[150] The preferred concept since the 2019 amendment is 'regional spatial planning'; this terminology emphasises that such plans concern land-use, the built environment and the physical environment more broadly.[151]

The function of regional spatial planning is to address matters of significance that concern two or more municipalities within a county, including guidelines for the localization of housing needs.[152] Regional planning was made obligatory only for Stockholm County and Skåne County. Today, the County of Halland is added to that list.[153] These counties represent the major population centres in Sweden.

The region is appointed as responsible for regional planning within the county.[154] The first provision of Chapter 7 details what regional spatial planning entails,[155] where long-term housing supply and the reduction of the county's climate impacts and ways to mitigate its consequences, are explicitly mentioned.[156] The tasks include above all the adoption of a regional plan. This plan shall provide guidance for subsequent planning instruments and functions primarily as a complement to municipal comprehensive planning. A regional plan is therefore never legally binding.[157]

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143 Subsequently, regional plans were also confirmed for Borås and for the Sundsvall areas, see prop. 2021/22:184 Regional fysisk planering i Hallands län, 7.

144 Act (1987:147).

145 PBA of 1987, ch. 7 ss. 1–8; prop. 2021/22:184, 7.

146 Prop. 2009/10:170, 252–53.

147 At the same time the Act (1987:147) on regional planning for the municipalities in Stockholm County was revoked.

148 Prop. 2017/18:266, 40.

149 Prop. 2017/18:266, 36.

150 Regulation (2011:338) contains provisions relating to e.g. the role of the county administrative board in regional planning. See also bylaws from Boverket (BFS 2025:1), concerning the digital format of the reginal plan.

151 Prop. 2017/18:266, 35–36 refers to prop. 1985/86:1, 122.

152 PBA ch. 7 s. 2; prop. 2017/18:266, 38.

153 Amendment in effect 1 January 2023. See prop. 2021/22:184. This change was due to a written request from the County of Halland and the municipalities, see ibid. Appendix 1.

154 PBL ch. 7 s. 1 para. 1 and ch. 7 s. 9. Halland need to adopt their regional plan no later than 31 December 2026.

155 PBL ch. 7 s. 1 para. 2.

156 Item 6–7.

157 PBA ch. 7 s. 2.

A regional spatial plan shall indicate how consideration has been given to, and how coordination has taken place with other national, regional, and municipal plans and programs.[158] The plan can also serve as a basis for the county administrative board when assessing how and whether the municipal planning have coordinated sufficiently on relevant matters.[159] The region is obliged, at least once during the period between two regular council elections, to review whether the regional plan is up to date in relation to the legal requirements.[160] Formally, planning is directed by the regional assembly (the region's highest decision-making body), which determines overarching development priorities, budget and adopts regional planning instruments. Political control over the planning process is both strong and highly centralised; strategic and principled decisions are ultimately made by elected representatives, meaning that regional planning objectives are closely tied to prevailing political priorities concerning economic growth, infrastructure, and the green transition.

In sum, regional plans include cross-municipal issues, normally relating to infrastructure, public transport, climate, and regional housing supply. The mandatory requirement for the Counties of Stockholm, Skåne and Halland does not prevent other regions from engaging in regional spatial planning.[161] Other counties may very well have to solve issues were obtaining an overall view would be beneficial and provide guidance for the region and succeeding municipal planning. A regional plan could reveal essential structural conditions within the region and can contribute with increased knowledge and understanding for how societal and climate changes affect municipalities and regions.[162]

From the examples provided in the preparatory works – coordination and collaboration concerning transport infrastructure, traffic, public transportation, regional growth, improved housing supply, spatial planning, etcetera – it is apparent that focus is placed on urban areas, including socioeconomic benefits for the overall planning system. Here, regional spatial planning can offer a larger scale where prioritization and trade-offs can be made visible early in the process and thereby contribute to increased long-term perspective and sustainability. It is also intended to facilitate and streamline municipal comprehensive and detailed planning.[163] Outside the built environment, regional spatial planning may, according to the preparatory works, encompass roads and railways, nature conservation, seascapes, flood risks, freshwater supply and agricultural land, and thus, has an untapped potential to be used also for clarifying cumulative land-use effects in the landscape, especially effects that may have serious impact on Sámi reindeer herding.[164]

Regional spatial planning is subject to a strategic environmental assessment (SEA) under Chapter 6 of the EC concerning implementation of the regional plan, in accordance with the SEA Directive (2001/42/EC).[165] Public consultation and review also apply to proposals for regional plans, following the provisions applicable for the municipality's comprehensive plan.[166]

[158] PBA ch. 7 s. 3 para. 1 item 2.
[159] Prop. 2017/18:266, 36.
[160] PBA ch. 7 s. 6.
[161] Prop. 2017/18:266, 84. Direct costs for regional spatial planning have likely a restrictive effect.
[162] Ibid., 34; cf. prop. 2017/18:163.
[163] Prop. 2017/18:266, 34–5.
[164] Ibid., 37.
[165] PBA ch. 7 s. 3 para. 2.
[166] PBA ch. 7 s. 5. A key difference is that the review period must be at least three months.

Regional spatial planning is, however, rarely undertaken voluntarily.[167] The preparatory works to the revised Chapter 7 of the PBA noted that, although the rules have long existed, regional planning has not been implemented outside metropolitan regions.[168] From 2019 onwards, all regions are instead engaged in regional growth planning and prepare county plans for regional transport infrastructure, often referred to as RUS (*regional utvecklingsstrategi*).[169] The focus is to support sustainable regional growth and development. State agencies are obliged to consider the RUS in certain decision-making contexts, and the county administrative board is tasked with supporting the RUS and the county transport infrastructure plan.[170]

All things considered, the regional plan is, by design, a *strategic* instrument covering a part of or the entire county and capable of transcending administrative boundaries.[171] In this capacity, it can address issues that are difficult to manage within existing municipal comprehensive planning, particularly in northern Sweden. At best, regional spatial planning may constitute an important component of the overall planning system.[172]

Although the Regions of Norrbotten and Västerbotten may adopt regional plans to map and guide land-use developments linked to the current wave of industrialisation, limited state resources are likely to constrain such efforts. Moreover, the influence of regional planning is limited by its largely non-binding character, the strong municipal planning monopoly, and the supervisory role of the county administrative boards and other state authorities.

5. Analysing Finnish spatial planning instruments

5.1 Introduction: current trends

The trajectory of the Finnish planning system appears to differ in important respects from that of Sweden.[173] Although both countries face similar societal and land-use challenges, Finland has gradually reduced the role of the state in planning, particularly in relation to safeguarding public interests. The primary objective of recent reforms has been to streamline planning and appeal procedures and to accelerate decision-making. This trend has intensified over the past decade and shows no signs of reversal.[174]

Among the measures reflecting this 'retreating state'[175] is the reform of the national land-use guidelines (2017), which perform a function broadly comparable to the Swedish system of areas of national interest. The current guidelines were deliberately drafted in more general and less prescriptive terms than their predecessors, with the aim of reducing their steering capacity and increasing local leeway. Their added value

[167] A search for adopted regional plans elsewhere shows that although a few regions refer to a regional plan in the title, it is evident that it is not the long-term spatial planning stipulated in the PBA. See e.g. regional plans för the Region of Västernorrland (2023–2025 or 2026–2028) at <www.rvn.se/sv/Demokrati-och-insyn/Sa-styrs-regionen/Regionplanen/> (accessed 2026-02-13).

[168] Prop. 2017/18:266, 33.

[169] See Act (2010:630) on regional growth responsibility ss. 1–3, 5 and 7; prop. 2009/10:156; prop. 2017/18:206.

[170] Act (2010:630) s. 10.

[171] Cf. the Regional Plan of Skåne 2022–2040, 4.

[172] Cf. prop. 2017/18:266, 34; prop. 2017/18:266, 33–34.

[173] The Finnish system has not evolved independently of the Swedish system, see. e.g., HE 91/1954 vp, 1.

[174] Aleksi Heinilä, 'Ympäristöoikeus, osallistuminen ja demokratia' in Ismo Pölönen, et al. (eds), *Puheenvuoroja ympäristöoikeuden yleisistä opeista* (Juhlajulkaisu Tapio Määttä 1965 – 2/11, – 2025 Edilex 2025) 95–140, 105, 108–109, 118–120; ESPON, 'COMPASS – Comparative Analysis of Territorial Governance and Spatial Planning Systems in Europe. Applied Research 2016–2018' (2018) (Final Report – Additional Volume 1 Comparative tables) 21.

[175] E.g. Katharina Hölscher, et al., 'Opening up the transition arena: An analysis of (dis)empowerment of civil society actors in transition management in cities' (2019) Technological Forecasting & Social Change 145, 176.

beyond the statutory provisions has therefore been questioned.[176]

A significant reform was enacted also in 2016, when the requirement that regional plans be ratified by the Ministry of the Environment – on grounds of legality and compliance with the national land-use guidelines – was abolished.[177] This procedure had enabled systematic state review and, according to case-law analysis, contributed to more uniform implementation of national objectives.[178] Its removal therefore marked a substantial reduction in supra-municipal state oversight.

For decades, a state supervisory authority also possessed a general right of appeal against planning decisions on grounds of legality. In 2017, however, the scope of this supervision was significantly curtailed. Under Section 18 of the Land-use Act (132/1999, LUA), supervision now concerns only 'national and significant regional' land-use decisions. This qualification is consequential, as many impacts on biodiversity, climate, and Sámi livelihoods are cumulative rather than attributable to individual decisions. Such cumulative land-use effects rarely meet the threshold of national or significant regional importance.

This development is further accentuated by the expansion of permit instruments that substitute for planning. Traditionally, the Finnish planning system limited the use of such permits to projects without 'substantial' impacts. In recent years, however, legislative reforms have enabled their use also for projects with manifestly significant environmental and social effects.[179]

Sectoral authorities retain rights of appeal concerning compliance with their respective legislation, for example environmental protection law. However, such supervision does not extend to the substantive requirements of planning legislation. As a result, key elements of planning law fall largely outside state legality control. Recent reforms have also curtailed civil society's means to challenge planning decisions, thereby further weakening legality control and the weight accorded to public interests.[180] Rights of appeal also underpin meaningful participation in ex ante planning procedures.

In contrast to Sweden – where recent developments point towards strengthened national coordination in response to present challenges – Finland appears to be moving in the opposite direction. This orientation is also reflected in the ongoing reform of planning and building legislation. The comprehensive reform process initiated in 2018 led to a draft government bill for a new Planning and Building Act in September 2021. However, lacking political consensus, the draft was not advanced further and was eventually abandoned. Shortly thereafter, the less contested building legislation component was enacted separately as the new Building Act (751/2023), which entered into force in early 2025.

The 2021 draft proposed substantial changes to supra-municipal planning instruments. In particular, regional plans would have had

[176] Aleksi Heinilä and Hanna Partinen, *Valtakunnalliset alueidenkäyttötavoitteet ja niiden kehittäminen*. VAT-esiselvityshankkeen loppuraportti. Ympäristöministeriön julkaisuja 2022:27 (Ministry of the Environment 2022) 90, 103–7, 126.

[177] Aleksi Heinilä, 'Ylikunnallinen maankäytön suunnittelu ja maankäyttö- ja rakennuslain kokonaisuudistus' (2021) Ympäristöpolitiikan ja -oikeuden vuosikirja XIV, 279–81.

[178] Aleksi Heinilä and Susanna Wähä, 'Valtakunnalliset alueidenkäyttötavoitteet korkeimman hallinto-oikeuden kaavaratkaisuissa' (Ympäristöministeriön raportteja 27/2013, Ympäristöministeriö 2013) 51.

[179] Aleksi Heinilä, 'Suunnittelujärjestelmän sielunmessu? Alueidenkäytön lupaohjauksen kehitys' (2024) Lakimies, 776–81; Heinilä, 'Ympäristöoikeus, osallistuminen' (n 174) 108–9.

[180] Heinilä, 'Ympäristöoikeus, osallistuminen' (n 174) 105.

legal effects only in a very limited set of land-use themes.[181] Although these proposals were ultimately withdrawn, regional planning has remained subject to reform. The current government programme states that the precision, detail and legal effects of regional plans shall be reduced,[182] and this objective has been implemented in the most recent draft Land Use Act. Under the present system, regional planning in principle covers all *supra-municipal* land-use issues. Under the draft, matters would need to be of national importance or of significance for the region as a whole.[183] The draft would also permit deviations from regional plans under certain conditions.[184] Collectively, these changes would narrow and weaken regional planning as a coordinating instrument.

Particularly noteworthy is the proposed removal of the explicit coordinating function of regional planning. At present, one of its core statutory tasks is to coordinate land-use objectives and interests across national, regional and local levels.[185] This intermediary function – linking and adapting national interests and statutory requirements to the local scale – has been recognised as central to the Finnish planning system.[186] Evaluations suggest that regional planning has largely succeeded in fulfilling this coordinating role.[187] However, the recent draft does not explicitly retain this function. The omission appears aligned with the broader objective of limiting the scope and influence of regional plans.

Thus, in its efforts to streamline and accelerate planning processes, Finland appears willing to relinquish coordination mechanisms that Sweden is currently seeking to strengthen. Whether such a coordinating function can in practice be abandoned is debatable, however, as mediating between competing land-use interests and governance levels constitutes a core function of spatial planning. Meanwhile, the OECD acknowledges the Arctic as 'an epicenter' of the land-use conflicts brought about by the environmental multicrises, urging Finland to utilise careful, evidence-based planning tools to mitigate the effects the land-use needs of the green industrial transition to, inter alia, biodiversity and reindeer herders.[188]

Finally, the recent Building Act reform introduced instruments that further shift development outside the planning framework. Most notably, the 'situating permit for clean transition'[189] allows certain large-scale industrial projects – including battery factories, specific data centres and selected projects related to RED III (excluding wind and solar power) – to proceed without a plan.[190] As the latest step in this trend, in April 2026 the 'situating permit for a production facility critical to national defence' was introduced to the Building Act.[191] As increasingly large and impactful projects may be realised through permit procedures alone, the capacity of land-use plans to address cumulative effects and broader landscape-scale trade-offs is further diminished.

[181] Heinilä, 'Ylikunnallinen maankäytön suunnittelu' (n 177) 291–302.
[182] Ministry of the Environment (2025) A draft for a government bill for a new land-use act, 4.
[183] Ibid., 36–7.
[184] Ibid., 37, 172.
[185] The Land-use Act, s. 25; HE 101/1998 vp, 70.
[186] Heinilä, 'Ylikunnallinen maankäytön suunnittelu' (n 177) 267–69.
[187] Juha Riihiranta, et al., 'Tulevaisuuden maakuntakaava – maakuntakaavoituksen nykytila ja kehittämistarpeita' (Ympäristöministeriön julkaisuja 2023:46, 2023) 16–7.
[188] OECD (n 4) 76, 116–17.
[189] BA s. 43 a.
[190] Heinilä, 'Suunnittelujärjestelmän sielunmessu?' (n 179) 776–81.
[191] See HE 3/2026 vp.

5.2 Outline of the Finnish planning system and its legal effects

In Finland, land-use planning is carried out through a statutory multi-level planning system set out in the Land Use Act (132/1999, LUA). The title of the former Land Use and Building Act of 1999 was amended to Land Use Act when the new Building Act (751/2023) entered into force in 2025.

Decision-making in planning is simultaneously political and legal. The Land Use Act defines – alongside procedural requirements for participation – the substantive boundaries of planning through flexible norms identifying the public and private interests that must be observed, weighed and balanced when drafting land-use plans. These norms leave considerable discretion to political decision-makers – who approve both regional and municipal plans – within the statutory framework. It has been argued, however, that the system is not well equipped to promote sustainability objectives, and that such goals may function more as an overlay on a system fundamentally oriented towards development and growth.[192] In practice, economic growth considerations have predominated,[193] in both municipal and regional planning, as regional development is a main tasks of the regional councils.[194] The OECD has urged Finland to place biodiversity and climate on a more equal footing with economic development.[195] Nevertheless, a comprehensive planning framework with legally binding effects has been recognised as possessing significant, albeit partly untapped, potential for managing conflicting land uses in the context of environmental multicrisis.[196]

One of the central objectives of the planning and building legislation reform at the turn of the century was to strengthen participation and transparency in planning procedures.[197] Since then, however, legislative developments have increasingly prioritised administrative efficiency and predictability for development projects, at the expense of participation and accountability.[198] The recalibration of the state's role and the narrowing of supra-municipal planning instruments form part of this broader trend.[199]

All statutory planning instruments within the Finnish system have legal effects, although these effects differ in scope and intensity. According to the planning hierarchy, more general plans guide the preparation of more detailed plans.[200] The more general instruments therefore establish approximate and flexible boundaries within which more detailed planning must operate. Their requirements may typically be realised in multiple ways in plans lower in the hierarchy. It is considered an important element of planning democracy that detailed and local plans retain sufficient discretion to determine how broader objectives are implemented and to address issues best resolved at that scale.

In urban areas, land-use changes must, as a rule, be based on a detailed plan. In more rural

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192 Aleksi Heinilä, et al., 'Kasvua vai kestävyyttä? Alueidenkäytön suunnittelun ja liikennesuunnittelun normit ja käytännöt kaupunkien ilmastokestävyyden näkökulmasta' (2024), Oikeustiede – Jurisprudentia LVII, 89–91.

193 E.g. Jonne Hytönen and Toni Ahlqvist, 'Emerging vacuums of strategic planning: an exploration of reforms in Finnish spatial planning' (2019) European Planning Studies 27(7) 1350, 1351. Hytönen and Ahlqvist argue that Finnish planning has been moving in a reactive and market-driven direction, e.g. through the process of rescaling in the spatial planning regime.

194 E.g. Heinilä, et al., 'Kasvua vai kestävyyttä?' (n 192) 35–6.

195 OECD (n 4) 15.

196 Aleksi Heinilä, 'Maankäytön suunnittelu ja turvallisuus' (2019), Oikeustiede – Jurisprudentia LII 5, 91–5.

197 HE 101/1998 vp, 1, 38–9.

198 Heinilä, 'Ympäristöoikeus, osallistuminen ja demokratia' (n 174) 108–9.

199 E.g. Heinilä, 'Ylikunnallinen maankäytön suunnittelu' (n 177) 279–81, 306–8.

200 LUA s. 24, 32, 42.

contexts, a detailed plan may be required for certain industrial or large-scale projects, whereas in other cases a legally binding general plan may suffice. General plans are not mandatory in all municipalities; they are to be prepared according to identified needs and need not cover the entire municipal territory.

At the national level, the national land use guidelines aim to concretise the material requirements of the Act and to coordinate supranational and national interests within planning.[201] This national-level instrument was introduced into legislation for the first time in the comprehensive reform culminating in the Land-use and Building Act (132/1999) introduced, for the first time, a national-level instrument: the national land-use guidelines. One rationale for introducing this instrument was that the state simultaneously relaxed its ex post control over municipal and regional planning. Prior to the reform, most municipal and regional plans required ratification by state authorities before entering into force. The abandonment of this ratification requirement underscored the need for strengthened ex ante guidance concerning national public interests.[202]

Formally, the guidelines steer the preparation of all land-use plans. In practice, however, their primary influence is exerted at the regional planning level.[203] Regional plans set out general principles of regional land use and community structure and designate areas considered necessary for regional development.[204]

As noted earlier, the current guidelines (2017) are deliberately more general than their predecessors, reflecting a political choice to reduce their steering capacity and increase local discretion.[205] They have been criticised for functioning less as coordinating instruments and more as an aggregation of objectives from different government sectors, leaving regional and municipal planners to interpret and reconcile often vague and conflicting aims.[206] This weakens their horizontal coordinating capacity and, consequently, their practical efficacy.[207] Earlier national guidelines were more detailed, and could even refer to specific infrastructure projects.

At the same time, regional planners regard the reconciliation of national objectives with regional land-use interests as a core task of regional planning.[208] The LUA also contains a mechanism through which the Ministry of the Environment may oblige a Regional Council or municipality to implement a national guideline through planning, provided that the matter is of overriding public interest.[209] These provisions have not yet been used and have been considered somewhat insufficient in detail.[210]

The effectiveness of the national land use guidelines is further constrained by the absence of systematic cross-references in sectoral legislation. In general, sector authorities are not required to consider the guidelines when applying other environmental statutes; explicit links exist primarily within transport legislation.[211]

Municipalities hold the most significant planning powers in the Finnish system, reflecting the constitutional guarantee of municipal self-government. Municipal planning is con-

[201] LUA ch. 3.
[202] Heinilä and Partinen, *Valtakunnalliset* (n 176) 91.
[203] LUA ch. 4.
[204] Regional planning is discussed later in more detail.
[205] Heinilä and Partinen, *Valtakunnalliset* (n 176) 90.
[206] Ibid., 115, 138.
[207] Aleksi Heinilä, et al., 'Kasvua vai kestävyyttä?' (n 192) 14, 45–6.
[208] Riihiranta, et al., 'Tulevaisuuden maakuntakaava' (n 187) 16.
[209] LUA s. 178.
[210] Heinilä and Partinen, *Valtakunnalliset* (n 176) 57–60, 127.
[211] Supreme Administrative Court's decision KHO 2010:32; Heinilä, et al., 'Kasvua vai kestävyyttä?' (n 192) e.g. 59.

ducted through general plans and detailed plans. General plans are highly versatile instruments. They may directly regulate specific forms of development – such as holiday housing in shoreline areas[212] or wind power projects[213] – or function as broader, strategic planning instruments. Joint general plans between municipalities are also possible, although this option has been used only rarely.[214]

Traditionally, general plans provide the framework for detailed plans in urban areas. Detailed plans are the most legally strict planning instruments and regulate land use with considerable precision, particularly in built-up areas. As a rule, there is both a right and an obligation to build in accordance with an effective detailed plan, although mechanisms for deviation exist.

Municipal plans are approved by municipal councils consisting of elected representatives. Regional plans prepared by regional councils are approved by the regional assembly, the highest decision-making body of the regional council.[215] Regional councils are formally joint municipal authorities that municipalities have a legal obligation to belong to and in practice, regional assemblies consist mainly of representatives from municipal councils.

Although municipalities enjoy a planning monopoly within their territory, planning is also a statutory task and a duty. The LUA imposes obligations to prepare and update plans where necessary,[216] and provides a mechanism through which the Ministry of the Environment may order a municipality or regional council to fulfil its planning obligations.[217] However, the Ministry cannot dictate the substantive content of a plan; it may only require that a plan be prepared or amended. The final determination of content remains within the planning authority's competence.

The existence of a planning obligation and the statutory requirements governing plan content may, however, significantly constrain possible outcomes.[218] For example, where conservation of cultural heritage requires planning measures, a legally compliant plan would typically need to include provisions safeguarding those values.[219]

More generally, legal requirements for plans are important in safeguarding those interests that might not otherwise be sufficiently considered in (political) planning decisions. Also, where certain interests are explicitly protected in statutory provisions and reinforced by rights of appeal, participation, too, may acquire greater practical significance.[220] As noted above, there is a certain growth-orientation in planning, in both municipal and regional, and thus interests and rights impeding growth are in need of legal protection. However, the trends in Finnish legislation markedly undermine the protection of such rights and interests.

5.3 Spatial plans and mineral development in Finland

The mechanism allowing the Ministry of the Environment to order a planning authority to fulfil its planning obligation,[221] has been applied with considerable restraint – only on a handful of occasions – even though a similar mechanism already existed under the Building Act of 1958

212 LUA ch. 10.
213 LUA ch. 10 a.
214 LUA ch. 6.
215 LUA s. 31.
216 LUA s. 27, 36, 51.
217 LUA s. 177.
218 Aleksi Heinilä, 'Suomi- rata ja suunnittelujärjestelmä' (2022) 1 Ympäristöjuridiikka, 32–6.
219 Supreme Administrative Court's decision KHO 2006:97.
220 Heinilä, et al., 'Yhteistoiminnallisuus ympäristöoikeudellisissa suunnittelumenettelyissä' (2021) Ympäristöpolitiikan ja -oikeuden vuosikirja XIV 49, 105.
221 LUA s. 177.

(370/1958).[222] It is nevertheless conceivable that large-scale 'green transition' projects of national importance – such as strategic projects under the Critical Raw Materials Act – may test this mechanism, and possibly the implementation of national land use guidelines, in the future. This may be particularly relevant where projects are nationally significant but locally contested due to environmental or social impacts.

Major renewable energy and industrial projects, as well as mining projects without exception, must be facilitated through land-use planning. Following a substantial reform of the Mining Act in 2023, mining operations require a legally binding municipal plan – either a detailed plan or a legally binding general plan under the LUA. These provisions require that the location of the mining area and its auxiliary areas, and their relationship to other land uses, are established in the plan.[223]

This requirement effectively grants municipalities a strong position, often described as a municipal veto over mining projects. Although there is no formal prohibition against invoking the above-mentioned ordering mechanisms in such contexts, the threshold for doing so is likely high. The reform of the Mining Act was explicitly premised on the principle that municipalities should retain the authority to decide whether mining is acceptable within their territory.[224] Of course, the municipal political stance on a certain mining project may be the opposite to that of the Sámi community, for example.

The municipal veto is perhaps particularly noteworthy from the perspective of EU law. Because measures concerning town and country planning require unanimity under Article 192 TFEU, there is no EU legislation directly regulating national land-use planning, even though EU environmental and energy legislation significantly influences planning outcomes.[225] EU legislation may therefore encourage or indirectly shape land-use planning but cannot harmonise it. Moreover, planning as such falls outside the scope of the time limits for permitting procedures introduced in instruments such as the CRMA and RED III.[226] This alters the dynamics between EU, national, and local levels in a manner that reinforces municipal influence in the Finnish context.

From the perspective of this article, a key issue concerns the legal effects of land-use plans outside the planning system itself. In addition to the Mining Act, a central statute is the Environmental Protection Act (527/2014, EPA), which regulates industrial activities liable to cause environmental pollution, including mining and wind power projects. Section 12 EPA provides that activities requiring an environmental permit, notification or registration may not be located in contravention of a detailed plan. Furthermore, in areas covered by a regional land-use plan or a legally binding general plan, it must be ensured that the siting of the activity does not impede the intended use of the area as indicated in the plan.

This illustrates a typical linkage between planning and sector legislation in Finland: compliance with detailed plans tends to be strict, whereas conformity with more general plans involves greater discretion. As noted above, there is no statutory link between the EPA and the national land use guidelines.[227]

The requirement introduced in 2023 that mining operations must be based on a munici-

[222] Aleksi Heinilä, 'Suomi- rata ja suunnittelujärjestelmä' (2022) 1 Ympäristöjuridiikka, 34.
[223] FMA s. 47.
[224] HE 126/2022 vp, 103.
[225] See Art. 192 of the Treaty on the functioning of the European Union.
[226] E.g. CRMA Art. 13, RED III Art. 15 and 15b.
[227] See the Supreme Administrative Court's decisions KHO 2025:24 and 2010:32.

pal plan constitutes perhaps the most significant substantive change to the Mining Act. It effectively incorporates the material requirements of the LUA into the legal framework governing mining projects. For example, in the Supreme Administrative Court decision KHO 2025:30 concerning the Hannukainen mining project in Kolari, the Court held that the general plan did not sufficiently ensure a safe and healthy living environment in light of the anticipated impacts on nearby residential areas. The impact assessments were considered inadequate to demonstrate compliance with the material requirements applicable to the plan.

This case illustrates that, although municipalities enjoy political discretion in planning, such discretion is bounded by statutory requirements whose fulfilment must be demonstrated through impact assessments. At the same time, these requirements do not operate solely as constraints; in some cases they may also support the approval of mining projects.

Land-use planning also plays a role at earlier stages of mineral development. Exploration permits and gold panning permits under the Mining Act may not be granted if the authorised activities would impede the implementation of a plan. The same applies where a municipality opposes the granting of a permit for a 'weighty reason' related to planning or land use, unless a significant public interest requires otherwise.[228]

Taken together, the Finnish system formally embeds mineral development within the planning framework. More generally, the practical steering capacity of planning instruments depends on their legal effects, the interaction with sectoral legislation, and the balance struck between municipal autonomy and broader public interests.

5.4 The 'strategic' potential of Finnish regional planning

The absence of clear coordination and prioritisation between statutory planning objectives and the national land use guidelines creates a framework characterised by flexibility. Such flexibility may facilitate context-sensitive decision-making. At the same time, it weakens the system's capacity to steer development in accordance with stated policy goals or to provide structured guidance in situations of conflict between competing land uses. Where decision-making tends to favour economic interests the legislative framework does little to counterbalance that tendency, and Finnish planning law has been portrayed as fundamentally oriented towards development and growth, with environmental mitigation and conservation functioning as secondary considerations.[229]

In this setting, outcomes depend heavily on planning practice. From a procedural perspective, this may enhance the strategic character of planning. Yet planning instruments still define legally binding boundaries. Even where Sámi livelihoods are not expressly mentioned in the Land Use Act (132/1999, LUA) – although, inter alia, general livelihood conditions and constitutional and human rights inform interpretation – the national land use guidelines state that areas significant for Sámi culture and livelihoods must be safeguarded. At the same time, they require preparation for renewable energy production and related infrastructure.[230]

Despite tensions between these objectives, planning law gives legal relevance to the values at stake and requires that they be considered when land-use choices are made. These interests are often further specified in concrete plans.

[228] FMA s. 46 para. 1.

[229] Heinilä, et al., 'Kasvua vai kestävyyttä?' (n 192) 89–91.

[230] National land use guidelines, ss. 3.4 and 3.5.

This is illustrated by the Supreme Administrative Court decision KHO 2022:12 concerning a general plan for a wind farm within the reindeer herding area. Although the site was identified in the regional plan as suitable for wind power of regional significance, the plan also required that the conditions for reindeer herding and other natural livelihoods be secured. The Court held that the impact assessments demonstrated significant adverse effects on reindeer herding. Although the wind farm's physical footprint was limited, the affected areas were central to grazing patterns and the annual cycle of the reindeer, and mitigation measures were found insufficient. The general plan therefore failed to comply with the regional plan's requirements and did not meet the statutory obligation under the LUA to take the regional plan adequately into account.

The case demonstrates that regional planning can operate as a substantive constraint on municipal planning where material requirements are not satisfied.

Despite the fragmented nature of cross-references in sectoral legislation, the Finnish planning system remains, in principle, comprehensive in relation to large-scale 'green transition' projects in Northern Finland and Sámi territories. Major wind farms require a legally binding plan – typically a wind power-specific general plan – and are often recognised in regional plans where they reach regional significance.[231] Similarly, new mining operations must be designated in a municipal plan, and known mineral deposits are generally identified in regional plans.

The central challenge, however, concerns cumulative effects and trade-offs at a broader spatial scale. Regional plans, which in practice cover almost the entire territory of Finland,[232] are the only location-specific planning instruments operating above the municipal level. As legally binding instruments guiding more detailed planning, they are in principle capable of identifying and mitigating cumulative impacts.[233] At the same time, their large territorial scope means that substantial areas remain without specific designations ('white areas'). Municipalities retain competence over projects falling below the scale of regional planning, which may collectively contribute to cumulative effects beyond the effective reach of regional plans.

The scale of regional plans both enables and constrains their steering capacity. The proposed narrowing of their scope would accentuate this limitation and may create a regulatory gap between municipal and regional levels for issues that are supra-municipal but not considered of 'regional significance'. Reindeer herding provides a clear example. According to an assessment of regional planning practice in northern Finland, the boundaries of reindeer herding cooperatives do not coincide with municipal borders. Consequently, wind power planning within the reindeer herding area is inherently a supra-municipal issue. Because planning legislation prohibits unreasonable harm, wind farms approved in one municipality may restrict planning options in neighbouring municipalities.[234]

Thus, even though northern municipalities are geographically extensive, there remains a structural need for effective supra-municipal planning. Partial regional plans have also proven insufficient in this respect.[235]

[231] E.g. the Supreme Administrative Court's decision KHO 2013:183.

[232] Riihiranta, et al., 'Tulevaisuuden maakuntakaava' (n 187) 18.

[233] E.g. KHO 2016:14, concerning the cumulative effects of wind farms in regional planning, to migratory birds in particular.

[234] Riihiranta, et al., 'Tulevaisuuden maakuntakaava' (n 187) 28.

[235] Ibid.

The need to make meaningful and legally effective land-use choices in the face of environmental multi-crises is evident. Such choices require planning instruments with binding effects. At the same time, strategic spatial planning is often described as dynamic, selective and open-ended, in contrast to statutory planning, which is comprehensive and legally determinate.[236] These perspectives need not be mutually exclusive. In the Finnish context, strategic steering through the planning hierarchy has been described as a combination of 'short-term positive direction' at the detailed level and 'long-term limitation of freedom' at more general levels, particularly regional planning.[237]

Regional planning – and the institutional framework underpinning it – appears well suited to such strategic use. Planning practice has, to an extent, evolved in this direction. Whereas regional plans were previously relatively detailed, they are increasingly more general and flexible in nature. For example, area reservations have been, to a degree, substituted by more general planning principles.[238]

Nevertheless, a balance must be struck between openness and legal certainty. Plans that are excessively indeterminate risk losing practical effect, particularly in highly conflictual contexts characterised by distrust and competing land-use claims. While planning is iterative and adaptable – allowing new knowledge to be incorporated – it must also produce sufficiently predictable outcomes. The institutional framework, including constitutional principles and statutory safeguards, provides continuity across planning cycles.[239]

In sum, Finnish regional planning exhibits both vertical and horizontal limitations: its capacity is shaped by its scale and by the varying legal effects of plans across sectoral legislation. Despite these constraints, regional planning remains a central instrument for addressing cumulative land-use effects associated with the green transition – combined with other land uses. Municipal planning alone is unlikely to be sufficient in this regard.

The steering and coordinating capacity of regional plans ultimately depends on their legal effects. Reducing those effects – a recurring theme in recent reform proposals – may increase flexibility but simultaneously weakens the capacity of regional planning to fulfil its coordinating function. Planning instruments lacking legal force risk becoming symbolic rather than operative, particularly where stakeholders expect tangible and enforceable outcomes.[240] The current legislative trajectory in Finland suggests a drift in that direction.

6. Comparative analysis and results

This article has, inter alia, examined the function and legal effects of strategic spatial planning instruments in Sweden and Finland, chiefly the regional plans, and to what extent they have the capacity to steer competing land-use decisions at a landscape scale beyond the single municipality. Particular attention is placed on mineral extraction and Sámi reindeer herding – an intractable land-use conflict characterised by cumulative land-use effects, structural asymmetries and competing claims.

[236] Louis Albrechts, 'Strategic (spatial) planning reexamined' (2004) 31(5) Environment and Planning B: Planning and Design 743, 746–47; Albrechts and Balducci (n 26) 20.
[237] Mäntysalo, et al., 'The paradox' (n 30) 180.
[238] Riihiranta, et al., 'Tulevaisuuden maakuntakaava' (n 187) 60–1, 55, 83.
[239] Atul Pokharel, et al., 'On Theories and Practices of Collective Action and Sustained Cooperation' (2024) 25(3) Planning Theory & Practice 409, 419–24.
[240] Mattila and Heinilä, 'Soft spaces' (n 32) 7.

Although the two systems show similarities, there are significant differences related to the binding effects of plans across planning levels and the role that regional planning has within the planning system, where Finland has a long tradition of using legally binding regional plans.[241] These differences are highly relevant in the context of the 'green transition', where EU law increasingly requires Member States to prioritise renewable energy and critical raw materials, while Indigenous rights and cumulative land-use effects demand long-term, cross-sectoral coordination.

Below follows an in-depth comparative analysis of the functions of spatial planning provisions described in the methods section.

6.1 Current trends comparatively

Sweden and Finland are currently responding quite differently to similar pressures arising from climate change, the green industrial transition, intensified land-use competition, and growing demands for energy and security infrastructure. In Sweden, ongoing reforms point towards stronger national coordination, enhanced cross-sectoral integration, and renewed interest in strategic spatial planning beyond the municipal level. Recent inquiries describe the planning system as fragmented and insufficiently coordinated, particularly regarding cumulative land-use conflicts. Proposed reforms therefore emphasise mandatory regional planning, stronger vertical coordination, and improved capacity to manage competing land uses, including those affecting Sámi reindeer herding.

Finland, by contrast, has moved towards deregulation and reduced state oversight. Recent reforms have aimed to streamline planning and accelerate development by weakening the steering capacity of national and regional planning instruments, limiting legality control, and expanding permit-based procedures outside the planning framework. Regional planning has gradually lost some of its coordinating role, while new legislation increasingly allows large-scale industrial projects to proceed without plans. This reduces the system's ability to address cumulative land-use impacts and broader landscape-scale conflicts.

Despite these differences, both countries face similar tensions between 'green transition' objectives and competing land uses. In both systems, Sámi reindeer herding risks becoming structurally disadvantaged when planning prioritises industrial development and growth, infrastructure, and resource extraction. The key difference is therefore institutional: Sweden increasingly views stronger strategic planning as necessary to manage land-use conflicts, whereas Finland appears to regard extensive planning coordination itself as an obstacle to efficient development.

6.2 Functions and legal effects of regional plans

Sweden has historically lacked a strong tradition of regional spatial planning outside urban regions. Regional plans have primarily been associated with urban growth, housing supply and transport infrastructure, and have no legal effect. Outside Stockholm, Skåne and, more recently, Halland, regional spatial planning has been optional and rarely used. The system has instead relied on municipal comprehensive planning combined with the state's designation

[241] Regional planning in Finland was introduced in the Building Act of 1958, and the provisions on regional planning were amended in 1967. Regional planning was comparatively robust and at times criticised for encroaching upon matters within the municipal planning monopoly. In the reform at the turn of the century, one objective was therefore to clarify the role of regional planning within the overall hierarchy. HE 101/1998 vp, 53.

of areas of national interest under the Environmental Code.

Finland, by contrast, developed a nationwide system of regional (landscape) plans already under the old Building Act. These plans have covered essentially the entire territory and have legal effects, guiding municipal planning and, to some extent, permitting under sector legislation. Regional planning has therefore functioned as a structurally embedded supra-municipal layer, despite its shortcomings, including in sparsely populated northern areas.

A key structural difference between Swedish and Finnish planning legislation lies in the legal effects of plans. In Sweden, only detailed development plans and area regulations are legally binding. Comprehensive plans and regional plans are formally guiding instruments. The linkage between planning levels is therefore legally weak. In mining cases, the Mining Inspectorate must ensure that a mining permit does not 'counteract' a legally binding plan, but statements in a comprehensive plan carry no direct legal force.

In Finland, all statutory plans have legal effects within the planning hierarchy. Regional plans guide municipal general and detailed plans, and sector legislation. The Environmental Protection Act and the Mining Act, for instance, contain explicit provisions requiring compliance or consideration of certain plans. Since 2023, a mining permit requires that the mining area is designated in a legally binding municipal plan. Municipalities thus have, in practice, a strong veto position.

However, the Finnish system's steering capacity is fragmented horizontally: the effect of plans depends on explicit links in sector legislation, and these links vary. The horizontal coordinating capacity of the national land use guidelines is lacking. Moreover, recent reforms propose to narrow the scope of regional planning and thereby risks weakening the capacity of the planning system to address cumulative land-use effects.

6.3 The role of the state and competent authority for regional planning

Both Sweden and Finland are characterised by strong municipal planning monopolies. Yet the role of the state differs. In Sweden, the state's influence is primarily exercised through the system of areas of national interest and through sectoral legislation. The balancing between competing national interests – for example mineral extraction and reindeer herding – ultimately occurs either within municipal planning or in permitting procedures, including decisions by the government under the Minerals Act. This has led to politicised trade-offs, where socio-economic interests such as employment and industrial development have frequently been prioritised.

In Finland, the state has gradually retreated from its control of planning. Ratification of regional plans by the ministry has been abolished, state supervisory rights of appeal have been reduced, and national land-use guidelines have been made more general and less prescriptive. This reduces vertical coordination and weakens the capacity to ensure that national and supranational objectives are consistently implemented. From a comparative perspective, Sweden struggles with insufficient supra-municipal binding force, whereas Finland risks losing the coordinating strength of an otherwise coherent planning hierarchy.

The institutional design of Swedish regional planning suggests that strategic spatial priorities are closely shaped by political growth agendas. Since regional assemblies' exercise strong and centralised control over planning priorities, budgets, and planning instruments, regional planning becomes closely aligned with prevailing political objectives concerning economic

growth, infrastructure expansion, industrialisation, and the 'green transition'. The Regional Development Strategies (RUS) reinforce this orientation, as their statutory purpose is to promote regional growth and development. Although formally non-binding, the RUS nevertheless acquires practical influence through the obligation of state agencies to consider it in certain decision-making processes and through its links to regional transport infrastructure planning.

This growth-oriented planning logic may have important implications for competing land-use interests, including Sámi reindeer herding. Regional development strategies are particularly focused on infrastructure investments, industrial establishment, energy production, and increased regional competitiveness – all sectors that often generate cumulative pressures on grazing lands, migration routes, and ecologically sensitive areas. Since the RUS lacks binding requirements to prioritise or systematically integrate reindeer husbandry interests, there is a risk that such interests will become subordinated to broader economic and transition-oriented objectives. In practice, regional planning may therefore contribute to legitimising continued land-use transformation within Sámi territories while lacking sufficiently robust mechanisms for addressing cumulative impacts at the landscape scale.

The situation is fairly similar in Finland. Political objectives and development strategies pursue economic growth, new infrastructure, and industrialisation (including 'green transition' projects), and in this context, conflicting rights and interests, such as Indigenous rights and environmental interests, are often considered only to the extent required by law. Thus, legal requirements and institutions that ensure compliance with those requirements (such as rights of appeal, state supervision) are key to ensuring that such rights and interests are given sufficient weight in political decision-making, and that plans indeed genuinely balance competing interests. The streamlining of planning through deregulation currently taking place taking in Finland therefore poses risks to the very functions of strategic planning.

6.4 Spatial plans and mineral development

In both countries, the interaction between planning and mining law is crucial. In Sweden, mining permits are granted under the Minerals Act, with trade-offs framed through the Environmental Code's provisions on areas of national interest. Municipal planning enters late and is primarily concerned with detailed development plans for built structures. There is no statutory requirement that mining be grounded in a spatial plan designating the mining area. This limits the capacity of planning to shape the strategic choice of whether and where mining should occur.

In Finland, mining operations must be based on a legally binding municipal plan. Regional plans also typically designate known mineral deposits and set conditions for reconciling mining with other interests, including reindeer herding. This creates a more explicit integration between planning and permitting. At the same time, if regional planning is weakened and permits substituting planning become more common, the integrative function of planning may erode.

Of particular importance is the clearer connection in the Finnish legal system between substantive provisions in sector legislation and spatial planning requirements. The Finnish Mining Act safeguards Sámi culture and traditional livelihoods within the Sámi Homeland, through mandatory cumulative impact assessments and a prohibition on granting mining permits that would substantially undermine traditional Sámi

livelihoods. The Swedish Minerals Act contains no explicit reference to Sámi rights.

This stronger integration between mining law and land-use considerations also reflects the more developed role of spatial planning in the Finnish system. In both systems, however, cumulative land-use effects across municipal borders – particularly in reindeer herding areas – are difficult to address through purely municipal planning. Here, regional or landscape-scale instruments are essential for foreseeability and long-term coordination.

6.5 Planning-related requirements under CRMA and RED III

EU law, notably the CRMA and RED III, introduces a new supranational layer that reshapes national land-use governance. The CRMA designates strategic raw materials and strategic projects, introduces accelerated permitting deadlines and requires member states to consider critical raw material projects in spatial planning at all levels. RED III mandates renewables acceleration areas (RAAs), short permitting timelines and a presumption of overriding public interest.

These instruments embed spatial differentiation and prioritisation into EU energy and raw material governance. They effectively encourage member states to proactively allocate land for mining and renewable energy. While spatial planning formally remains a national competence, the discretion of member states is constrained by binding targets, time limits and expectations of acceleration – pointing to a potentially shrinking planning space for Sweden and Finland in these subjects.

For Sweden and Finland, this means that planning systems need both accommodate EU-driven prioritisation and ensure compliance with environmental law and human rights obligations. There is still room for national design of planning instruments, but not for inaction. We argue that strategic spatial planning becomes necessary to identify suitable areas, manage cumulative effects and reduce conflict – otherwise prioritisation will occur ad hoc in permitting procedures.

On the other hand, these instruments add another layer that, to a degree, prioritises green industrial projects over other environmental considerations (such as biodiversity) and Indigenous rights. They may thus in effect shrink the significance of these concerns in planning decisions.

A significant gap in both CRMA and RED III is indeed the limited recognition of Indigenous peoples within the EU. The CRMA's reference to Indigenous rights is vague and relies largely on national law within the relevant EU member states (i.e. Sweden and Finland). If national frameworks provide weak protection in this regard, the EU designation of strategic projects risks reinforcing asymmetries. Strengthening Sámi influence in EU-level processes – including clearer criteria for assessing Indigenous rights when designating strategic projects – would therefore enhance coherence between EU climate policy and human rights obligations.

6.6 The 'strategic' potential of existing regional planning

Swedish regional planning has untapped strategic potential because it operates at a supra-municipal scale and may address cumulative land-use conflicts that individual municipalities struggle to manage, particularly in northern Sweden where industrialisation and Sámi reindeer herding intersect across large territories. However, this potential remains weakly developed due to the limited use of regional plans, their non-binding character, and the strong municipal planning monopoly. In practice, regional growth strategies (RUS) have become the domi-

nant regional instruments, reinforcing a largely growth-oriented planning logic.

Finnish regional planning retains stronger coordinating capacity since regional plans are legally binding and cover almost the entire territory of Finland. As the only planning instrument above the municipal level, they are important for addressing cumulative land-use effects and supra-municipal conflicts, including those affecting Sámi reindeer herding. Yet ongoing reforms seek to reduce their legal effects and coordinating role, potentially weakening the very mechanisms needed to manage landscape-scale conflicts linked to the 'green transition'.

7. Conclusions and discussion

This article has shown that Sweden and Finland currently approach strategic spatial planning and land-use coordination in fundamentally different ways, despite facing similar pressures linked to the industrial transition, mineral extraction, energy development, and Indigenous land use. Finland retains a more integrated and legally structured planning hierarchy, where regional plans and municipal plans play an important role in coordinating mining activities and safeguarding competing interests, including Sámi reindeer herding. Sweden, by contrast, relies more heavily on sectoral legislation and rather blunt instruments for balancing of public interests within permitting procedures, while regional planning remains comparatively weak and non-binding.

The comparison further demonstrates that cumulative land-use effects and landscape-scale conflicts are difficult to address through purely municipal planning. This is particularly evident in Sámi reindeer herding areas, where migration routes, grazing lands, and industrial pressures extend across administrative borders and sectors. In both countries, regional or supra-municipal planning therefore appears necessary to provide long-term coordination, foreseeability, and a more coherent framework for balancing competing land uses. At the same time, current developments move in opposite directions: Sweden is considering stronger strategic and regional planning mechanisms, whereas Finland is gradually weakening the coordinating role of regional plans.

All in all, the article argues that recent EU legislation, particularly the CRMA and RED III, increases the importance of strategic spatial planning. Accelerated permitting schemes and the prioritisation of renewable energy and critical raw material projects risk shifting land-use conflicts into fragmented permitting processes unless broader spatial planning frameworks are strengthened. Without effective landscape-scale coordination and stronger integration of Indigenous rights and cumulative impact assessments, the industrial transition risks reinforcing existing asymmetries in land-use governance, particularly within Sámi territories.

From a *de lege ferenda* perspective, Swedish planning legislation would benefit from a planning system more similar to that of Finland, one that i) creates greater oversight of land-use impacts and stronger coordination between competing land-use interests, Sámi rights, and Sámi culture, ii) incorporates cumulative impact assessments to support decisions on trade-offs between, inter alia, mining development and reindeer herding at a landscape scale, and iii) strengthens supra-municipal and regional planning capacity in northern Sweden in order to manage long-term land-use pressures linked to the 'green transition' and large-scale industrialisation. Such a system could also improve coordination between EU-level instruments, including strategic projects under CRMA and renewables acceleration areas (RAAs) under RED III, and national planning processes. Which authority would be best suited to assume such responsibil-

ity requires further investigation. However, given the strong centralised political coordination within the regional assemblies and their statutory focus on regional growth and development, they appear less suitable for this role.

As formulated by Healey, the planning enterprise has always been future-oriented.[242] A well-functioning strategic spatial planning system on a landscape scale may offer significant benefits for managing intractable land-use conflicts, such as with respect to Sámi rights and livelihoods, particularly by enabling overview and strategic prioritization between competing land-uses. At the same time, it supports the so-called 'green transition' by aligning renewable energy and climate adaptation strategies with broader territorial visions, thereby reducing conflicts and enhancing social legitimacy. In this way, strategic spatial planning can embed equity, sustainability and foresight in land-use governance.

[242] Patsy Healey, 'The New Institutionalism and the Transformative Goals of Planning' in Niraj Virma (ed.) *Institutions and planning* (Elsevier 2007) 61.

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The Interface Between Waste and Non-waste: Legal Preconditions for Reutilization of Sewage Sludge

*Oskar Johansson**

Abstract

Circular economy poses new challenges for waste management. Within the European Union, the regulatory framework for waste has the purpose of environmental protection in a broad sense. It can, however, be argued that the regulatory framework poses a barrier for circular economy as it favors environmental protection in the short-term, as strict requirements typically constitute a regulatory burden. In this paper, the regulatory requirements for waste and non-waste are highlighted through legal analysis. Co-incineration of sewage sludge and straw fuels serves as an example to illustrate differences. As a substance or object is either regarded as a waste or a non-waste, and due to the lack of clear cessation of waste status prior to incineration, unnecessary barriers for otherwise environmentally beneficial operations are created. This can be argued to constitute a hindrance to proper utilization of resources.

Keywords: End-of-waste; By-products; Circular Economy; EU Law; Environmental Law

1. Introduction

Demand for virgin materials such as food, feed, fibre, and aggregate is estimated to increase by 70% by 2050.[1] Almost all virgin materials show similar trends of an increase in demand, and if the world reaches the estimated global population of 9.8 billion by 2050, it would require almost three planets worth of natural resources to sustain the population.[2] Yet it is becoming increasingly clear that both finite and renewable resources are becoming scarce due to unsustainable rates of extraction.[3] To alleviate these issues, circular economy (CE) has been proposed as a sustainable economic model for the future. Initially, CE was, in the European Union's (EU) seventh Environmental Action Programme, described as an economic system where natural resources are managed sustainably and waste is recovered as a resource.[4] Today, CE is identified as a priority objective for the EU in the latest Environmental Action Programme where it is considered imperative to achieve an economy where growth is regenerative.[5]

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[1] M Dri, P Canfora, I S Antonopoulos and P Gaudillat, *Best Environmental Management Practice for the Waste Management Sector* (JRC Science for Policy Report, EUR 29136 EN, Publications Office of the European Union 2018) 26, doi:10.2760/50247.

[2] United Nations, 'Sustainable Development Goals: Goal 12 – Ensure Sustainable Consumption and Production Patterns' (UN, no date) <https://www.un.org/sustainabledevelopment/sustainable-consumption-production/>, accessed 17 May 2026.

[3] Dri et al., *supra* note 1, 28.

[4] Decision 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', [2013] OJ L 354/171.

[5] Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030 [2022] OJ L 114/22 article 2(c).

One integral part of a regenerative economy is that waste is valued and utilized as a resource. However, waste is routinely, and often correctly, associated with negative connotations such as hazards, odors, pests, mess, disgust, etc.[6] A consequence of this is that the concept of waste itself carries a notion of increased risk regardless of the physical and chemical properties of the waste, which affects the possibility to valorize it as a resource. This is particularly true for certain waste streams, such as sewage sludge. Sewage sludge is a residual product from waste water treatment that contains large amounts of biodegradable material and plant nutrients, such as phosphorus and nitrogen, as well as pollutants in the form of heavy metals and pathogens.[7] It has been shown that treated sewage sludge can be used as an effective fertilizer with positive impacts on crop-yields and little to no biomagnification of pollutants.[8] At the same time, research shows that use of treated sewage sludge for agricultural purposes is routinely associated with great risks, while other, arguably, equally harmful practices such as spraying crops with pesticides are more commonly accepted.[9] The presence of pollutants in untreated sludge does, nevertheless, serve as a legitimate concern when it is used in agriculture. An alternative venue for the recovery of valuable material from sewage sludge is thermal conversion, where the sewage sludge is incinerated, and valuables are recovered from the ash. Notably, incineration enables both the destruction of pollutants and the concentration of valuables in the ash. Moreover, incineration of sewage sludge produces ash that is rich in phosphorous. Yet, there are drawbacks associated with incineration, including expensive infrastructure, transport, and negative public opinion.[10] For the purposes of this study, one potential challenge connected to utilization of waste and, by extension, both agricultural use and incineration of sewage sludge, is the regulatory framework.[11] One frequently mentioned issue concerning the management of waste is the different requirements for utilization of waste and non-waste, or in other words, the coherency of the regulatory framework.[12]

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[6] A Liu, F-R Wenlin, Y, Lin and J-Y Wang, 'A review of municipal solid waste environmental standards with a focus on incinerator residues' (2015) 4(2) *International Journal of Sustainable Built Environment* 165, 167.

[7] K Fijalkowski, A Rorat, A Grobelak and MJ Kacprzak, 'The presence of contaminations in sewage sludge – The current situation' (2017) 203 *Journal of Environmental Management* 1126, 1129.

[8] Hushållningssällskapet, *Slamtillförsel på åkermark. Slamrapport 2015–2018* (2021) ISBN 978-91-519-6761-5. <Available at: https://hushallningssallskapet.se/wp-content/uploads/2020/10/slamrapport-2020-rev-2021.pdf>; J Pulkrabová et al., 'Is the long-term application of sewage sludge turning soil into a sink for organic pollutants?: evidence from field studies in the Czech Republic' (2019) 19(5) *Journal of Soils and Sediments* 2445, 2455–58.

[9] N Ekane, K Barquet and A Rosemarin, 'Resources and Risks: Perceptions on the Application of Sewage Sludge on Agricultural Land in Sweden, a Case Study' (2021) 5 *Frontiers in Sustainable Food Systems* 647780, 6.; L Ekman Burgman, 'What sewage sludge is and conflicts in Swedish circular economy policymaking' (2022) 8 *Environmental Sociology* 292, 297.

[10] M Bagheri, *Sewage Sludge Treatment Scenarios: Techno-Economic Analyses of Energy and Phosphorus Recovery Focusing on Implementation Challenges* (PhD dissertation, Luleå University of Technology 2024) 5.

[11] J Grafström and S Aasma, 'Breaking circular economy barriers' (2021) 292 *Journal of Cleaner Production* 126002, 10.

[12] European Commission, *Communication from the Commission: on the implementation of the circular economy package: options to address the interface between chemical, product and waste legislation* COM (2018) 32 final, 7; European Commission, *Communication from the Commission: A new Circular Economy Action Plan for a cleaner and more competitive Europe* COM (2020) 98 final, 4; IM de Waal, 'Coherence in law: A way to stimulate the transition towards a circular economy? A critical analysis of the European Commission's aspiration to achieve full coherence between chemicals legislation and waste legislation – and product legislation' (2021) 28 *Maastricht Journal of European and Comparative Law* 760, 764; J Alaranta and T Turunen, 'How to Reach a Safe Circular Economy?—Perspectives on Reconciling the Waste, Product and Chemicals Regulation' (2021) 33 *Journal of Environmental Law*

Coherence has by the European Commission been identified as critical for the transition to a circular economy.[13] From a broader perspective, a coherent legal system is a desideratum of any law; Neil MacCormick has argued that it is even the basic idea of a legal system.[14] Yet, there is no set explanation of what coherence in law is. Typically, coherence is considered closely interlinked with consistency.[15] It is also considered a 'looser' concept than consistency.[16] In short, consistency means that application of different rules will result in the same legal outcome given the same facts. In relation to the topic of this paper, it would mean that a substance or object with the same physical and chemical characteristics would be regulated in the same manner regardless of its legal classification. To be even more precise, waste-based products, such as sludge-based fertilizers, should be subjected to the same regulatory standard as their virgin counterparts. However, a set of legal norms may be coherent, while at the same time inconsistent. If differences can be explained by virtue of a rational principle, inconsistencies may be coherent.[17] Thus, different requirements for waste and non-waste must be justified by some explicit or underlying principle or value, such as environmental protection. Tromans (2001), for instance, explains that there is an economic incentive to use raw materials as efficiently as possible, whereas the economic incentive for waste often is to dispose of it as cheaply as possible.[18] Gillespie (2015) has similarly noted that if it is not possible to dispose of waste in a commons for free (e.g., as emissions into air, or dumping into oceans), it is likely to end up in communities that are less likely to object to its placement.[19] This fact, that waste is likely to be handled as cheaply as possible, serves as a strong argument for certain diverging (stricter) rules for waste compared to its virgin counter-part, such as restrictions of transboundary transportation of waste. However, if it is economically advantageous to utilize waste this argument weakens.

The aim of this paper is to contribute to the ongoing discussion regarding the coherency of the legal framework for waste and to discuss if and how diverging legal requirements between waste and non-waste may affect recovery strategies. Co-conversion of sewage sludge with straw-fuel using existing infrastructure (district heating plants) will serve as an example to illustrate how different legislated limit values may affect the feasibility of innovative solutions. These two input materials (feedstock) are chosen due to their inevitable production and substantial quantity.[20] In addition, Hannl et al. (2024) have noted that mono-thermochemical conversion of both sewage sludge and agricultural residues such as straw may cause operational issues, such as slag-formation, deposit buildup or

113, 125; T de Römph and JM Cramer, 'How to improve the EU legal framework in view of the circular economy' (2020) 38 *Journal of Energy & Natural Resources Law* 245, 252.

[13] European Commission, *Communication from the Commission: Closing the loop—An EU action plan for the circular economy* COM (2015) 614 final, 3; European Commission, *supra* note 12, p. 3; Directive (EU) 2018/852 of the European Parliament and of the Council of 30 May 2018 amending Directive 94/62/EC on packaging and packaging waste OJ L 150/141, Recital 4.

[14] N MacCormick, *Legal Reasoning and Legal Theory* (2nd edn, Clarendon Press 1994) 106.

[15] de Waal, *supra* note 12, 763.

[16] MacCormick, *supra* note 14, 106.

[17] T Spaak, 'Consistency in Law' (Faculty of Law, Stockholm University Research Paper No 132, 13 April 2023) 4 SSRN <https://ssrn.com/abstract=4418149> 4; MacCormick, *supra* note 14, 106–107.

[18] S Tromans, 'EC Waste Law – A Complete Mess' (2021) 13 *Journal of Environmental Law* 133, 135.

[19] A Gillespie, Waste Policy: International Regulation, Comparative and Contextual Perspectives (Edward Elgar Publishing 2015) 3.

[20] TK Hannl et al., 'Bubbling fluidized bed co-combustion and co-gasification of sewage sludge with agricultural residues with a focus on the fate of phosphorus' (2024) 357 *Fuel* 129822, 2.

corrosion.[21] Moreover, they note that co-conversion of sewage sludge and agricultural residues alleviate these operational issues, such as by reducing agglomeration.[22] Co-conversion also provides other benefits, such as reducing the need for drying through mechanical dewatering or thermal treatment of the sewage sludge prior to incineration.[23] Additionally, co-conversion may produce a more favorable ash-composition that provides for a more plant available form of phosphorous.[24]

2. Setting the Scene: Waste or Non-Waste

To discuss diverging requirements between waste and non-waste, it must first be established what the concept of waste entails. Much like how it is justified to adopt different rules for apples and oranges, it can be justified to adopt different rules for waste and non-waste, provided that the rules relate to real differences between the substances, such as physical or chemical properties. This means that the definition of waste itself can serve as justification for diverging rules. However, for this reasoning to be adequate, the definition of waste can only be applicable to substances or objects that show a certain negative trait, such as toxicity, likelihood of abandonment, etc.

The current definition of waste within the EU reads: '"waste" means any substance or object which the holder discards or intends or is required to discard'.[25] According to de Römph (2018), the regulatory framework(s) for waste can be considered to be developed 'around' this definition.[26] Yet, the definition has not been substantially revised since its introduction in 1991 and has subsequently garnered much judicial review and attention in scholarly debate.[27] Both legal scholars and jurists have debated whether the current definition is the most appropriate.[28]

[21] *Ibid*.

[22] *Ibid.* See also H Liu et al., 'Influence of sewage sludge on ash fusion during combustion of maize straw' (2019) 33 *Energy Fuels* 10237-10246, 240; A Nordin et al., 'Co-Combustion of municipal sewage sludge and biomass in a grate fired boiler for phosphorus recovery in bottom ash' (2020) 13 *Energies* 1708, 2; L Li, Q Ren, S Li S and Q Lu, 'Effect of phosphorus on the behavior of potassium during the co-combustion of wheat straw with municipal sewage sludge' (2013) 27 *Energy Fuels* 5923, 5924; J Falk et al., 'Ash transformation during Fixed-Bed co-combustion of sewage sludge and agricultural residues with a focus on phosphorus' *ACS Omega* 13162, 13163.

[23] F Neuwahl et al., *Best Available Techniques (BAT) Reference Document for Waste Incineration* (European Commission Joint Research Centre, EUR 29971 EN, 2019) 33 <https://doi.org/10.2760/761437>.

[24] Bagheri, *supra* note 10, 6.

[25] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 22.11.2008, art. 3(1).

[26] T de Römph, *The Legal Transition towards a Circular Economy: EU Environmental Law Examined* (PhD Dissertation, KU Leuven and Hasselt University 2018) 220.

[27] See e.g., I Cheyne and M Purdue, 'Fitting Definition to Purpose: the Search for a Satisfactory Definition of Waste' (1995) 7 *Journal of Environmental Law* 149; G van Calster, 'The EC Definition of Waste: the Euro Tombesi Bypass and Basel Relied Routes' (1997) 8 *European Business Law Review* 137; L Bontoux and F Leone, *The Legal Definition of Waste and Its Impact on Waste Management in Europe* (European Commission Joint Research Centre, Institute for Prospective Technological Studies (IPTS) 1997); M Purdue and A van Rossem, 'Distinction between Using Secondary Raw Materials and the Recovery of Waste: the Directive Definition of Waste' (1998) 10 *Journal of Environmental Law* 116; D Pocklington, 'UK Perspectives on the Definition of "Waste" in EU Legislation' (1999) 5 *European Environmental Law Review* 177; Tromans, *supra* note 18; I Cheyne, 'Definition of Waste in EC Law' (2002) 14 *Journal of Environmental Law* 61.

[28] Opinion of AG Jacobs in Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Euro Tombesi* [1996] ECLI:EU:C:1996:399; Opinion of AG Alber in Joined Cases C-418/97 and C-419/97, *Arco Chemie* [1999] ECLI:EU:C:1999:286; Opinion AG Jacobs in Case C-129/96, *Inter Environment* [1997] ECLI:EU:C:1997:216; E Pongrácz, *Re-defining the concepts of waste and waste management* (PhD thesis, University of Oulu 2002); E Pongrácz and VJ Pohjola, 'Re-defining waste, the concept of ownership and the role of waste management' (2004) 40 *Resources, Conservation and Recycling* 141; N de Sadeleer, 'EC Waste Law or How to Juggle with Legal Concepts: Drawing the Line between Waste, Residues, Secondary Materials, By-products, Disposal and Recovery Operations' (2005) 6 *Journal of European Environmental & Planning Law* 458.

Some have argued that the existence of waste should be derived from whether the substance or object has purpose or is functional,[29] others have argued that the altering current definition of waste is best avoided as it will create numerous 'knock-off' effects.[30] A common critique of the definition of waste is ambiguity, particularly in relation to (1) when a substance or object becomes waste and (2) when a waste ceases to be waste. As waste management within the EU generally requires a permit or prior notification, clarity in what is, and what is not, covered by the definition is important. In other words, it is important that those targeted by the definition can predict the legal consequences of their actions, such as whether a transboundary shipment requires a permit or prior notification.[31] This is particularly important as illegal waste management typically carries criminal liability,[32] which cannot least be highlighted by the numerous preliminary rulings of the Court of Justice of the European Union (CJEU) concerning criminal liability for illegal waste management.[33]

Notably, the meaning of the center of the definition of waste, the verb 'discard', is not clearly defined in the Waste Framework Directive (WFD), despite this being a highlighted issue prior to the enactment of the WFD in 2008.[34] This has been a long-standing issue within the waste sector, and it is often surmised as a regulatory or administrative burden that increases the cost of various operations due to uncertainty.[35] Here, it must also be noted that even if this can be seen as a shortcoming of the definition, it also serves as a safeguard that enables assessments to err on the side of caution. In many cases, the meaning of 'discard' is evident. An ice cream wrapper in a garbage bin is obviously 'discarded', whereas a brand-new item on a store shelf is obviously not 'discarded'. However, in other cases it is not immediately evident (or even logical). An illustrative example of this is biochar. Biochar is a solid material that is generated by heating biomass with limited oxygen to prevent combustion. It has been shown that biochar can be used for several purposes, such as feedstock for energy production or as a fertilizer.[36]

Regarding the waste status of biochar, Strubelj (2022) notes that it depends on the input biomass, not its content. He asserts that if waste-based biomass is used, the end product (biochar) will constitute waste, whereas if virgin biomass is used, the end product will be non-waste. This

[29] Pongrácz and Pohjola, *supra* note 28, 150–153; Opinion of AG Jacobs in Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95, *supra* note 28.

[30] L Krämer, '*The Distinction between Product and Waste in Community Law*' (2003) 1 *Environmental Liability* 3, 9; D Pocklington, 'Opening Pandora's Box – the EU Review of the Definition of "Waste"' (2003) 12 *European Environmental Law Review* 204, 215. Krämer notes that thousands of laws are built upon the current definition, which means that altering it would require extensive revision of an entire corpus of law.

[31] E Paunio, 'Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2009) 10 *German Law Journal* 1469, 1472.

[32] Regarding the importance of predictability for criminal liability in general, see Paunio *supra* note 31, 1472; J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law* (MIT Press 1996) 220. Regarding the importance of predictability for the concept of waste see Opinion of AG Jacobs in Joined cases C-304/94, C-330/94, C-342/94 and C-224/95, *supra* note 28, para. 56.

[33] See e.g., Joined cases C-206/88 and C-207/88, *Vessoso and Zanetti* [1990] ECLI:EU:C:1990:145; Joined cases C-304/94, C-330/94, C-342/94 and C-224/95 *Euro Tombesi* [1997], ECLI:EU:C:1997:314; Case C-235/02, *Saetti and Frediani* [2004] ECLI:EU:C:2004:26; Case C-1/03, *Van de Walle* [2004] ECLI:EU:C:2004:490; Case C-457/02, *Niselli* [2004] ECLI:EU:C:2004:707; Joined Cases C-487/17 to C-489/17, *Verlazza* [2019] ECLI:EU:C:2019:270; or Case C-624/17, *Tronex* [2019] ECLI:EU:C:2019:564.

[34] European Commission, Proposal for a Directive of the European Parliament and of the Council on waste COM (2005) 667 final, 1–3.

[35] See e.g., Bontoux and Leone, *supra* note 27, 24; or more recently Judgment of the Swedish Environmental Court of Appeal of 20 May 2020, Case M 9646-19.

[36] L Štrubelj, 'Waste, Fertilising Product, or Something Else? EU Regulation of Biochar' (2022) 34 *Journal of Environmental Law* 529, 531.

means that regardless of content, if waste-based biomass (such as garden waste) is used as an input material, the resulting biochar will constitute waste, whereas if virgin (non-waste) feedstock is used, the biochar will constitute non-waste.[37] This is true no matter how miniscule amount of waste are used as an input material; the 'end product' will constitute waste even if only small amounts of waste-based biomass is used. In *Sappi Austria*, the CJEU concluded that mixing municipal sewage sludge (waste) with waste water from paper and pulp production (in that case, a by-product; a non-waste) to a ratio of 3% waste and 97% non-waste results in the mixture wholly constituting waste.[38] In essence, the CJEU argued that if waste is mixed with non-waste to a degree where they become inseparable, the mixture always constitutes waste, as it would otherwise be possible to circumvent waste requirements by dilution. This reasoning is, of course, generally applicable for all processes where waste is used as an input material, be it the production of organic fertilizer, glass bottles, or clothing. It is not possible to remove the waste status of a substance or object by mixing it with something else, unless it is expressly stated by law, as is the case for, e.g., animal by-products per the ABP-regulation.[39] Instead, the only way to remove waste status is to recover the substance or object in the legal sense.

To clarify when a recovery operation is complete and to indicate that waste ceases to be waste, an 'end-of-waste' procedure was introduced in the 2008 WFD. The aim of the provision was to decrease the uncertainty regarding when a waste that has been treated to the state equal of a product ceases to be waste. Today the provision is found in article 6(1) WFD and reads:

Member States shall take appropriate measures to ensure that waste which has undergone a recycling or other recovery operation is considered to have ceased to be waste if it complies with the following conditions:

(a) the substance or object is to be used for specific purposes;
(b) a market or demand exists for such a substance or object;
(c) the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and
(d) the use of the substance or object will not lead to overall adverse environmental or human health impacts.

Most member states (MS) have, with few exceptions, transposed the provision *in verbatim*.[40] For the purposes of utilizing sewage sludge, application of the provision provides for an interesting example. For a waste to cease to be waste in accordance with article 6(1) WFD, it must (1) undergo a recovery operation and (2) conform with the cumulative criteria (a)-(d). First, a 'recovery operation' per article 6 WFD ranges from simple processes such as cleaning or inspecting functionality to more complicated treatment pro-

[37] *Ibid.*, 533.

[38] Case C-629/19, *Sappi Austria* [2020] EU:C:2020:824, paras. 58–59.

[39] Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products … OJ L 300, 14.11.2009. If animal by-products are mixed with waste the mixture will wholly be treated as an animal by-product unless it contains hazardous waste or merely trace amounts of animal by-product, see Case C-634/17, *ReFood* [2019] EU:C:2019:443, para. 62 in conjunction with Joined Cases C-21/19, C-22/19, C-23/19, *P.F. Kamstra Recycling BV* [2020] EU:C:2020:636, paras. 58–59 and 61.

[40] European Commission, Directorate-General for Environment, *Study to assess member states (MS) practices on by-product (BP) and end-of waste (EoW): final report* (Publications Office 2020), 15.

cesses such as regeneration of acid.[41] For sewage sludge, aerobic or anaerobic digestion, or incineration are common methods of treatment and recovery.[42] Recovery is defined in article 3(15) WFD as:

> any operation the principal result of which is waste *serving a useful purpose by replacing other materials* which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. [emphasis added]

The first requirement of a recovery operation is that waste will substitute other materials that would have otherwise been used. For example, if waste is burned to obtain energy, the waste has replaced other materials that would otherwise have been burned to obtain energy. The substitution requirement should not be interpreted too strictly, as the CJEU has asserted that, for the purposes of reaching end-of-waste, a recovery operation may be as simple as checking whether the conditions of article 6(1) WFD are fulfilled.[43] Recovery alone is, however, per article 6(1) WFD, not enough for cessation of waste status to be attained. This remains a contentious issue for stakeholders in the waste sector in general and sewage sludge management in particular. Chiefly, it may be challenging to assess conformity with the cumulative conditions. For sewage sludge in particular, it may be difficult, if not impossible, to show conformity with article 6(1b) WFD as the provision typically requires that the substance or object show a positive market price. As classification as 'waste' in itself is considered to be detrimental to market value, the condition also creates a self-fulfilling prophecy: the waste cannot cease to be waste due to no market value, and there is no market value due to waste status.[44] The applicability of article 6(1) WFD is discussed further in section 4.

For innovative solutions, the waste status becomes important as it determines what regulatory framework will be applicable, and consequently what is required for the permissibility of the intended action. The consequences of waste classification can be extensive, especially if the operation involves transboundary shipment or transfer of ownership. For instance, prior to a commercial transaction of waste, it must, as a main rule, be ascertained whether the buyer needs or has a permit to either treat, store, or transport waste.[45] While it is possible for a waste to cease to be waste prior to a transaction, the waste must in such a case show conformity with the requirements of article 6(1) WFD. This means that actors are faced with two options: either deal with the substance or object as a waste or recover the waste prior to the transaction. Here it should be noted that there is no set standard to illustrate that the requirements of article 6(1) WFD are fulfilled. The European Commission published a guidance document in 2012, but it offers scant explanation regarding the specific conditions of article 6(1a–d) WFD.[46] Equally important, most

[41] See Annex II of the WFD for a non-exhaustive list of recovery operations.

[42] See e.g. T Bauer, Sustainable Sewage Sludge Management: Addressing Multidisciplinary Challenges (PhD thesis, Luleå University of Technology 2023) or Bagheri, *supra* note 10.

[43] Case C-238/21, *Porr Bau* [2022] ECLI:EU:C:2022:885, para. 66.

[44] G van Calster, *EU Waste Law* (Oxford University Press 2015) 47.

[45] In Sweden, this was most recently the case in *Harrys Bilskrot* where the Swedish Land and Environmental Court of Appeal (MÖD) disallowed a 'self-picking' service at a scrapyard. As the scrapyard had not ascertained that the customers had the necessary permits to manage waste, they were not allowed to sell the scrap parts. See Judgement of the Environmental Court of Appeal of 31 May 2023, Case M 3735-20.

[46] European Commission, *Guidance on the interpretation of key provisions of Directive 2008/98/EC on waste* (2012) 22 *et seq.* N.B. for iron, copper and aluminum scrap, and

MS do not provide for the possibility to ascertain whether 'end-of-waste'-status has been achieved by a government authority. In fact, the CJEU has in *Tallina Vesi* asserted that article 6(1) WFD does not obligate MS to recognize that 'end-of-waste'-status has been achieved.[47] This means that the 'end-of-waste' assessment made by an operator may be challenged by administrative authorities after the fact. Consequently, as mismanaging waste often carries criminal liability, this has been considered a 'risky approach'.[48] To safeguard their decisions, stakeholders in MS, such as Sweden, have requested that an 'end-of-waste' procedure that involves a government decision should be established. As of yet, this, however, has not been established in Sweden and is uncommon in other MS.[49] Interestingly, the Swedish transposition of article 6(1) WFD has resulted in a situation where the authorities, in many cases, cannot provide a decision regarding 'end-of-waste', even if they wanted to. In *Econova Recycling*, the Swedish Environmental Court of Appeal determined that the supervisory authorities are only empowered to make the necessary decisions to ensure that the Swedish Environmental Code is not infringed. As demonstrating 'end-of-waste'-status does not in itself imply that the Code is infringed, supervisory authorities are only empowered to make decisions concerning 'end-of-waste' when it is decisive in determining potential infringement, such as whether a transport concerns a shipment of waste or non-waste.[50]

3. Sewage Sludge

Waste is within the EU regulated through the WFD and its daughter acts. The WFD contains provisions for the management of waste in general and provides for a minimum level of environmental protection that must be observed by all waste management activities within the EU. The WFD is applicable to various waste fractions, ranging from relatively homogenous waste streams, such as agricultural residues, to heterogenous waste streams, such as mixed municipal waste. The wide range of waste fractions covered implies that it is hard to provide for detailed provisions in one framework directive. Instead, detailed provisions for various waste management operations, such as shipping or incineration, and waste fractions, such as sewage sludge or electronic waste, are provided by daughter acts to the WFD. For sewage sludge, detailed provisions are found in the Sewage Sludge Directive (SSD).[51]

Regarding waste classification of sewage sludge, the CJEU has proclaimed in *Sappi Austria* that '[i]t is common knowledge that residential or municipal waste water is to be regarded as a substance which its holder discards.'[52] Consequently, the residual from its treatment – sewage sludge – was due to its origin and unavoidable nature considered as a waste in a legal sense by the CJEU.[53] However, by virtue of article 2 WFD, some waste fractions are wholly or partially excluded from the scope of the Directive, including

certain waste-based fertilizers, explicit end-of-waste regulations containing explicit indicators, such as content of foreign material etc., exist.

47 Case C-60/18, *Tallinna Vesi* [2019] ECLI:EU:C:2019:264, para. 30; N.B this verdict was made under the original wording of article 6(1) WFD, which means that it is not certain that the CJEU would reach the same conclusion today.

48 AM Ragossnig and DR Schneider, 'Circular economy, recycling and end-of-waste' (2019) 37 *Waste Manag Res* 109, 110.

49 European Commission, *supra* note 40, 16–28.

50 Judgement of the Environmental Court of Appeal of 31 May 2023, Case M 3735-20 (available in Swedish).

51 Council Directive 86/278/EEC of 12 June 1986 on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture OJ L 181, 4.7.1986.

52 Case C-629/19, *supra* note 38, para. 59.

53 Case C-629/19, *supra* note 38, paras. 46, 47 and 62.

the definition of waste. Wastewater is a fraction that may be partially excluded from the WFD in accordance with article 2(2a):

> The following shall be excluded from the scope of this Directive to the extent that they are covered by other Community legislation:
> (a) waste waters; […]

The partial exclusion implies that waste water is omitted from the scope of the WFD to the extent that it is covered by other Community legislation.[54] Prior to the enactment of the 2008 WFD, the CJEU noted in *Thames Water* and *Avesta Polarit* that not only legislation on EU-level but also national legislation could exclude the applicability of the WFD.[55] This is no longer the case, as since the enactment of the 2008 WFD, article 2(2) explicitly refers to Community legislation. Regardless, article 2(2) WFD, which still only allows for partial exclusions, must be interpreted restrictively, and requires that application of other legislation achieve the same level of environmental protection as application of the WFD would.[56] Nevertheless, due to the partial exclusion of waste water, there has been some confusion regarding the exclusion of the residual of its treatment: sewage sludge.

In the above-mentioned case *Sappi Austria*, a case which concerned the waste status of sewage sludge prior to co-incineration, the CJEU was faced with the question and determined that the SSD only regulates a specific recovery operation, agricultural use of sewage sludge on arable land. Sewage sludge is in large not excluded from the scope of the WFD and must therefore be handled as a waste in accordance with the framework present in the WFD.[57] The CJEU highlights that the potentially applicable legislation, the Urban Waste Water Treatment Directive (UWWD),[58] does not provide for the same level of environmental protection as the WFD in relation to sewage sludge, and consequently, sewage sludge cannot be excluded from the scope of the WFD by virtue of being covered by the UWWD.[59] However, the CJEU did not deliberate upon whether the environmental protection provided by the SSD would be enough for exclusion. Instead, the CJEU asserts that the SSD is irrelevant for the purposes of classifying sewage sludge prior to incineration (as the SSD only regulates agricultural use).[60] It is likely that the SSD does not reach the standard of protection mandated by the WFD as it is largely based on scientific knowledge from the mid 1980's and has, therefore, been considered outdated by the wastewater treatment sector and the European Commission alike.[61] Considering that the CJEU

[54] The treatment of wastewater was at the time covered by Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, OJ L 135/40, 30.5.1991 (UWWD). Sewage sludge was to an extent also covered by the UWWD. Article 14(1) of the UWWD prescribed that sewage sludge should be re-used whenever appropriate, and that disposal of sludge is subject to general rules or registration or authorization. The UWWD does, however, not contain any detailed provisions relating to how sludge should be treated or used. The Directive has since been amended, and the corresponding provision is today found in article 20 of Directive (EU) 2024/3019 of the European Parliament and of the Council of 27 November 2024 concerning urban wastewater treatment, OJ L, 2024/3019, 12.12.2024.

[55] C-252/05, *Thames Water* [2007] ECLI:EU:C:2007:276, para. 33; Case C-114/01, *AvestaPolarit* [2003] ECLI:EU:C:2003:448, para. 49.

[56] Case C-252/05, *supra* note 55, para. 34; Case C-114/01, *supra* note 55, para. 60; Case C-629/19, *supra* note 38, para. 36.

[57] Case C-629/19, *supra* note 38, paras. 38–39.

[58] Directive 91/271/EEC, *supra* note 54.

[59] Case C-629/19, *supra* note 38, paras. 37–39.

[60] Case C-629/19, *supra* note 38, para. 38.

[61] Cf. L Ekman-Burgman and B Wallsten, 'Should the Sludge Hit the Farm?: – How Chemo-Social Relations Affect Policy Efforts to Circulate Phosphorus in Sweden' (2021) 27 *Sustainable Production and Consumption* 1488, 1489; A Nilsson, 'Avloppsslam som gödselmedel? Om normhierarkier, normkonflikter och principer förlag-

in *KVZ Retec* determined that the exclusions should be interpreted restrictively, it is likely that sewage sludge under no circumstances is excluded from the WFD.[62]

4. Incineration of Sewage Sludge

Like all waste incineration, incineration of sewage sludge is regulated by the Industrial Emissions Directive (IED).[63] The IED provides for an exhaustive framework for industrial emissions in general.[64] This includes emission limits for combustion, incineration, industrial tanning, or livestock rearing.[65] Notably, the IED only applies to 'industrial activities',[66] but does not clarify what 'industrial activities' are, other than that research activities are not included. Jans and Vedder (2012) have noted that it follows from Annex I of the IED that the Commission shall establish guidance regarding certain activities of the Annex.[67] Annex I, however, cannot be seen as an exhaustive list of the activities covered by the Directive. It should also be mentioned that research activities on an industrial scale are not excluded, such as trials of emerging technologies. Notably, since the adoption of the 'IED 2.0' in 2024, the possibility for derogations for trials of emerging technology has been extended. It now follows from article 27b that temporary derogations may be granted for a period up to 30 months (as opposed to the prior 9 months) to evaluate emerging technologies on an industrial scale.

All activities covered by the IED are considered environmentally hazardous and require that MS establish a permit or notification procedure for such activities in accordance with article 4 IED.[68] This includes incineration of sewage sludge. Both new and 'substantially changed' operations must acquire a permit per article 4–5 IED. A substantial change is a change that carries a change in the nature or functioning, or an extension of the operation that may have significant negative effects on human health or the environment.[69] The permit shall contain conditions, or reference to generally binding rules, that will ensure that the operation fulfills the requirements of the IED.[70] The CJEU has noted in *Ilva and Others* that it is not enough to limit the permit conditions to substances that may foreseeably be present without accounting for the emissions generated in practice.[71] Additionally, operators must show that best available technology (BAT) is used in accordance with article 11 IED. In general, the requirements of the IED vary between different operations. For incineration of waste, the requirements of the IED are largely a codification of the old Waste Incineration

tolkning' In L. Gipperth, & C. Zetterberg (eds), *Miljörättsliga perspektiv och tankevändor* (Iustus förlag 2013) 371, 371; European Commission, Communication from the Commission: Consultative Communication on the Sustainable Use of Phosphorus COM (2013) 0517 final, 18.

[62] C-176/05 *KVZ Retec* [2007] ECLI:EU:C:2007:123, para. 46.

[63] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) OJ L 334, 17.12.2010. N.B. In 2024, the EU has adopted the Industrial and Livestock Rearing Emissions Directive (IED 2.0), which amends the IED. Notably, through the IED 2.0 circular economy is included as an explicit goal of the IED. The provisions for waste-incineration remain largely unchanged. See Directive (EU) 2024/1785 … OJ L, 2024/1785, 15.7.2024 art. 1.

[64] JH Jans and HHB Vedder, *European Environmental Law: After Lisbon* (Europa Law Publishing 2012) 365. N.B A fifth edition of the book has been published in 2024, however, in the fifth edition, chapter 8, which concerns secondary law, is omitted. This means that the fourth edition still contains the up-to-date reference. This distinction follows from Article 3(12) WFD.

[65] See Articles 2, 10 and Annex I IED.

[66] Article 2 IED.

[67] Jans and Vedder, *supra* note 64, 364.

[68] Article 4(1) IED.

[69] Case C-43/21, *FCC Česká* [2022] ECLI:EU:C:2022:425, paras. 33–4.

[70] Articles 4–6 IED.

[71] Case C-626/22, *Ilva and Others* [2024] ECLI:EU:C:2024:542, para. 117.

Directive,[72] whereas the provisions for incineration of non-waste are largely a codification of the old Integrated Pollution Prevention and Control Directive (IPPC).[73]

For waste incineration or waste co-incineration plants, there are stricter rules pertaining to emission control, operation conditions, and delivery and reception of feedstock. These stricter rules stem from the typically heterogenous (and unknown) composition of waste. Consequently, waste incineration or waste co-incineration plants usually have more advanced flue-gas cleaning systems that can handle the wide range of chemical variations in the waste and feature a more controlled storage of feedstock. For example, during delivery and reception of feedstock, the operator of a waste incineration plant, including co-incineration plants, must take all necessary measures to prevent or minimize pollution of the air, soil, surface water, and groundwater (article 52 IED). Additionally, they should mitigate other negative environmental impacts that may occur during reception and delivery, such as odors and noise. There are no corresponding explicit requirements for delivery or reception of non-waste feedstock. However, precautions during delivery and reception may be necessary due to article 11 IED, which requires MS to ensure that plants take all the appropriate preventive measures to mitigate pollution, and that no significant pollution is caused. As article 11 IED already requires that the necessary precautions are made to mitigate pollution, the requirements of article 52 IED may, to an extent, be superfluous.[74] At the same time, the existence of a more rigorous provision for waste incineration and co-incineration plants provides for clarity and suggests that the Directive is enacted under the presumption that waste is more hazardous than their virgin counterparts.

A similar observation can be made in relation to the operating conditions for waste incineration and waste co-incineration plants. It follows from article 50(2) IED that a temperature of at least 850 °C for non-hazardous waste and 1 100 °C for some hazardous waste must be maintained for at least two seconds during incineration.[75] The latter only applies to hazardous waste that contains halogenated organic substances, expressed as chlorine.[76] Principally, however, hazardous and non-hazardous waste is subjected to largely the same requirements.[77] Nevertheless, the tempera-

[72] Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste OJ L 332/91, 28/12/2000.

[73] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, OJ L 24/8, 29/01/2008.

[74] Interestingly, one shortcoming of the legal framework prior to the adoption of the IED in 2010 was, according to the Commission, lack of coherence. See European Commission, Proposal for a Directive of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) COM (2007) 843 final 5. To some degree, the IED still demonstrates incoherence between its different chapters. For example, for waste incineration and waste co-incineration there are explicit emission limits stated in Annex VI IED, whereas for incineration of non-waste the emission limits largely follow from an individual permit (however, cf. Annex V IED).

[75] In individual cases, higher temperatures than what the law mandates may, however, be required to remove certain contaminants. For example, a temperature of 1000 °C is required for removal of heavy metals from sewage sludge, see G Hui et al., 'An overview of removing heavy metals from sewage sludge: Achievements and perspectives' (2020) 266 *Environmental Pollution* 115375, 7.

[76] The higher temperature requirements for halogenated organic substances was a contentious issue when the initial waste incineration directive was to be adopted. The Parliament initially wanted specific strict standards for incineration of Polyvinyl Chloride (PVC or Vinyl). Ultimately, this was not accepted, and the Parliament had to settle for the current solution. See van Calster *supra* note 44, 191.

[77] In the amended proposal for a waste incineration directive, the European Commission noted that the distinction between hazardous and non-hazardous waste follows from the properties of the waste but that this matters less if the same level of emissions is maintained

ture requirements reflect the basic aim of waste incineration: heat generation, destruction or immobilization of contaminants, and reduction of volume.[78] The presumption is, that incineration of waste is more hazardous than incineration of a virgin fuel. As mentioned in the introduction, Tromans (2001) and Gillespie (2015) have noted that a plausible rationale for diverging requirements are economic considerations. Typically, waste will be disposed of as cheaply as possible. Often it is cheap to incinerate it. However, if it is economically advantageous to utilize waste this argument weakens. For example, end-of-waste criteria for precious metals have been considered redundant, as precious metals very rarely get discarded due to their value.[79] A more persuasive argument is that the requirements are based on the precautionary principle, especially for incineration of heterogenous waste where the unknown composition warrants a higher degree of caution. The composition may be unknown both due to the waste being mixed (such as municipal solid waste or sewage sludge) or the origin being unknown (such as a barrel of unknown content). Thus, control of additional substances, like lead or mercury, is warranted as these can before the fact be excluded when using a homogenous virgin fuel. If, however, mercury, lead, or any similarly hazardous emission is caused by a virgin fuel, they must be covered by emission limits in a permit.[80]

In connection to this, in the amended proposal for a waste incineration directive, the European Commission noted that the distinction between hazardous and non-hazardous waste follows from the properties of the waste, but that this matters less if the same level of emissions are maintained, at least from the perspective of environmental protection.[81] This is an important argument, and the same can be applied to the incineration of waste and non-waste. The input material matters less if the output, emissions, ash, etc., is the same. Yet, in addition to monitoring additional substances, the average daily emission limit for, for example, sulfur dioxide (SO_2) is up towards eight times lower for waste than for non-waste.[82] Conversely, it has been noted by Alaranta and Turunen (2020) that higher levels of Cadmium (Cd) are allowed for in recycled plastic (0.1%) than virgin plastic (0.01%).[83] Their observation reflect the reality of the variance in quality of waste. At the same time, it in practice enables products manufactured from waste to be of lower quality, which in turn *inter alia* provides for reduced legitimacy.[84] It also illustrates that diverging requirements may be necessary to make operations practically feasible.

5. Waste Status Prior to Incineration

It follows from the above that it is pivotal to determine what will be incinerated at a plant, as this will determine the applicable rules, and thus which precautions are necessary. From a prac-

(European Commission, Amended proposal for a European Parliament and Council Directive on the incineration of waste (2000/C 150 E/01), COM (1999) 330 final, 3 Art. 6(b). Cf. Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste OJ L 332/91, 28.12.2000, recital 16).

78 Neuwahl et al., *supra* note 23, p. 1.

79 A Villanueva et al., Study on the selection of waste streams for end-of-waste assessment (European Commission Joint Research Centre, EUR 24362 EN, 2010) 5–6.

80 Case C-626/22, *supra* note 71, paras. 113–14.

81 European Commission, *supra* note 77 and Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste OJ L 332/91, 28.12.2000, recital 16.

82 For non-waste, Annex V Part 1(2) allow daily emissions up towards 400 mg/Nm^3 depending on feedstock and thermal input (ranging from 200–400 mg/Nm^3). For waste, however, the same emission limit is a fixed 50 mg/Nm^3 per Annex VI Part 3(1.1) and Annex VI Part 4(2.3).

83 Alaranta and Turunen, *supra* note 12, 12.

84 Alaranta and Turunen, *supra* note 12, 18.

tical perspective, Hannl et al. (2024) note that classifying sewage sludge as a usable fuel is an arduous task due to the waste streams' heterogeneity.[85] From a legal perspective, sewage sludge is either a 'waste' or a 'non-waste', although classification may be arduous from a legal perspective as well. While the CJEU in *Sappi Austria*, as noted above, concluded that untreated sewage sludge is a waste in the legal sense, the waste status of sewage sludge may become uncertain depending on how the sludge is treated. The CJEU proclaims in the same case that it is possible for sewage sludge to cease to be waste – attain end-of-waste status – prior to incineration, granted that conformity with article 6(1) WFD is demonstrated.[86]

For the purposes of co-incinerating straw fuel with treated sewage sludge, it is first worth noting that converting sewage sludge into a suitable fuel, such as through briquetting, dewatering, or drying, can itself be regarded as a recovery operation. Recovery and recycling include not only processes where a waste material directly replaces another material, but also processes in which waste is prepared so that it can be used as a raw material in other operations. A common example is the production of pellets from waste wood chips for use as fuel in pellet boilers. In the 2012 guidance, the European Commission noted that a recovery operation may be as simple as ascertaining the working condition of a substance or object.[87] In such cases, the CJEU clarified in *Mastrodonato* that the recovery operation must result in a product that is suitable for its intended purpose, taking into account the most recent state of scientific and technical knowledge.[88] Following this reasoning, the creation of a briquette for the purpose of use as fuel in a district heating plant can be regarded as a recovery operation given that the briquette is a suitable fuel. Recovery alone is, however, not enough to demonstrate compliance with article 6(1) WFD. It must also be demonstrated that (a) there is an intended use; (b) there is a market or demand; (c) the intended use is lawful and complies with technical standards; and (d) the intended use carries at least neutral environmental impacts.

As for (a), creating a usable fuel in the form of a briquette shows that there is a specific use for the sludge in question. The CJEU has, however, noted in *Prato Nevoso* that 'end-of-waste' must be assessed on a case-by-case basis, which means that it is not possible to grant 'end-of-waste' before the fact.[89] This means that criterion (a) must be read in conjunction with criterions (b)-(d). In other words, it must be determined if there is a market or demand for this particular use of the substance or object; if this particular use is legal and complies with technical standards; and, finally, if this particular use of the substance or object carries with it at least neutral environmental impacts.[90]

It is harder to show general compliance with (b), the existence of a market or a demand for such briquettes, than with (a). While previous research has shown that there are potential benefits associated with using sludge briquettes as an additive, there is currently no demonstrable market for this product.[91] While specific buy-orders may be enough to demonstrate compliance with the criterion in individual cases, the marketability of the substance or object as the waste-

[85] Hannl et al., *supra* note 20, 2.
[86] Case C-629/19, *supra* note 38, para. 69.
[87] European Commission, *supra* note 46, 30.
[88] Case C-147/15, *Mastrodonato* [2016] ECLI:EU:C:2016:606, para. 45.
[89] Case C-212/18, *Prato Nevoso* [2019] ECLI:EU:C:2019:898 para. 50.
[90] *Id.* para. 55.
[91] This is, of course, not surprising as the operation is not deployed on commercial scale yet.

status still becomes uncertain as each individual consignment would have to pass this criterion.

As for (c), incinerating the briquette for energy must comply with the rules applicable to non-waste, i.e. Chapter III of the IED. Ironically, these requirements are less strict than those for waste, meaning that compliance must instead be shown with potentially more lenient standards. From a systematic perspective, this can be seen as a shortcoming of the regulatory framework. One purpose of waste law is to control how waste is managed and to maintain a certain level of environmental protection.[92] This purpose is undermined if a substance or object can cease to be waste simply by meeting lower environmental requirements.

This issue becomes more pronounced given that corresponding rules for waste incineration impose stricter obligations. At the same time, it may be argued that the provision works as intended, as it excludes material that is of equal quality to a virgin counterpart. The substantive IED rules for waste incineration, however, concern not only emission limits but also operating conditions such as purification requirements and tighter control during shipping and receiving. These requirements relate less to the properties of the waste itself and more to the operation of the plant.

Moreover, there are no definitive prohibitions on fuels that may be used for energy production; permissibility is assessed case by case. This reflects the underlying idea that the input matters less than the output. From a sustainability perspective, however, the input does matter. Promoting renewable energy over fossil fuels is a core objective of EU energy policy, whereas in waste policy, incineration (energy recovery) represents the least preferred form of recovery in the waste hierarchy.[93] Accordingly, granted that mono or co-incineration of a sludge briquette complies with the requirements of the IED, the use can be considered lawful.

The fourth requirement, condition (d), is likely the most difficult to assess, as there are no objective indicators to reference. Whether there is a use, a market, and whether the use is legal and complies with technical standards can be clearly demonstrated, e.g., through buy-orders and specifications. But as article 6(1d) requires that the use cannot lead to overall adverse environmental or human health impacts, it requires more extensive assessment. The European Commission (2012) notes that compliance can be indicated by a comparison between the use of the substance or object under relevant product legislation with the same use under waste legislation.[94] In relation to this, in *Inter Environment*, AG Jacobs has previously expressed that special attention must be given to what provisions apply if waste legislation ceases to apply and subsequently, if the application of those provisions are disadvantageous for the environment.[95] This has since been confirmed in *Prato Nevoso*, where the CJEU concluded that the use of the waste as a product should not imply any greater (negative) effects on the environment than it would under the waste regime.[96]

Interestingly, Van Calster (2015) has noted that stricter emission limits for dioxins and furans was one key objective of the first harmo-

[92] Cf. Article 1 WFD.

[93] See e.g., Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328/82, 21.12.2018, recital 2.

[94] European Commission, *supra* note 46, 24.

[95] Opinion of Mr AG Jacobs in Case C-129/96, *supra* note 28, paras. 43–48.

[96] Case C-212/18, *supra* note 89, para. 55. The CJEU reached a similar conclusion in *Mayer Parry*, see Case C-444/00, *Mayer Perry* [2003] ECLI:EU:C:2003:356 paras. 73–74.

nized waste incineration directive.[97] As of writing, strict limit values for the presence of dioxins and furans during waste incineration and co-incineration follow from chapter IV and Annex IV IED. For example, over a sampling period of a minimum of 6 hours and a maximum of 8 hours, tetrachlorodibenzodioxin (TCDD) cannot exceed 0,1 ng/Nm^3 and octachlorodibenzodioxin (OCDD) cannot exceed 0,0001 ng/Nm^3. However, there are no corresponding provisions for incineration of non-waste.[98] This means that applying product legislation to waste that may emit dioxins or furan during incineration will always imply a lower level of environmental protection. At the same time, it can be argued that since waste legislation in general provides for a high level of environmental protection, the standard protection will always be lower if product legislation is applied. In connection with this, Turunen (2018) notes that negative effects from continued waste classification should also be accounted for. He mentions, for example, emissions associated with shipping virgin materials as opposed to utilizing local waste.[99]

All in all, the procedure aims to ensure that the waste-based risks are eliminated. To thereafter determine if the creation of a sludge briquette for the purposes of co-incineration complies with this standard of review is an arduous task. The fact that the chemical composition of the sludge is not altered suggests that the risks are not eliminated, although it is allowed to use the same sludge as fertilizer in agriculture. Moreover, it is arguably 'safer' from an environmental protection perspective to immobilize contaminants through incineration than to spread them on agricultural land.

6. Waste Status After Incineration

As noted earlier, the waste status of a material is decisive for determining which regulatory framework applies to its incineration. It is equally relevant for the subsequent use and marketability of the resulting residual, namely, the ash. When sewage sludge is applied to arable land as fertilizer, it normally falls under the SSD rather than the WFD.[100] By contrast, fertilizer derived from ash generated during the incineration of sewage sludge is governed by the general waste rules in the WFD, since ash is typically regarded as a substance discarded by its holder and is not excluded from the scope of the WFD. Following its generation, the holder of the ash may therefore either manage it in accordance with the provisions applicable to waste or seek to have the ash recognized as a product.

Classification as a product may occur either under the Fertilizer Regulation (FR),[101] if CE-marking is intended, or pursuant to the general exclusions under the WFD, namely, as a by-product (article 5(1)) or through the attainment of end-of-waste status (article 6(1)). Here, it should be noted that CE-marking is not mandatory, and ash-derived fertilizer may be marketed and utilized without CE-classification per the regulation, granted that the utilization is done in accordance with national rules.[102] For non-CE

[97] van Calster, *supra* note 44, 190. See also European Commission, Proposal for a Council Directive on the incineration of waste COM (1998) 0558 final, 11.

[98] Emission limits for both dioxins and furans may, however, follow from a permit condition. See article 14(1a) and Annex II IED.

[99] T Turunen, *The Concepts of Waste and Non-Waste in the Circular Economy* (PhD thesis, University of Eastern Finland 2018) 99.

[100] This follows from the partial exclusion found in article 2 WFD.

[101] Regulation (EU) 2019/1009 of the European Parliament and of the Council of 5 June 2019 laying down rules on the making available on the market of EU fertilising products … OJ L 170/1, 25/06/2019.

[102] Recital 5 FR. Whether the conformity with the new regulation should be optional was discussed at length during the legislative process. Ultimately, the Commission decided that fertilizers should only be subjected to

fertilizers, however, national legislation becomes decisive. MS retain discretion to impose stricter rules or even prohibitions on the use of materials derived from sewage sludge in agriculture, including setting lower contaminant limits, requiring permits, or adopting precautionary bans. These domestic frameworks are therefore directly relevant for determining 'lawfulness of use' under Articles 5(1d) and 6(1c) WFD, since the permissibility of placing ash-derived products on the national market cannot be assumed from EU-level rules alone.

Regarding the CE-marking per the FR, it follows from article 1(2a) when sewage sludge is used in agriculture, it is excluded from the scope of application of the FR. The same does, however, not apply when ash derived from incineration of sewage sludge is used as fertilizer. Here follows from component material category 13 (CMC) that ash derived from incineration (oxidation) of sewage sludge may be accepted as an input material for fertilizer production.[103] Concerning waste status and the cessation thereof, the FR establishes indicators distinct from those under Article 6(1) WFD. Pursuant to Article 19 FR, a waste ceases to be waste once it forms part of a compliant EU fertilizing product. Thus, where a waste material is used as an approved input under the FR, the conditions of Article 6(1) WFD are deemed to be satisfied without the need for an independent assessment. Although the conceptual approach differs, the underlying criteria largely overlap. Inclusion in a compliant fertilizer demonstrates both a use (condition a) and the existence of a market (condition b), while lawfulness of use (condition c) is inherent in compliance with the FR. The principal difference concerns (condition d), as the FR does not require a separate assessment of environmental benefits; compliance with the Regulation is sufficient to establish that the intended use does not entail adverse effects.

Alternatively, the holder may seek recognition of the ash as a by-product under article 5(1) WFD. According to article 5(1) WFD, substances or objects that are a secondary result of a production process, for example, ash from incineration, may be considered non-waste, granted that the residue meets the conditions of article 5(1) WFD. A strict interpretation of 'production process' may appear to exclude recovery operations; however, CJEU case law provides a more nuanced picture. In *Palin Granit* the CJEU stated that residuals from a 'manufacturing or extraction process' may be regarded as a by-product.[104] This wording has since been reused by the CJEU.[105] In relation to the re-utilization of sewage sludge, the CJEU has determined that article 5(1) WFD may be applicable to sewage sludge but that its management also requires special precautions, which indicates that it is a waste.[106] The CJEU has neither explicitly applied article 5(1) to residues from recovery operations, nor precluded such an application. In *Sappi Austria* the CJEU, however, noted that it was not necessary in that instance to examine whether the sewage sludge in question was a 'by-product'; waste-status was already demonstrated.[107] Regardless, it is reasonable to assume that the provision would be applicable to residues from recovery processes, granted that the subsequen-

the regulation if the holder of the fertilizer wishes to CE-mark the fertilizer, see European Commission, Commission Staff Working Document: *Impact Assessment* SWD (2016) 64 final, 17 March 2016, accompanying COM (2016) 157 final, ch. 5, 27–34.

[103] CMC 13(1e) and CMC 14 FR.

[104] Case C-9/00, *Palin Granit* [2002] ECLI:EU:C:2002:232, para. 34.

[105] Case C-235/02, *supra* note 33, para. 35; Case C-457/02, *supra* note 33, para. 44; Case C-629/19, *supra* note 38, para. 51.

[106] Case C-629/19, *supra* note 38, paras. 45–47.

[107] Case C-629/19, *supra* note 38, paras. 51–52.

tial use is both certain and environmentally as well as economically beneficial.

Granted that article 5(1) WFD is applicable, ash stemming from co-incineration of sewage sludge and straw fuel may be excluded from the scope of application of the WFD. This, however, requires that the cumulative conditions of article 5(1) WFD are met. The conditions are similar to those of article 6(1) WFD mentioned above. First, the holder of the residue must show that further use of the object is certain. There is no standard to follow to demonstrate certainty of further use, but economic benefits or the existence of an established market may be guiding.[108] Second, the residue cannot be subjected to any further processing that is not normal industrial practice. Here, the intention is to exclude residues that require treatment akin to the treatment of waste. This requirement has, nevertheless, been highlighted as potentially excluding innovative practices as they typically cannot be considered normal due to their novelty. Application of this condition requires the holder to determine whether (a) any treatment is necessary and (b) whether that treatment is normal industrial practice. Examples of normal industrial practice include washing, cleaning, or modification of size or shape.[109] Third, the residue must be produced as an integral part of a production process. To an extent, this requirement is self-explanatory; the residue must be a result of the production process in question. The European Commission (2012) notes that flue gas desulphurisation (FGD) gypsum, a residue from flue gas cleaning during incineration of fossil fuels, fulfills this condition. Similarly, it is reasonable to assume that ash stemming from incineration also fulfills this condition. Fourth, future use must be both lawful and carry with it at minimum a net benefit for the environment. Similarly, to end-of-waste, this condition requires that it be demonstrated that the residue complies with the legal requirements for their virgin counterpart. Here, it can be noted that if there are no corresponding requirements for virgin materials, the use is, of course, lawful, granted that its use is not specifically forbidden.[110]

In connection to the lawfulness of use, the FR does not allow for by-products that are a direct result of either incineration or pyrolysis of waste to be used as an input material for fertilizer.[111] In practice, this means that the by-product status as well as end-of-waste-status of ash derived from mono- or co-incineration of sewage sludge is largely redundant if the holder intends to market it as CE-fertilizer per the FR. This is because the ash must comply with the substantive requirements of the FR irrespective of whether it is classified as waste or non-waste under the WFD to be CE-marked.[112]

Finally, it is important to situate this analysis within the broader EU sustainability framework. Phosphorus is recognized as a critical raw material,[113] and the revised Urban Wastewater Directive encourages the development of nutrient-recovery pathways from sewage sludge.[114] At the same time, the waste hierarchy places energy recovery among the least preferred options, while agricultural land application of sewage sludge raises increasing environmental concern. Ash-based phosphorus recovery is therefore

[108] Turunen, *supra* note 99, p. 84.
[109] European Commission, *supra* note 46, pp. 17–18; Turunen, *supra* note 99, p. 85.
[110] European Commission, *supra* note 46, p. 20.
[111] CMC 11(1f–g) FR.
[112] See Annex IV, Part II, Module D1 FR.
[113] 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 … OJ L, 2024/1252, 3.5.2024, Annex II Section 1(z).
[114] Directive (EU) 2024/3019, *supra* note 54, Recital 42 and Art. 20.

viewed as a potential compromise strategy, yet the regulatory framework remains fragmented between waste law, fertilizer law, and national discretion. These systemic tensions underscore the importance of clarifying the legal status of sewage-sludge ash to support coherent policy implementation.

7. Conclusion

Waste status is decisive for incineration of sewage sludge or sewage sludge-derived products as it determines the applicable regulatory framework and, consequently, the legal requirements. Additionally, the legal requirements vary depending on whether the substance or object is incinerated as a waste or non-waste. This in turn affects the necessary precautions and makes certainty of waste-status paramount. At the same time, the European Commission has noted that the relevant factors for incineration are, in principle, not the input, but the output.

Whether a substance or object constitutes a waste relies upon the definition of waste found in article 3(1) WFD, a definition that is neutral in the sense that it does not rely on physical or chemical characteristics of a substance or object. Instead, the definition relies upon whether the substance or object has been discarded. Regarding sewage sludge, the CJEU has noted that sewage sludge is typically something that is discarded by its holder. This means that when sewage sludge is used as a fuel, the rules pertaining to incineration of waste are applicable if waste-status is maintained. Consequently, sewage sludge cannot be co-incinerated with virgin fuels unless (a) relevant waste or co-incineration rules are adhered to or (b) the sewage sludge loses waste-status prior to incineration.

For sewage sludge to lose its waste-status it must be recovered. Additionally, it must conform with the corresponding national rule that codifies the conditions of article 6(1) WFD. For most MS, these conditions are codified *in verbatim*. Interestingly, for the purposes of incineration, article 6(1c) requires that the contended waste conforms with laxer requirements than those that would apply if waste status were maintained. As noted above, the CJEU has in *Prato Nevoso* determined that article 6(1d) WFD requires that the environmental impacts are at least neutral for the condition to be fulfilled. Likely, this means that even if the intended use is lawful, the waste cannot cease to be waste if the environmental impacts would be greater if non-waste legislation is applied. To an extent, this is rational as it means that waste cannot cease to be waste by virtue of complying with a lower standard. At the same time, it means that it is, in principle, permitted to incinerate non-waste that result in higher environmental impacts than it would if the non-waste were incinerated according to the requirements for waste incineration.

Regarding utilization of the ash and consistency of the regulatory framework, it can be noted that if sewage sludge is used directly as a fertilizer in accordance with the rules of the SSD, the allowed concentration of certain pollutants, such as cadmium or mercury, is up towards 20 times higher than when ash derived from sewage sludge is used as an input material for CE-marked fertilizer.[115] This discrepancy highlights a regulatory tension: the shift from the SSD to the FR not only changes the applicable legal framework but also results in substantially stricter contaminant thresholds for materials stemming from the same original source. The stricter contaminant limits under the FR reflect its harmonized and market-oriented scope, aimed at ensuring a high level of environmental and human-health protection in cross-border fertilizer trade. At the same time, the comparatively lenient limits under the SSD underscore

[115] Cf. Annex I PFC1 FR and Annex 1B SSD.

its function as a minimum harmonization instrument primarily focused on safe land application within national boundaries. Consequently, the regulatory pathway chosen for the material, direct land application versus conversion into a fertilizer product, significantly influences both the legal status and the permissible environmental risk profile of the substance.

In conclusion, the waste status of sewage sludge plays a critical role in determining the regulatory framework for its incineration, impacting the legal requirements and necessary precautions. The process for sewage sludge to lose its waste status involves recovery and compliance with national rules transposing article 6(1) WFD. The environmental impact considerations, as highlighted by the CJEU, ensure that waste cannot be reclassified to non-waste if it results in greater environmental harm. Additionally, the utilization of ash from incinerated sewage sludge as an input material under CMC 13 demonstrates a different regulatory approach compared to the direct use of sewage sludge as fertilizer, emphasizing the importance of consistent regulatory standards to manage pollutant concentrations effectively.

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Horizontal Coherence for Agricultural Nutrient Emissions Mitigation Policies: A Comparison of Denmark, Finland, Sweden, Poland and Norway

*Eerika Albrecht**

Abstract

This paper examines the horizontal policy coherence of key EU and national legislation on agricultural nutrient emissions. It focuses on the EU's regulatory framework for agricultural nutrient management, which consists of several environmental directives and framework policies and purely national regulations and policies. Additionally, the paper studies these policies in four EU member states (Denmark, Sweden, Finland, and Poland), and Norway and how they promote changes in agricultural practices through mandatory or incentivized mitigation measures. Our findings suggest that coherent policies with clearly defined and binding targets are needed to mitigate nutrient emissions from agricultural sources, setting water conservation as a priority in European agricultural policy. Policy coherence should be addressed in national implementation, which consists often of heterogeneous and constantly changing rules for farmers with each country setting their priorities on different measures to mitigate agricultural nutrient emissions.

Keywords: Policy coherence, policy implementation, eutrophication, agricultural nutrient emission

1. Introduction

Eutrophication in the coastal areas of the Baltic Sea, the Atlantic, and the North Sea in Norway is driven by anthropogenic stressors.[1] Agricultural nutrient emissions, consisting to a large part of nitrogen (N) and phosphorus (P) from agricultural lands, are major contributors to algal blooms and oxygen depletion in marine ecosystems.[2] The primary sources of anthropogenic N and P inputs in the Baltic Sea and North Sea are land-based, with agriculture being the dominant contributor.[3] Nutrient pollution from agricul-

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[1] Eutrophication has major impacts on aquatic ecosystems and negatively affects their ecological status and changes the ecological communities with naturally occurring species to communities dominated by species tolerant to nutrient pollution. See e.g., K. Karlson, R. Rosenberg and E. Bonsdorff, Temporal and spatial large-scale effects of eutrophication and oxygen deficiency on benthic fauna in Scandinavian and Baltic waters—a review. In H. Barnes, R.N. Gibson, M. Barnes and R.J.A. Atkinson, Oceanography and marine biology. An annual review, Volume 40, CRC Press, London, 2002), pp. 427–489, and M. Szymczak-Żyła, M. Krajewska, A. Winogradow, et al., Tracking trends in eutrophication based on pigments in recent coastal sediments. Oceanologia 2017; 59(1), 1–17.

[2] A. Lagus, J. Suomela, G. Weithoff, K. et al., Species-specific differences in phytoplankton responses to N and P enrichments and the N: P ratio in the Archipelago Sea, northern Baltic Sea. Journal of Plankton Research 2004; 26(7), 779–798.

[3] Baltic Sea Action Plan addresses the eutrophication by combining latest scientific knowledge and management. HELCOM. 2021. Baltic Sea Action Plan 2021 update. October 2021. Helsinki Commission, Helsinki. For further

ture derives from diffuse sources, and therefore pollution control is challenging. The nitrogen surpluses have remained high in Northern and Central Europe, with no significant improvement in past 30 years.[4] In response, the European Commission has emphasized the need for stronger measures to prevent nutrient-related water pollution, particularly from N and P.[5]

To address this issue, the European Union (EU) has implemented a comprehensive framework of directives, regulations, and policies to protect water resources from agricultural nutrient pollution. Key EU legislation includes the Water Framework Directive (WFD, 2000/60/EC)[6], the Marine Strategy Framework Directive (MSFD)[7], the Nitrates Directive (ND)[8], the Groundwater Directive (GWD)[9], and the Common Agricultural Policy (CAP)[10]. Additionally, international and regional agreements, such as the Helsinki Convention (HELCOM) for the Baltic Sea and the Oslo-Paris Convention (OSPAR) for the North-East Atlantic, aim to mitigate eutrophication by regulating nutrient emissions into freshwater, coastal, and marine environments.[11] National policies, including those governing phosphorus fertilizer use, further contribute to efforts in controlling agricultural nutrient pollution.

The European Commission has published a staff working document concerning the links between the CAP and the European Green Deal (EGD), which states that its objectives are already

reading see e.g., M.V. Brady, M.S. Andersen, A. Andersson, et al., Strengthening the policy framework to resolve lax implementation of the Baltic Sea Action Plan for agriculture. Ambio 2022; 51, 69–83, and K. Elofsson, Cost-effectiveness of the Baltic Sea action plan. Marine Policy 2010; 34(5), 1043–1050.

4 F. Platjouw, I. Nesheim, and C. Enge, Policy coherence for the protection of waste resources against agricultural pollution in the EU and Norway. RECIEL 2023; 32, 485–500.

5 Commission (EU) 'Report from the Commission to the Council and the European Parliament on the Implementation of Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources based on Member State reports for the period 2016–2019' (Communication) COM(2021) 1000 final, 11 Oct 2021.

6 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for community action in the field of water policy. Official Journal 22 December 2000 L 327/1.

7 Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy. Official Journal 25 June 2008 L 164/19.

8 Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources. Official Journal 31 December 1991 L 375.

9 Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration. Official Journal 27 December 2006 L 372.

10 Legal foundations of the Common Agricultural Policy are established in the "Treaty on the Functioning of the European Union." Consolidated version of the Treaty on the Functioning of the European Union. Official Journal 26 October 2012 C 326, P. 0001 – 0390, and in Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013, Official Journal 6 December 2021 L435 and in other applicable regulations.

11 HELCOM convention, Baltic Marine Environment Commission, The Baltic Sea joint comprehensive environmental action programme. Baltic Sea Environmental Proceedings, 1993; 48, 1–133, and OSPAR convention, Convention for the protection of the marine environment of the North-East Atlantic of 22nd September 1992, entered into force on 25th March 1998, 32 ILM 1072; 1993, Fur further reading see, e.g. M.S. Andersen, A. Andersson, M. Brady, et al., The Helsinki Convention's agricultural nutrient governance: how domestic institutions matter, Journal of Baltic Studies, 2023; 54(3), 443–466; M.H. Thorsøe, M.S. Andersen, M.V. Brady, et al., Promise and performance of agricultural nutrient management policy: Lessons from the Baltic Sea. Ambio, 2022; 51(1), 36–50; N. Tynkkynen, P. Schönach, M. Pihlajamäki and D. Nechiporuk, The governance of the mitigation of the Baltic Sea eutrophication: Exploring the challenges of the formal governing system. Ambio, 2014; 43, 105–114; R. Varjopuro, E. Andrulewicz, T. Blenckner, et al., Coping with persistent environmental problems: systemic delays in reducing eutrophication of the Baltic Sea. Ecology and Society, 2014; 19(4), 48.

in line with the focus of the EGD in relation to food systems.[12] The EGD advances a vision that by 2050, air, water and soil pollution is reduced to levels no longer considered harmful to health and natural ecosystems and that respect the boundaries our planet can cope with.[13] To structure the progress towards this ambition, the EGD and the related EU zero pollution action plan[14] establish specific targets for 2030 addressing required levels of reduction of different types of pollution in different parts of the environment. According to this document, by 2030, EU should reduce nutrient losses by 50%, the use and risk of hazardous chemical pesticides and the sale of antimicrobials for farmed animals and in aquaculture. Considering the marine environment, it is at risk of being polluted by diffuse pollution of nutrients and chemicals originating mostly from land-based sources.[15]

The document also stresses the importance of the CAP strategic planning process in which the EGD objectives are examined. In the process, Member States are required to give the Commission an account of the EGD targets related to agriculture. Thus, from the point of view of the fulfilment of EGD objectives, the phase of national strategic planning is central. Additional targets are included in the Farm to Fork strategy and the biodiversity strategy. CAP 2023–27 will be a key instrument in achieving the EGD objectives of the Farm to Fork and biodiversity strategies.[16] Consequently, low coherence between these policies may affect the achievement of EGD objectives, which will also impact implementation at the national level.

Policy coherence refers to the relationship between policies or policy sectors.[17] The concept is closely linked to the effective implementation of environmental policies, which is a widely debated topic in the European policy domain due to the horizontal and vertical fragmentation of EU institutions and the Member States' policies.[18] Several studies have examined effective implementation, coherence, and compliance within EU law.[19] Fewer studies have focused on mitigation measures to reduce nutrient losses from a comparative legal perspective. Our starting point is that policy coherence can lead to more efficient implementation of environmental legislation, although its evaluation depends on the time horizon and the objectives considered. While numerous policies and regulations apply to protection of water resources from agricultur-

[12] European Commission. European Commission staff working document, Analysis of links between CAP Reform and Green Deal SWD (2020) 93 final.

[13] European Commission, 2025. Zero Pollution Action Plan. <https://environment.ec.europa.eu/strategy/zero-pollution-action-plan_en>. Accessed on 12 August 2025.

[14] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Pathway to a Healthy Planet for All EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil (COM(2021) 400 final).

[15] European Environmental Agency, Marine messages II: Navigating the course towards clean, healthy and productive seas through implementation of an ecosystem-based approach. EEA Report 17/2019.

[16] European commission, Farm to fork strategy, 2025. <https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy_en>.

[17] For the definition of coherence see, M. Nilsson, T. Zamparutti, J.E. Petersen, et al., Understanding Policy Coherence: Analytical Framework and Examples of sector–Environment Policy Interactions in the EU. Environmental Policy and Governance, 2012; 22(6), 395–423.

[18] K. Hogl, E. Kvarda, R. Nordbeck and M. Pregernig, (Eds.), Environmental Governance: The Challenge of Legitimacy and Effectiveness. Edward Elgar Publishing, Cheltenham, 2012.

[19] C. Knill and A. Lenschow, (Eds.), Implementing EU environmental policy: New directions and old problems. Manchester University Press, 2000; C., Knill and D. Liefferink, Implementation effectiveness of EU environmental policy. In C., Knill and D. Liefferink (Eds.), Environmental politics in the European Union, Manchester University Press, 2013, pp. 145–161, and U. Sverdrup, Compliance and conflict management in the European Union: Nordic exceptionalism. Scandinavian Political Studies 2004; 27(1), 23–43.

al nutrient pollution, there is a need for higher level of policy coherence across the European, national and regional policies to support implementation of these policies.

The aim of this paper is to study the horizontal policy coherence[20] of key EU and national legislation on agricultural nutrient emissions by scrutinizing the objectives of multiple policy sectors towards the objectives of the EGD. Research has primarily focused on the challenges of transposing EU law into national law.[21] However, here, the paper will focus also on the horizontal policy coherence between two policy subsystems: water quality, as part of environmental policy, and agricultural policy as a sectoral policy. This paper studies policies that mandate or support the implementation of N and P mitigation measures, as well as nature-based solutions (NBS). NBS are defined as living solutions inspired and supported by nature, utilizing resources efficiently and adaptively to address societal challenges while providing economic, social, and environmental benefits.

The paper focuses on the EU's regulatory framework for agricultural nutrient management, which consists of several environmental directives and framework policies as well as purely national regulations and policies, such as those concerning phosphorus fertilizer use. To understand horizontal and vertical fragmentation of the EU and national policies the paper focuses on the nutrient mitigation policies in Northern European countries. To study horizontal coherence of the EU agricultural nutrient management policies, it first analyzes the coherence of EU environmental legislation related to agricultural nutrient emissions in the EU. As a second step it compares agricultural nutrient emission mitigation policies in four EU member states (Denmark, Sweden, Finland, and Poland), and Norway. Norway, as a non-EU country, partially follows EU environmental policies (e.g. the WFD) while implementing its own agricultural policies. The paper lists main legislation implementing the agricultural nutrient management policies in each member state and Norway in Appendix 1. Our research questions are:

1. How are EU agricultural and environmental policy instruments and objectives targeted towards the aims of mitigating N and P emissions?
2. What kind of horizontal policy coherence challenges exist when targeting water and agricultural environmental policies towards mitigating N and P emissions?
3. How are these policies implemented in Denmark, Finland, Sweden, Poland and Norway?

2. Conceptual and methodological approaches

Policy coherence has been defined as a policy attribute that reduces conflicts and promotes synergies between different policy areas to achieve jointly agreed-upon objectives.[22] Policy coherence for sustainable development has gained increasing scholarly attention.[23] Horizontal coher-

[20] K. Kurze and A. Lenschow, Horizontal policy coherence starts with problem definition: Unpacking the EU integrated energy-climate approach. Environmental Policy and Governance, 2018; 28(5), 329–338.

[21] C. Demmke, S.F. Deakin, Towards effective environmental regulation: innovative approaches in implementing and enforcing European environmental law and policy. New York University School of Law, 2001.

[22] Nilsson, et al., n 17.

[23] M. S. Righettini, and R. Lizzi, How scholars break down "policy coherence": The impact of sustainable development global agendas on academic literature. Environmental Policy and Governance, 2022; 32(2), 98–109; J., Meadowcroft, Who is in charge here? Governance for sustainable development in a complex world. In Governance for sustainable development (pp. 107–122). Routledge, London, 2013; F. Platjouw, et al., fn 4.; Keijzer, N., EU Policy Coherence for Development: From Moving the Goalposts to Result based Management? European Centre for Development Policy Management 2010. Single European Act [1987] OJ L169/1 art. 30(2)(d)),

ence is linked to support and synergies to achieve shared objectives across individual policies, e.g. agricultural and biodiversity policies.[24] Vertical coherence refers to interplay between directives' national and local implementation that support reaching shared objectives. Horizontal policy coherence can be studied by comparing multiple policy sectors on EU, national or local scale. I focus on horizontal policy coherence of agricultural nutrient mitigation policies from European to local scale. In the EU, this involves e.g. coherence between the Farm to Fork Strategy and the Biodiversity Strategy, both components of the EU Green Deal, and the CAP. Norway, as a non-EU country, partially follows EU environmental policies while implementing its own agricultural policies.

Policy coherence is therefore expected to lead to more efficient implementation of environmental policy mixes, although its evaluation depends on the time horizon and the objectives considered[25]. Traditional policy analysis often focuses on the effectiveness of policy implementation within a single policy area, while the policy mix approach examines coherence within a given policy sector or across sectors.[26] "Policy mix," refers to a policy area where a combination of policy instruments is applied, influenced by instruments from other sectors.[27] It is important to note that a sectoral policy can be effective in achieving its own objectives without being coherent with other policy areas and their goals. Coherent policymaking can navigate trade-offs and synergies across multiple policy goals and sectors.[28]

Policy coherence can be analyzed by focusing on policy outputs, integration, evaluation, and the implementation of policy instruments and objectives. Policy outputs have been distinguished between policy objectives and policy instruments.[29] Policy integration analysis is particularly focusing on upstream policy making processes related to formulation of policy objectives and instruments. Policy evaluation refers to *ex ante* or *ex post* analysis of certain policy areas by applying certain criteria and forming policy recommendations.[30] Policy implementation refers to the arrangements by authorities and other actors enforcing policy instruments.[31] In the context of EU policy implementation 'layered' understanding of coherence including the

called on the EU to act as 'a cohesive force in international relations', the Treaty on European Union [1992] OJ C191/1 art. C established that the 'The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic, and development policies'.

In the European context, policy coherence was introduced as a concept in the Maastricht Treaty of 1992 and further developed in Lisbon Treaty of 2009. Coherence is also one of the OECD evaluation criteria for sustainable policies, see also: OECD/DAC Network on Development Evaluation, Better Criteria for Better Evaluations. Revised Evaluation Criteria. Definitions and Principles for Use"; OECD, Better Policies for Sustainable Development. A New Framework for Policy Coherence, 2016.

[24] M. Nilsson, et al., fn 17.

[25] K. Kurze, et al., fn 20.

[26] L. Kanger, B.K. Sovacool, M. Noorkõiv, Six policy intervention points for sustainability transitions: A conceptual framework and a systematic literature review. Research Policy, 2020; 49(7), 104072.

[27] S. Oberthür, T. Gehring, (Eds.), Institutional interaction in global environmental governance: Synergy and conflict among international and EU policies. Mit Press, 2006.

[28] P. Antwi-Agyei, A.J. Dougill, L.C. Stringer, Assessing coherence between sector policies and climate compatible development: Opportunities for triple wins. Sustainability 2017; 9(11), 1–16; M. Nilsson, N. Weitz, Governing trade-offs and building coherence in policy-making for the 2030 agenda. Politics and Governance 2019; 7(4), 254–263; Z. Shawoo, A. Maltais, A. Dzebo, J. Pickering, Political drivers of policy coherence for sustainable development: An analytical framework. Environmental Policy and Governance 2023; 33(4), 339–350.

[29] P. Hall, Policy paradigms, social learning, and the state: the case of economic policymaking in Britain. Comparative Politics 1993; 25, 275–296, and M. Nilsson, et al., fn 17.

[30] A. Crabbé, Leroy, P., The handbook of environmental policy evaluation. Earthscan, Routledge, 2008.

[31] M. Nilsson, et al., fn 17.

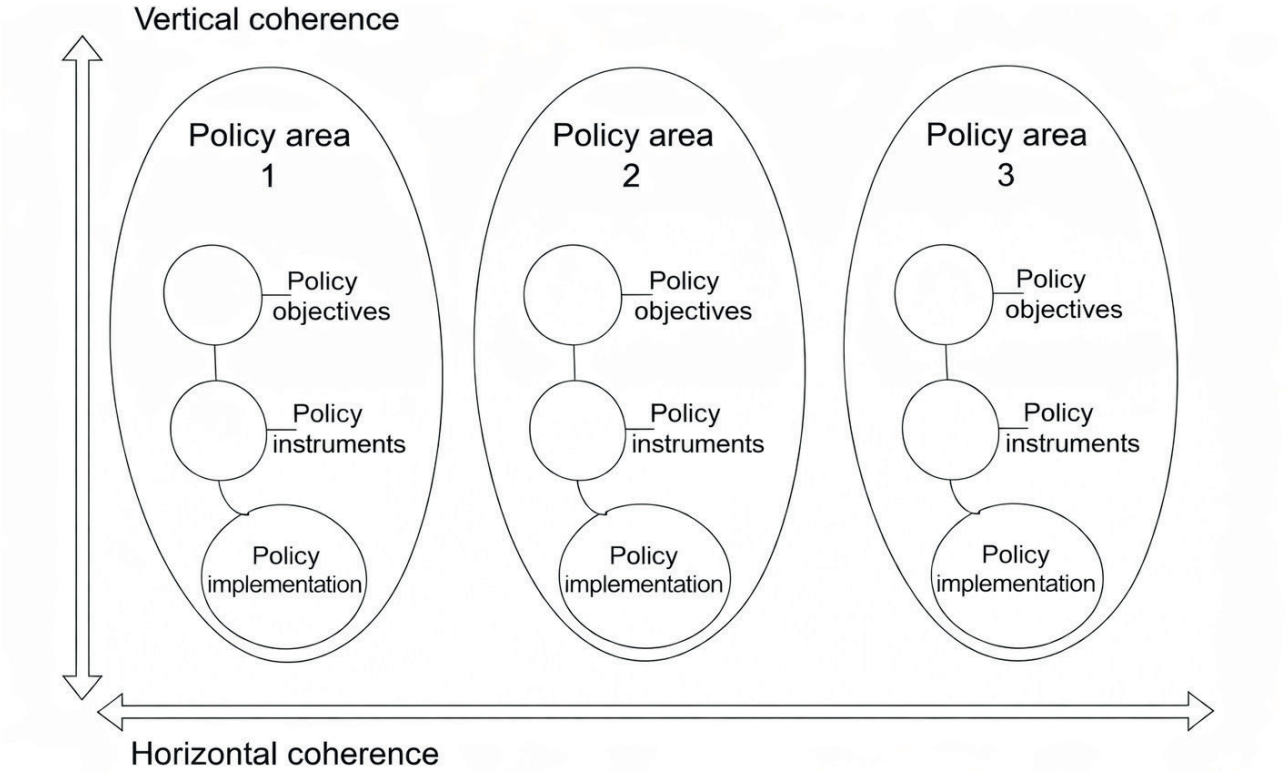

Figure 1. Policy coherence and implementation of European policies.

horizontal and vertical interactions therein aim to capture the interaction between EU and national level policy.[32] The multilevel governance of the EU reflects at least to some extent the analytical layers from objectives to instruments to implementation (Figure 1). The overarching objectives and instruments are designed on European level, whereby more specific instruments and implementation are defined at the Member State or regional level.

3. Agricultural Nutrient Emission Policies

3.1 EU Water Framework Directive

The Water Framework Directive (2000/60/EC; WFD), enacted in 2000, governs the ecological status of rivers, lakes, transitional waters, coastal waters and groundwater across Europe. Its primary objective is to ensure that all European surface and groundwater bodies achieve good status by 2015 or, at the latest, by 2027. The directive introduces ecosystem-based management (EBM), requiring member states to organize river basin management in Europe to river basin districts.[33] It promotes adaptive management[34] through a cyclical approach of 6-year planning cycles of River Basin Management Plans (RBMPs), which are developed through an extensive public consultation process. Adaptive management has

[32] M. Nilsson, et al., fn 17; I. Bache, M. Flinders, Multilevel governance and environmental policy. Oxford University Press, Oxford, 2004; A. Jordan, A. Schout, The coordination of the European Union. Oxford University Press, Oxford, 2006.

[33] M. Kaika, and B. Page, The EU Water Framework Directive: Part 1. European policy-making and the changing topography of lobbying. European environment, 2003; *13*(6), 314–327; N. Voulvoulis, K. D. Arpon, and T. Giakoumis, The EU Water Framework Directive: From great expectations to problems with implementation. Science of the Total Environment, 2017; 575, 358–366.

[34] *Adaptive management* has been promoted through the EU water policy for the past decades: C., Pahl-Wostl, Adaptive and sustainable water management: from improved conceptual foundations to transformative change. International Journal of Water Resources Development 2020; 36(2–3), 397–415.

been defined as an environmental management process that integrates environmental with economic and social understanding.[35] EU Member States are mandated to establish RBMPs and programme of measures (PoM) for the implementation cycles of 2009–2015, 2016–2021 and 2022–2027. The European Commission evaluates the WFD's implementation through an implementation report, submitted to the European Parliament after each RBMP-cycle. The report is based on member states assessments of their progress in implementing the PoM's of the RBMP's.

All pressures affecting aquatic ecosystems should be accounted for and reduced to achieve good status unless exemptions are applied.[36] All waters are regulated by the non-deterioration clause, by which Member States are required to implement all the necessary measures to prevent deterioration of water bodies in their territory (WFD Article 4.1(a)(i); 4.1(b)(i)). The status of waters is monitored and assessed based on a classification of ecological status into high, good, moderate, poor, and bad.[37] The ecological status assessment is based on physico-chemical and hydro-morphological quality elements, which must meet certain levels to safeguard a functioning ecosystem. The status classification relies on Biological Quality Elements, which should show only a low level of distortion caused by human activity (WFD Annex V). Both the good ecological status and non-deterioration requirements are legally binding for EU member states, as confirmed by the Court of Justice of the European Union in the Weser ruling (CJEU C-461/13). States must consider WFD requirements when permitting new projects that impact water quality.[38]

3.2 EU Marine Strategy Framework Directive

The Marine Strategy Framework Directive (2008/56/EC; MSFD), adopted in 2008, aims to protect and ensure the sustainable use of marine ecosystems. As the environmental pillar of the EU's Integrated Maritime Policy, it supports sustainable growth in maritime sectors[39]. The directive sets a target to achieve Good Environmental Status of the EU's marine waters by 2020, with a scheduled review for 2023 (Article 23 of the MSFD). According to the MSFD (Annex I) the good ecological status is reached by low human-induced deterioration of key areas, such as biodiversity, presence of non-indigenous species, populations of commercial fish and shellfish, marine food webs, eutrophication, sea floor integrity, alteration of hydrographical conditions, contaminants, marine litter and underwater noise. Agricultural nutrient emissions significantly contribute to eutrophication, which

[35] C.S., Holling, Adaptive environmental assessment and management, John Wiley and Sons, New York, 1978, and L., Hasselman, Adaptive management; adaptive co-management; adaptive governance: what's the difference?. Australasian Journal of Environmental Management; 2017, 24(1), 31–46.

[36] L. Squintani, and H. van Rijswick, Improving legal certainty and adaptability in the programmatic approach. Journal of Environmental Law, 2016; 28, 443–470.

[37] A.S. Heiskanen, W. Van de Bund, A.C. Cardoso and P. Nõges, Towards good ecological status of surface waters in Europe-interpretation and harmonisation of the concept. Water science and technology, 2004; 49(7), 169–177; I. Zacharias, P. Liakou, and I. Biliani, A review of the status of surface European waters twenty years after WFD introduction. Environmental Processes, 2020; 7(4), 1023–1039.

[38] T.M. Paloniitty, The (In) Compatibility between adaptive management and law: Regulating agricultural runoff in the EU, Juvenes Print Oy, Helsinki, 2018, and N. Soininen and F.M. Platjouw, Resilience and adaptive capacity of aquatic environmental law in the EU: An evaluation and comparison of the WFD, MSFD, and MSPD. In D. Langlet and R. Rayfuse (eds), Ecosystem Approach in Ocean Governance and Planning. Brill Nijhoff. 2018, pp. 17–79.

[39] F. Galgani, G. Hanke, S. Werner and L. De Vrees, Marine litter within the European marine strategy framework directive. ICES Journal of marine Science, 2013; 70(6), 1055–1064.

is closely linked to the ecological status of the marine environment.

Its implementation follows an ecosystem-based approach[40], prioritizing the attainment and maintenance of good ecological status across all community's marine environments, ensuring their protection and preservation and preventing further degradation (MSFD Preamble 8). Member States are required to follow an adaptive management approach that involves a reiterative six-year cycle for the development of Programme of Measures (PoM) to achieve good environmental status (art. 13 MSFD). They are also expected to establish monitoring programmes for ongoing assessment and regular updating of targets to achieve Good Environmental Status (art. 11 MSFD).

3.3 EU Nitrates Directive

The Nitrates Directive (ND; 91/676/EEC)[41], enacted in 1991, has guided water protection from nitrate contamination that results from nitrogen compounds in fertilizers and manure leaching into groundwater and runoff from agricultural land into surface waters. The directive aims to promote good farming practices and prevent nitrate pollution from agricultural sources. It regulates the monitoring of nitrate concentrations in water bodies, requires designation of nitrate vulnerable zones, defined as land-areas that drain into polluted waters or waters at risk of pollution, and which contributes to nitrate pollution. The ND also establishes codes of good agricultural practices and requires measures to prevent and reduce water pollution from nitrates. The nitrogen vulnerable zone concern waters that are eutrophic or could contain >50 mg/l of nitrates due to agricultural activities and all surface water bodies that are at risk of becoming eutrophic soon, if no action is taken (Art. 3.1 and Annex 1, point A.3). In Nitrate Vulnerable Zones, excessive nitrate levels are primarily due to shortcomings in groundwater management rather than a lack of knowledge or available water protection techniques.[42] Similarly, in eutrophic or potentially eutrophic surface waters, nitrate exceedance stems from ineffective surface water management. In non-vulnerable zones, Member States shall establish voluntary measures, primarily focused on regulating fertilizer use based on specific time periods and weather conditions.

3.4 Groundwater Directive

The Groundwater Directive (GWD; Directive 2006/118/EC) aims to prevent and control groundwater pollution from harmful substances. The directive sets assessment criteria on good chemical status of groundwaters and for identification of an upward trend. Groundwater is considered to have a good chemical status, when the measured nitrate levels do not exceed 50 mg/l, active pesticides do not exceed 0.1 μg/l or 0.5 μg/l, and levels of certain high-risk substances are below threshold values set by Member States.[43] In the GWD, the concentrations of any other pollutants should conform to the definition of good chemical status as outlined in Annex V of the WFD. If a value set in the groundwater quality standards is exceeded, an

[40] T. Berg, K. Fürhaupter, H. Teixeira, L. et al., The Marine Strategy Framework Directive and the ecosystem-based approach–pitfalls and solutions. Marine pollution bulletin, 2015; 96(1–2), 18–28, and J. Van Leeuwen, L. Van Hoof and J. Van Tatenhove, Institutional ambiguity in implementing the European Union marine strategy framework directive. Marine Policy, 2012; 36(3), 636–643.

[41] Fn 8.

[42] A. Musacchio, V. Re, J. Mas-Pla, E. Sacchi, EU Nitrates Directive, from theory to practice: Environmental effectiveness and influence of regional governance on its performance. Ambio, 2020; 49, 504–516.

[43] Such substances are ammonium, arsenic, cadmium, chloride, lead, mercury, sulphate, trichloroethylene and tetrachloroethylene.

investigation must confirm that it does not pose any significant environmental risk.

3.5 EU Common Agricultural Policy (CAP)

The Common Agricultural Policy (CAP), established in 1962, is the primary instrument for promoting and financing agriculture in the EU.[44] It aims to enhance agricultural productivity, ensure a fair standard of living for farming communities, stabilize markets, secure food supply availability, and maintain fair consumer prices. Environmental objectives, such as climate change mitigation and sustainable resource management, have been introduced in CAP reform in 1992. Since then, the CAP has undergone several reforms introducing new environmental objectives to the payment scheme including water protection measures.

The CAP 2023–2027 includes the greening of agricultural systems through eco-schemes that provide incentives for climate-friendly and environmentally friendly agricultural practices. Despite an overall reduction in EU funding, the programmatic period aims to strengthen environmental and climate measures, with objectives to address reduced pollution, biodiversity, climate change mitigation and adaptation, and sustainable natural resource management. At the EU level, CAP promotes water protection and enforces environmental standards that farmers must meet to receive subsidies through conditionality, also previously referred to as the cross-compliance mechanism.[45] All farmers—whether receiving payments or not—must adhere to Statutory Management Requirements (SMRs), which cover EU rules on public health, animal and plant health, animal welfare, and environmental protection. Good Agricultural and Environmental Conditions (GAECs), apply to farmers receiving area-based support in form of CAP payments. Eco-schemes go beyond the conditionality baseline by supporting farmers in adopting sustainable farming practices that minimize harmful impacts of agriculture on environment and climate.[46] This mechanism supports activities, such as organic farming or agroforestry that benefit European biodiversity and agricultural landscapes by safeguarding habitats, improving animal welfare, and establishing good agricultural and environmental practices.

Each EU Member State must develop a national strategic plan for the 2023–2027 CAP programmatic period, outlining agricultural policy measures and requirements. These plans are subject to EU approval, and they include country-specific conditionality requirements and eco-schemes that are mandatory for Member States but voluntary for farmers. CAP national strategic plans include measures such as balanced nutrient use (limits on nitrogen and phosphorus fertilization), herbicide restrictions, two-stage ditches and channels, buffer strips, grassed waterways and winter plant cover on arable land. Many of the measures function as NBS, that can be implemented on a farm level and that provide solutions to address quality of water. Additionally, CAP funds support non-productive investments, such as establishing wetlands to reduce nutrient runoff and enhance biodiversity.

[44] European Commission, The common agricultural policy at glance. 2024a. <https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-glance_en>. Accessed on 2 Feb. 2024.

[45] Conditionality. Linking income support to respect for European Union rules. <https://agriculture.ec.europa.eu/common-agricultural-policy/income-support/conditionality_en>. Accessed on 20 Feb. 2026.

[46] Eco-schemes. Sustainable land use, rewarding farmers for taking care of the climate, landscapes and the environment, and animal welfare. <https://agriculture.ec.europa.eu/common-agricultural-policy/income-support/eco-schemes_en>. Accessed on 20 Feb. 2026.

4. Comparison of Northern European countries

4.1 Denmark

Denmark is among the most intensively farmed countries in the world. As an EU Member State, it implements all major directives mentioned above – the WFD, MSFD, ND and GWD as well as the CAP. Denmark implements the WFD in four river basin districts and the RBMPs emphasize reducing nitrogen and phosphorus to improve water quality through measures, such as catch crops schemes and establishing wetlands. Since 1991, as part of implementation of the ND, Denmark has introduced a nationwide catch crop scheme, and extended its coverage supported by regulations requiring a specific percentage of agricultural land to be dedicated to these crops. This approach has successfully reduced nitrate-N leaching from fields and helped to protect Denmark's water resources. From 1990 to 2004, Denmark achieved a world-record 36% reduction in nitrogen losses, made possible by a comprehensive set of mandatory measures and until 2014 almost 50%.[47] As a result, the Danish catch crop model serves as a best practice that could be applied in other regions struggling with high nitrogen concentrations in water. The CAP plan, approved in August 2022, allocates significant resources to sustainable agriculture and rural development, with a strong focus on mitigating nitrogen and phosphorus pollution. Denmark was among the Member States that fully implemented the GAEC 8—a conditionality requirement for farmers to set aside 4% of their agricultural land.

4.2 Finland

In Finland, agricultural land accounts for approximately 7% of the total land area.[48] Due to its northern location, farming is not highly profitable, however, the country maintains a high level of self-sufficiency in agricultural production, with food security as a key focus of its agricultural policy. Since joining the EU in 1995, Finland has implemented the WFD, MSFD, ND, and other relevant regulations, along with the CAP. There are seven river basin districts in the mainland and one in Åland. The RBMP align proposed agricultural measures with the CAP programmatic measures which in Finland have primarily focused on direct payments. The CAP environmental payment scheme serves as the primary financial tool for reducing nutrient runoff from farming. Additional policies and regulations, such as the new national regulation on phosphorus fertilizer and manure use (64/2023), have been introduced. As part of the CAP measures, Finland has emphasized the importance of maintaining minimum winter plant cover, with an increasing number of hectares receiving subsidies for this environmental practice. Structural liming and other soil structure management measures have also been implemented. Due to high fertilizer prices, farmers are using only the amount needed by crops rather than the maximum permitted. In addition to agricultural subsidies, water protection in farming is supported through various project initiatives that significantly contribute to improving water quality. For instance, Finland's Ministry of the Environment funds a nutrient recycling programme and a water protection initiative, under

[47] T. Dalgaard, et al., Policies for agricultural nitrogen management–trends, challenges and prospects for improved efficiency in Denmark. Environmental Research Letters, 2014; 9(11), 115002, and H.T. Anker, Agricultural nitrate pollution – regulatory approaches in the EU and Denmark. Nordic Environmental Law Journal, 2015:2.

[48] J. Tiainen, et al., Biodiversity in intensive and extensive grasslands in Finland: the impacts of spatial and temporal changes of agricultural land use. Agricultural and Food Science, 2020; 29(2), 68–97.

which gypsum treatment has been applied to fields in the Archipelago Sea catchment area.[49]

4.3 Sweden

Agriculture accounts for less than 10% of Sweden's total land use.[50] Sweden joined the EU in 1995 and follows the WFD, MSFD, ND, and GWD, which regulate nitrate concentrations in surface and groundwater. These directives are enforced through national legislation, including Chapter 5 of the Environmental Code (Miljöbalk 1998:808). Sweden implements the WFD across five river basin districts. CAP is implemented through farm subsidies, payments for investment and environmental mitigation measures and it funds the agricultural advisory program Focus on Nutrients. In addition to supporting various initiatives to enhance water quality, the agri-environmental payment model has helped sustain small, diverse farms with low-intensity management practices, particularly within mixed forest–farm landscapes.[51] In Sweden, in addition to implementing CAP measures, various agricultural advisory programs and subsidies have been introduced to improve nutrient management. Among these measures, structural liming has specifically focused on enhancing soil structure. Some measures have been particularly popular among farmers, for example, subsidies for drainage system renovations received more applications than available funding. National subsidies support local water management projects (LOVA) and local nature conservation initiatives (LONA). Farmers undertake also many environmental initiatives beyond those that are subsidized or officially documented, such as improvements to field drainage and soil structure. Wetlands, for instance, are established with the national and also voluntarily without public funding.

4.4 Poland

In Poland, agricultural policy has primarily focused on modernizing the sector and improving its profitability. The country implements the WFD, MSFD, ND, and GWD through national legislation as well as CAP. RBMPs and their PoM address nitrate pollution from agriculture by implementing nutrient management, runoff and erosion control, and water retention measures to improve water quality and support sustainable farming.[52] Poland's Strategic Plan emphasizes direct payments over environmental needs, which is why it appears insufficient to respond to environmental and climate demands. The Code of Good Agricultural Practices recommends measures such as efficient fertilization, soil and water protection, erosion control, and advisory code additional measures for ammonia emission reduction to address agricultural pollution. To support the implementation of the above-mentioned directives, there is a need for more information on the impacts of different land management practices, as well as incentives to encourage the adoption of nature-based solutions and mitigation measures. Integrating these solutions into broader strategic policies—

[49] E. Albrecht, A. Belinskij, E. Heikkilä, Policy coherence for ecosystem-based management: Implementing EU water and marine policies in the Archipelago Sea. Marine Policy, 2025; 171, 106427.

[50] European Commission, Sweden – CAP Strategic Plan, (2024c). Accessed on 11 February 2025.

[51] K. Eksvärd, K. Marquardt, From change to transition? Learning from environmental protection activities in Sweden. Agroecology and Sustainable Food Systems, 2018; 42(2), 189–209, and M. Granvik, G. Lindberg, K.-A. Stigzelius, E. Fahlbeck, Y. Surry, Prospects of multifunctional agriculture as a facilitator of sustainable rural development: Swedish experience of Pillar 2 of the Common Agricultural Policy (CAP). Norsk Geografisk Tidsskrift – Norwegian Journal of Geography, 2012; 66(3), 155–66.

[52] M. Piniewski, et al., How effective are River Basin Management Plans in reaching the nutrient load reduction targets? Ambio 2021; 50, 706–722.

such as climate change mitigation and adaptation strategies, green infrastructure planning, and biodiversity conservation—follows an ecosystem-based approach. The EU and national funding programs require redirecting towards supporting rural restructuring, particularly in agro-tourism. This would include targeting investments in constructing environmental protection infrastructure. Environmental education is needed, and this could be incorporated into curricula at various levels. Additionally, compensating farmers for practices that enhance ecosystem services would benefit the society.

4.5 Norway

In Norway, agricultural land makes up only 3.5% of the country[53], yet, enhancing food self-sufficiency is a national priority. Norway is not a member of the EU but has incorporated the EU WFD into its national law in December 2006 through the Framework for Water Management regulation. The legal framework for implementing the WFD and Norway's *Regulation on Framework for Water Management* is based on four national laws: the *Planning and Building Act*, the *Pollution Control Act*, the *Nature Diversity Act*, and the *Water Resources Act*. While the latter three specifically address water-related environmental concerns, the *Planning and Building Act* ensures that RBMPs are integrated into the broader planning system. Additional legislation also governs agricultural activities. The ND is implemented in catchments draining into the Oslo Fjord, a water body facing significant environmental challenges. In response to nutrient-driven ecological decline in the Oslo Fjord, new regional regulations in Oslo & Viken[54] mandate practices such as grass-covered buffer zones, reduced tillage, and winter plant cover. While Norway does not implement the CAP, it employs its own regulations and policies and economic incentives to promote environmental mitigation measures. Many of these measures are included in Regional Environmental Programs – regional environmental funding schemes with similar measures as in national CAP plans. At the national level, economic incentives have been the primary tool for encouraging such measures, with relatively few legal requirements. However, at regional and local levels, regulations have been introduced to enforce buffer zones and conservation tillage.

5. Assessing the Horizontal Coherence of Agricultural Nutrient Emission Policies

When evaluating the coherence of directives targeting water quality, the WFD and MSFD are largely coherent with each other's objectives, although some overlap exists, particularly in the management of coastal areas. The geographical scope of these plans overlap with coastal waters up to one nautical mile. While the WFD addresses inland, transitional, and coastal surface waters as well as groundwaters, the MSFD focuses on marine ecosystems. It serves as an environmental pillar of the Integrated Maritime Policy of the European Union, aiming for sustainable growth in maritime sectors.[55] Like the WFD, the MSFD employs an adaptive management approach with a 6-year planning cycle[56], however their timeline for implementation differs.

The WFD mandates the drafting of River Basin Management Plans (RBMP) and PoM, while the MSFD provides the foundation for the Marine Management Plan (MMP) and associated measures. Both RBMPs and MMPs introduce multi-sectoral measures to combat eutrophica-

[53] NIBIO, Areal barometer for Norway, 2024. Accessed on 11 October 2024.

[54] Forskrift om regionale miljøkrav i jordbruket, Oslo og Viken, No. 2182 of 06 December 2022.

[55] F. Galgani, et al., fn 39.

[56] J. Van Leeuwen, et al., fn 40.

tion, including legislative actions, financial guidance, and increased information and research. MSFD allows more freedom in terms of measures implemented under the directive. There is also a clear connection between the Baltic Sea Action Plan (BSAP) of HELCOM and the RBMP and MMP measures in the Baltic Sea region.[57] However, the effectiveness of these measures has been undermined by their voluntary nature and the challenges of achieving cross-sectoral cooperation. Regardless of the water quality objectives, reducing agricultural nutrient emissions and improving water quality is behind the schedule.[58] The European Commission monitors WFD implementation and published its 6th implementation report in 2021, concluding that agriculture is a major driver for failure to achieve good status in EU water bodies.[59]

The ND, along with its national implementation, has successfully reduced nitrogen leaching into groundwater, surface waters, and the atmosphere.[60] It is also one of the Statutory Management Requirements of the Common Agricultural Policy. Non-compliance with the ND requirements leads to a proportional reduction in agricultural subsidies. The measures required under the ND are mostly also required to be included in the programmes of measures (PoM) in the WFD (Annex VI, Part A). Therefore, the objectives of ND are to a large degree coherent with the other directives compared here. Further reductions could be achieved through stricter requirements[61], as demonstrated by significant progress in Denmark. The Danish example of nutrient emission reductions through successful implementation of ND shows that it is possible to move towards safe nutrient boundaries through environmental legislation. In contrast, P use in agriculture has not been as strictly regulated by the EU.[62] However, some Member States, such as Finland, have implemented national regulations to address this gap.

Agricultural policy has often been studied as a separate sector, with findings that the CAP subsidy scheme and its cross-compliance mechanism are overly complex and inefficient.[63] The agri-environmental schemes of the CAP have faced criticism for the lack of effectiveness in achieving environmental outcomes.[64] There are several reasons for this inefficiency, including the management of nutrient loading and the uneven distribution of costs and benefits.[65] Re-

[57] Ibid.

[58] European Environment Agency, 2018. European waters: Assessment of status and pressures 2018. EEA Report no. 7/2018, Publications Office of the European Union, Luxembourg, 2018; L. Carvalho, E.B. Mackay, A.C. Cardoso, et al., Protecting and restoring Europe's waters: An analysis of the future development needs of the Water Framework Directive. Science of the Total Environment 2019; 658, 1228–1238, and N. Voulvoulis, et al., fn 33.

[59] European Commission, Report from the Commission to the Council and the European Parliament on the implementation of the Water Framework Directive (2000/60/EC), the Environmental Quality Standards Directive (2008/105/EC amended by Directive 2013/39/EU) and the Floods Directive (2007/60/EC), COM(2021) 970 final, Brussels, 15.12.2021, 2021.

[60] G.L. Velthof, J.P. Lesschen, J. Webb, et al., The impact of the Nitrates Directive on nitrogen emissions from agriculture in the EU-27 during 2000–2008. Science of the Total Environment, 2014; 486, 1225–1233.

[61] Ibid.

[62] K. Heyl, Reducing Phosphorus Input into the Baltic Sea—An Assessment of the Updated Baltic Sea Action Plan and Its Implementation through the Common Agricultural Policy in Germany. Water, 2023; 15(2), 315.

[63] G. Pe'er, S. Lakner, R. Müller, et al., Is the CAP Fit for purpose? An evidence based fitness-check assessment. Leipzig, German Centre for Integrative Biodiversity Research (iDiv) Halle-Jena-Leipzig, 2017.

[64] C. Rega, and A. Spaziante, Linking ecosystem services to agri-environmental schemes through SEA: A case study from Northern Italy. Environmental Impact Assessment Review, 2013; 40, 47–53.

[65] S. Wuijts, M. Graversgaard, C. Van Den Brink, et al., Protection of water resources from agricultural pressures: Embracing different knowledge domains in governance approaches. Environmental Policy and Governance, 2025; 35(2), 201–213.

ducing administrative burdens and increasing farmer participation have been recommended to solve the lack of effectiveness in the agricultural sector.[66] Participation of farmers in agricultural practices that aim at water quality improvement is a necessity, and conditionality requirements aim to ensure this. Additional initiatives have been developed to further reduce pressure on water ecosystems. Also, implementation should include practical guidance and monitoring of outcomes. The main challenge lies in financing, subsidies, and effectively targeting these resources to the most problematic areas.

The countries' studies in this paper have introduced national legislation and additional measures to overcome this challenge. Finland has introduced additional policies and regulations, such as the phosphorus regulation and funds project activities such as the gypsum project. Also, Sweden funds additional measures, such as LOVA and LONA that have encouraged restoration and construction of wetlands. In Poland additional measures include information guidance for agro-tourism, however, additional incentives targeting the water quality would be needed. Norway implements the WFD separately and has its own regulations and economic incentives for the agriculture sector in Regional Environmental Programs.

6. Conclusions

This paper has studied the horizontal policy coherence[67] of key EU and national legislation on agricultural nutrient emissions in Northern Europe. It focused on the EU's regulatory framework for agricultural nutrient management consisting of several environmental directives and framework policies and purely national regulations and policies, such as those concerning phosphorus fertilizer use. The analysis included European, sea basin-level (HELCOM), and national laws and policies addressing agricultural nutrient emissions.

The primary coherence challenge lies in aligning the environmental objectives of the WFD, the MSFD, and the ND, with the agricultural payment scheme under the CAP. The absence of strong legal linkages between CAP and WFD creates a fragmented policy landscape. This variability risks falling short of the European Green Deal's nutrient reduction target and undermines progress toward the WFD's 2027 "good status" deadline. Without stronger policy coherence, which is established through binding nutrient reduction targets, alignment of CAP payments with water protection objectives, and exclusion of harmful subsidies, the EU's ambition to achieve zero pollution from agriculture will remain out of reach.

This paper suggests that improving the status of European waters requires greater policy coherence and stronger support for implementation. Improving coherence between EU environmental legislation and agricultural policies requires integrating environmental policies into core economic frameworks. The CAP objectives could be aligned with EU Green Deal's objectives to a larger extent. Although the WFD aims to build bridges across policy sectors, the implementation by Member States leaves much of its potential unexplored.[68]

[66] N. El Benni, C. Ritzel, K. Heitkämper, et al., The cost of farmers' administrative burdens due to cross-compliance obligations. Journal of Environmental Planning and Management, 2022; 65(5), 930–952.

[67] K. Kurze, et al., fn 20.

[68] S. Wuijts, et al., fn 65.

Appendix 1.

Legislation and policy instruments	Sources
Denmark	
Act on Environmental Protection	Bekendtgørelse af lov om miljøbeskyttelse; nr 1218 of 2019
The Danish Livestock Farming Act	Bekendtgørelse af lov om husdyrbrug og anvendelse af gødning m.v.; nr 1020 of 2018
Act on agricultural use of fertilizers and plant cover	Bekendtgørelse af lov om jordbrugets anvendelse af gødning og om plantedække; nr 388 of 2016
Act on water planning	Lov om vandplanlægning; nr 126 of 2017
The Danish Action Plans for the Aquatic Environment (APAEs); the Danish Nitrates Action Programme, RBMPs, CAP strategic plan 2023–2027	
Finland	
Environmental Protection Act	Ympäristönsuojelulaki; 527/2014
Act on Organizing the Water Management	Laki vesienhoidon ja merienhoidon järjestämisestä (1299/2004)
Water act	Vesilaki 587/2011
Degree by the Council of State (931/2000) on reducing the nitrates pollution on water from agricultural sources, RBMPs, CAP strategic plan 2023–2027, main measures are listed in Finnish Food Authorities guide to cross-compliance	
Sweden	
The Environmental Act	Miljöbalk 808/1998
The Ordinance on Water Management	Vattenförvaltningsförordning 2004:660
Environmental quality objectives	Svenska miljömål, 2009/10:155
Central authority regulations, National programme to achieve nutrient reductions, RBMPs, CAP strategic plan 2023–2027	
Poland	
Environment Protection Law	Prawo ochrony środowiska; nr 62, 2001
Water Law	Prawo wodne; 1566, 2017
Degree by the Ministry of the Environment (23 Dec 2002) on criteria designating vulnerable zones subjected to pollution by nitrate from agricultural sources; Degree by the Ministry of the Environment (23 Dec 2002) on action programme aimed at limitation of nitrogen outflow from agricultural sources; Polish Action Programme, RBMPs, CAP strategic plan 2023–2027	
Norway	
The Pollution Control Act	Lov om vern mot forurensninger og om avfall (Forureningslove); nr 6 of 1981
The Land Act	Lov om jord (jordlova), nr 23 of 1995
The Water Resources Act	Lov om vassdrag og grunnvann (vannressursloven), nr. 82 of 2000
The Planning and Building Act	Plan- og bygningsloven, nr. 71 of 2008
The Nature Diversity Act	Naturmangfoldloven, nr 100 of 2009

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Anslutningsskyldighet, anslutningstid och andra särskilda skäl

Några reflektioner om anslutning av anläggningar till elnätet med anledning av Tesla-målen

*Emil Ellervik**

Abstract

As Europe's green transition accelerates, access to the electricity grid is paramount. This article uses the "Tesla cases" as a case study to analyse a grid operator's obligation to connect electricity facilities. The cases, arising from a labour dispute, highlight the tension between the EU's mandate for third-party access (TPA) in a competitive electricity market and national exceptions for extraordinary circumstances.

The analysis addresses two central legal questions. First, it examines the distinction between an outright refusal to connect and a delay to connect. The article argues that an indefinite delay without a foreseeable timeline should be treated as a de facto refusal, in order to prevent the right to TPA from becoming illusory.

Second, it scrutinises the compatibility of the Swedish Electricity Act's exception for "other special reasons" (Sw. *andra särskilda skäl*) with EU law. This national provision, which lacks a direct counterpart in the Electricity Market Directive (EMD), allows network operators to refuse connection for reasons other than lack of capacity. Based on an interpretation of the EMD in the case law of the CJEU, particularly the *citiworks AG* case, the article concludes that this broad national exception is likely incompatible with EU law. The right to TPA is fundamental, and the grounds for exceptions are exhaustive and must be interpreted restrictively. The author suggests that the administrative courts have so far avoided confronting this discrepancy between the legal systems.

Keywords: elnät, anslutningsskyldighet, tredje parts tillträde, särskilda skäl, elmarknadsdirektivet

1. Inledning

Elektrifieringen omnämns inte sällan som en nyckel i den gröna omställningen.[1] En grundläggande förutsättning för elektrifieringen är tillgången till elnätet. Elnätet i Sverige bedrivs som ett naturligt monopol med detaljerad reglering av nätföretagets skyldigheter på elmarknaden. I enlighet med reglerna i fjärde kapitlet ellagen (1997:857) (ellagen), som i delar implementerar EU:s elmarknadsdirektiv (2019/944)[2] (elmarknadsdirektivet), följer som huvudregel att nätföretag har en skyldighet att ansluta anläggningar till nätet på objektiva, icke-diskriminerande och i övrigt skäliga villkor. Elmarknadsdirektivets krav på att ge tredje part tillträde till elnätet syftar främst till att skapa en fri inre marknad för el, vilket i sin tur även syftar till att leda till en

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[1] Se bl.a. prop. 2023/24:105; JOIN/2025/25 final, *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU global climate and energy vision: securing Europe's competitive role in world markets and accelerating the clean transition*; och Alliance of Energy Intensive Industries, *Joint Position Paper on the EU Electrification Action Plan*, 2026, <cefic.org/resources/alliance-of-energy-intensive-industries-joint-position-paper-on-the-eu-electrification-action-plan/>.

[2] Europaparlamentets och rådets direktiv (EU) 2019/944 av den 5 juni 2019 om gemensamma regler för den inre marknaden för el och om ändring av direktiv 2012/27/EU.

tryggare energiförsörjning och en mer miljömässigt hållbar energimarknad. En tredje part kan dock vägras tillträde till elnätet genom att nätföretaget, som har ensamrätt över ledningen, nekar att ansluta anläggningen. Grund för sådant nekande av en anslutning kan föreligga vid viss kvalificerad kapacitetsbrist i nätet. Enligt den svenska ellagen kan tillträde också nekas om det finns *andra särskilda skäl*.

En av frågorna för denna artikel, vilken aktualiserats i samband med Tesla-målen[3], är vad som omfattas av undantaget ”andra särskilda skäl” i ellagen, samt i vilken mån undantaget är förenligt med EU:s elmarknadsrätt. Vidare frågan om när en sådan vägran att ansluta en anläggning kan anses föreligga, i förhållande till reglerna om tidsåtgång för anslutningar. Med andra ord, huruvida nätföretagets ställningstagande om genomförandet av anslutningen ska tolkas som att anslutning har nekats eller om det ska tolkas som att anslutning kommer att ske i sinom tid. Detta aktualiserar även hur de olika rättsliga frågorna ska behandlas ur ett processrättsligt perspektiv och vilken hänsyn som ska tas i en efterföljande prövning om tidsåtgång för en anslutning, om anslutningsskyldighet dessförinnan har fastställts.

Ämnet föranleds av tre nyligen meddelade avgöranden från förvaltningsrätten med anledning av arbetsmarknadskonflikten mellan Tesla och ett antal fackförbund. Tvist har uppkommit mellan Tesla och olika nätföretag på grund av att nätföretagen uttryckt att de inte avser fullfölja påbörjade anslutningar av Teslas nya anläggningar, främst laddstationer, under tiden som arbetsmarknadskonflikten består. Tesla-målen används i artikeln som språngbräda för att analysera principiella frågor om tredje parts tillträde till nätet och krav på anslutning inom skälig tid. Tredje parts intresse av att få åtkomst till elnätet i syfte att skapa en välfungerande konkurrens på EU:s inre marknad för el står emot behovet av en ventil i regleringen som möjliggör undantag i extraordinära fall. Exempelvis när motpartens ageranden signalerar risk för framtida avtalsbrott eller när anslutningsskyldigheten kolliderar med grundläggande rättigheter, till exempel konflikträtten i Tesla-målen.

I första led argumenteras för att distinktionen mellan anslutningsskyldighet och anslutningstid måste betraktas ur ett systemperspektiv, där reglerna om tidsåtgång för anslutning syftar till att säkerställa ett effektivt genomförande av tredje parts rätt till tillträde. Eftersom ett motsatt synsätt riskerar att göra anslutningsskyldigheten tandlös, genom att skjuta upp anslutningen på obestämd tid, med mer extensiva grunder för undantag. Regeltolkningen måste ske med beaktande av elmarknadsdirektivets ändamål att undanröja hinder för ett förverkligande av EU:s inre elmarknad. I andra led anförs att det kan ifrågasättas om EU-rätten överhuvudtaget medger undantag vid särskilda skäl, en regelkonstruktion som går tillbaka till den äldre ellagen i svensk rätt. Om så skulle vara fallet är det ett mycket restriktivt undantag, som närmast aktualiseras när tredje parts tillträde skulle komma i konflikt med en för EU-rätten överordnad norm. Det kan diskuteras om ett lagstadgat undantag i svensk rätt är nödvändigt för att täcka sistnämnda situation.

2. Introduktion till elmarknadsregleringen och Tesla-målen

Den svenska elmarknadsregleringen har successivt ändrats och anpassats i syfte att effektivt genomföra EU:s reglering av den inre elmark-

[3] Förvaltningsrätten i Linköping dom den 20 maj 2025 i mål nr 2092–25, Förvaltningsrätten i Linköping dom den 10 februari 2026 i mål nr 7253–25 samt Förvaltningsrätten i Linköping dom den 10 februari 2026 i mål nr 7254–25. De två sistnämnda domarna är överklagade till Kammarrätten i Jönköping, där målen är under pågående handläggning, se Kammarrätten i Jönköping mål nr 852–26 och mål nr 853–26.

naden. Med stöd av EU:s kompetens på energiområdet enligt artikel 194 i funktionsfördraget har energimarknadsreglering successivt ökat över tid. För elmarknadens vidkommande utgör elmarknadsförordningen[4] och elmarknadsdirektivet de två mest centrala rättsakterna, varvid den sistnämnda står i centrum för denna artikel.

Elmarknadsdirektivet införlivas i svensk rätt primärt genom ellagen jämte tillhörande förordningar.[5] En central faktor för en välfungerande konkurrens på elmarknaden är rätten till fritt tillträde för tredje part till överförings- och distributionssystem. I ellagen har denna rätt konverterats till en skyldighet för nätföretag[6] att ansluta anläggningar till elnätet. Detta inledande avsnitt syftar till att översiktligt presentera det regelverk som aktualiseras i samband med anslutning av anläggningar till elnätet i Sverige. Vidare redogörs det för det övergripande händelseförloppet i Tesla-målen.

2.1 Elnätsreglering om anslutningsskyldighet och anslutningstid

Elnätet i Sverige bedrivs som ett naturligt, legalt, monopol.[7] Det råder koncessionsplikt för att bygga eller använda en starkströmsledning,[8] samtidigt som den med koncession har en ensamrätt att bedriva elnät för linje[9] eller område[10] (2 kap. 1–2 §§ ellagen).[11] Huvudregeln är att nätföretag har en skyldighet att på begäran ansluta en elektrisk anläggning på objektiva, icke-diskriminerande och i övrigt skäliga villkor (4 kap. 1 § ellagen). Genom bestämmelsen implementeras artikel 6.1 i elmarknadsdirektivet, vars lydelse har sin grund i artikel 20 i 2003 års elmarknadsdirektiv (2003/54/EG).[12] Av artikel 6.1 i elmarknadsdirektivet följer att medlemsstaterna ska säkerställa att tredje part får tillträde till överförings- och distributionssystem på offentliggjorda tariffer som gäller för alla kunder samt tillämpas objektivt och icke-diskriminerande.[13]

Nätföretag får i undantagsfall neka anslutning (4 kap. 2 § ellagen). Av bestämmelsen följer två grunder för undantag från anslutningsskyldigheten: a) vid viss kvalificerad kapacitetsbrist, eller b) om andra särskilda skäl föreligger. Undantaget vid kapacitetsbrist har tydlig förankring i artikel 6.2 elmarknadsdirektivet, medan undantaget ”andra särskilda skäl” är diskutabelt eftersom det saknar en tydlig motsvarighet inom EU-rätten.[14] Fortsättningsvis riktas fokus mot undantaget ”andra särskilda skäl”.

Det finns flera krav på nätföretag som är knutna till anslutningsskyldigheten. Bland an-

[4] Europaparlamentets och rådets förordning (EU) 2019/043 av den 5 juni 2019 om den inre marknaden för el.

[5] Se bl.a. förordning om leverans av el och aggregeringstjänster (2023:242), förordning om det nationella elsystemet (2023:241), förordning om elnätsverksamhet (2022:585) och förordning om nätkoncession (2021:808).

[6] Nätföretag definieras i 1 kap. 4 § ellagen som ”den som bedriver nätverksamhet”. Av samma paragraf följer att nätverksamhet innebär ”att med stöd av nätkoncession ställa en starkströmsledning till förfogande för överföring av el för någon annans räkning och vidta de åtgärder som behövs för överföringen”.

[7] Prop. 1996/97:136 s. 116.

[8] Jfr definitionen av nätverksamhet i 1 kap. 4 § ellagen; ”att med stöd av nätkoncession ställa en starkströmsledning till förfogande för överföring av el för någon annans räkning och vidta de åtgärder som behövs för överföringen”.

[9] En ledning med i huvudsak bestämd sträckning enligt 2 kap. 2 § ellagen.

[10] Ett ledningsnät inom ett visst område enligt 2 kap. 2 § ellagen.

[11] Det finns dock vissa undantag från kravet på nätkoncession enligt 2 kap. 5–9 §§ ellagen jämte förordning (2007:215) om undantag från kravet på nätkoncession.

[12] En snarlik bestämmelse, men med en mer öppen ordning för införande av ordning för tillträde, fanns redan i artikel 17 i Europaparlamentets och rådets direktiv 96/92/EG av den 19 december 1996 om gemensamma regler för den inre marknaden för el.

[13] Angående innebörden av begrepp som tillträde, överföringssystem och distributionssystem, samt hur de förhåller sig till ellagens terminologi, se avsnitt 3.1.1 och 3.1.2 nedan.

[14] Se mer härom nedan i avsnitt 4.2.

nat att nätföretag ska ha standardiserade rutiner för anslutning, kunna ge ut information om tidsplaner och åtgärder som behövs för nätförstärkning samt lämna ut uppgifter om villkor för anslutning.[15] När anläggningen väl är ansluten är nätföretaget vidare skyldigt att överföra el och detta med god kvalitet.[16] Samtidigt som motparten, innehavaren av anläggning, har som främsta skyldighet att betala nätavgifter samt ansvara för elsäkerheten för den egna anläggningen.[17] Därutöver finns ett till anslutningsskyldigheten nära sammanhängande krav på att en anläggning ska anslutas inom skälig tid enligt 4 kap. 5 § ellagen. Tiden räknas från den tidpunkt då motparten begärt en anslutning av anläggningen.[18] Utgångspunkten är att anslutningsprocessen inte bör ta längre tid än två år, även om det inte motsatsvis innebär att två år alltid är att betrakta som skälig anslutningstid.[19] Undantagen från kravet på anslutning inom skälig tid speglar i princip undantagen från anslutningsskyldigheten, dvs. anslutningens omfattning och tekniska utformning, till exempel, men inte begränsat till, kapacitetsbrist, samt andra särskilda skäl. Bestämmelsen gällande tidsfristen för anslutning har enligt förarbetena till ellagen ansetts införliva punkt b i bilaga XII till 2012 års energieffektiviseringsdirektiv[20] samt artikel 15.5 a) i elmarknadsdirektivet. Dock med den skillnaden att paragrafens tillämpningsområde inte begränsar sig till endast vissa typer av anläggningar eller kundgrupper. Emellertid kan det argumenteras för att även nätföretagens skyldighet att säkerställa en ordning för tredje parts tillträde, som följer av artikel 6.1 elmarknadsdirektivet, innebär ett visst underliggande krav på ett effektivt fullgörande av anslutningen och därigenom ett visst tidsmässigt krav. Åtminstone att tiden från begäran till anslutning inte bör få baseras på godtyckliga eller skönsmässiga grunder av nätföretagen.[21]

2.2 Tesla-målen

Förvaltningsrätten i Linköping har meddelat dom i tre mål mellan TM Sweden AB (Tesla) och olika nätföretag. I skrivande stund har två av domarna överklagats till Kammarrätten i Jönköping, som ännu inte beslutat om prövningstillstånd.[22] Artikeln syftar inte till att på detaljnivå kommentera de enskilda avgörandena, utan rättsfallen utgör snarare en grund för analys avseende de principiella frågor om anslutningsskyldighet och anslutningstid som målen ger upphov till.

Hösten 2023 inledde IF Metall en strejk mot Tesla, varefter ett antal fackliga organisationer, däribland Seko och Svenska Elektrikerförbundet, har slutit upp med sympatiåtgärder.[23] Ett av ändamålen med stridsåtgärderna uppges vara

[15] Se 4 kap. 6–9 §§ ellagen.

[16] Se 4 kap. 16 § ellagen samt Energimarknadsinspektionens föreskrift EIFS 2023:3.

[17] Angående nätavgifter se 4 kap. 26–36 §§ ellagen, Energimarknadsinspektionens föreskrift EIFS 2022:1, samt jfr Allmänna avtalsvillkor Elnät 2025 K avsnitt 7 för konsumenters del. Beträffande elsäkerhet, se 1 kap. 3 § och 11 kap. 11 § ellagen jämte 6–7 och 28–32 §§ elsäkerhetslag (2016:732), samt jfr Allmänna avtalsvillkor Elnät 2025 K avsnitt 5 för konsumenters del.

[18] I förarbetena diskuterades om tidpunkten skulle vara från beställningstidpunkten, men det ansågs mer lämpligt att använda termen begäran om anslutning, se prop. 2013/14:174 s. 197 f.

[19] Prop. 2013/14:174 s. 268 f. samt prop. 2021/22:153 s. 155.

[20] Europaparlamentets och rådets direktiv 2012/27/EU av den 25 oktober 2012 om energieffektivitet, om ändring av direktiven 2009/125/EG och 2010/30/EU och om upphävande av direktiven 2004/8/EG och 2006/32/EG.

[21] Se avsnitt 3.3 nedan.

[22] Se dagboksblad i Kammarrätten i Jönköping mål nr 852–26 samt mål nr 853–26.

[23] IF Metall, *IF Metalls konfliktåtgärder i konflikten med Tesla*, <https://www.ifmetall.se/aktuellt/tesla/darfor-tvingas-if-metall-att-strejka/aktuella-konfliktatgarder/> [hämtad: 2026-03-04] och IF Metall, *Sympatiåtgärder från andra fackförbund*, <https://www.ifmetall.se/aktuellt/tes-

att förhindra underhåll, service, nätutbyggnad och nyanslutning av Teslas laddstationer.[24]

Sommaren 2024 ansökte Tesla om prövning hos Energimarknadsinspektionen (Ei) av Ljungby Energinät AB:s (Lenab) skyldighet att ansluta företagets anläggning, i form av laddstationer för elfordon, till elnätet. Lenab erkände anslutningsskyldighet och menade att det i stället var en fråga om anslutningstid, med motiveringen att företaget avser att ansluta Teslas anläggning i framtiden förutsatt att arbetsmarknadskonflikten upphör. På grund av detta avvisades Teslas ansökan om prövning av Ei. Tesla överklagade beslutet till förvaltningsrätten, som menade att det var felaktigt att Ei ansåg sig inte kunna besluta om anslutningsskyldighet enbart av den anledning att Lenab hade erkänt sådant ansvar. Följaktligen fastställde förvaltningsrätten anslutningsskyldighet för Lenab, men avslog Teslas yrkande om att meddela föreläggande att ansluta anläggningen inom en månads tid. Föreläggandet bedömdes ligga utanför prövningsramen, såsom en fråga om anslutningstid, vilken med hänsyn till instansordningens princip bör handläggas av nätmyndigheten som första instans.[25]

I efterdyningarna av domen initierade Tesla två nya tvister hos Ei gällande anslutningstid. Det ena ärendet mot Lenab och det andra ärende mot Gävle Energi Elnät AB (Gävle Energi). I båda ärendena begärde Tesla att nätmyndigheten skulle pröva huruvida anslutningstiden varit skälig, samt förordna respektive nätföretag att ansluta aktuell anläggning inom en månad från beslut. Ei konstaterade likalydande i båda ärendena att tidsutdräkten orsakats av fackliga stridsåtgärder som är grundlagsskyddade enligt 2 kap. 14 § RF och att förekomsten av dessa stridsåtgärder utgör sådana andra särskilda skäl som berättigar till längre tidsåtgång än två år enligt 4 kap. 5 § ellagen.

Tesla överklagade besluten och förvaltningsrätten meddelade i februari 2026 dom i respektive mål, varvid Teslas överklagande avslogs i båda fallen.[26] Några särskilda aspekter av förvaltningsrättens avgöranden bör uppmärksammas.

Inledningsvis konstaterade domstolen att ett bifall av Teslas yrkande skulle strida mot konflikträtten i 2 kap. 14 § RF och fann därför att överklagandet redan på denna grund måste avslås. Slutsatsen nåddes därmed utan en prövning enligt undantagen i ellagen, liksom frågan om undantagsreglernas förenlighet med EU-rätten.

Vidare, i den mån ellagens förenlighet med EU-rätten kan sägas ha prövats i målet, gjordes detta endast i förhållande till artikel 15.5a elmarknadsdirektivet och bilaga XII punkt b) i energieffektiviseringsdirektivet – inte i förhållande till artikel 6 elmarknadsdirektivet. Av allt att döma beror det troligen på att Tesla inte hänvisat till bestämmelsen i sina överklaganden, vilket kan utläsas av aktuell underrubrik i domen: ”Ellagens förenlighet med åberopade EU-direktiv”. Nedan analyseras huruvida domstolen ändock borde ha beaktat förhållandet till artikel 6 elmarknadsdirektivet. Kortfattat kan dock noteras att parterna, i enlighet med principen *jura novit curia*, inte behöver åberopa relevanta rättsregler. Huruvida en svensk bestämmelse är förenlig med EU-rätten utgör en rättsfråga, varför det inte förelåg något hinder för domstolen

la/darfor-tvingas-if-metall-att-strejka/sympatiatgarder-fran-andra-fackforbund/> [hämtad: 2026-03-04].

[24] Seko, *Teslakonflikten*, <https://www.seko.se/stod-pa-jobbet/kollektivavtal/exemplet-tesla/> [hämtad: 2026-03-04].

[25] Förvaltningsrätten i Linköping dom den 20 maj 2025 i mål nr 2092–25.

[26] Se TM Sweden AB mot Ljungby Energinät AB i Förvaltningsrätten i Linköpings dom den 10 februari 2026 i mål nr 7253–25, samt TM Sweden AB mot Gävle Energi Elnät AB i Förvaltningsrätten i Linköpings dom den 10 februari 2026 i mål nr 7254–25.

att inkludera artikel 6 elmarknadsdirektivet i sin prövning.

Till sist bör noteras att domstolen gör en distinktion mellan andra särskilda skäl som undantag vid anslutningsskyldighet respektive anslutningstid. Domstolen menade att nätföretagen förvisso har anslutningsskyldighet enligt 4 kap. 1 § ellagen, men att lovliga stridsåtgärder faller inom andra särskilda skäl som undantag från skyldigheten att ansluta en anläggning inom två år (4 kap. 5 § ellagen).[27]

Sammantaget har förvaltningsrätten genom Tesla-målen gett uttryck för att elnätsföretagens ställningstaganden inte utgör en vägran av anslutning trots att nätföretagen saknar rimliga utsikter att ansluta respektive anläggning. Därutöver kan prövningsordningen av frågorna i målet diskuteras, samt huruvida de svenska reglerna tolkats direktivkonformt med elmarknadsdirektivet. Tesla-målen väcker frågan om ett nätföretag kan erkänna anslutningsskyldighet i syfte att förflytta tvisten från en om tredje parts tillträde till en tvist om anslutningstid och därmed kringgå ett fullgörande av dess anslutningsskyldighet. Målen väcker även frågor om vilket utrymme som finns för undantag från anslutningsskyldigheten med hänvisning till andra särskilda skäl, i förhållande till elmarknadsdirektivet.

3. Tredje parts tillträde, anslutningsskyldighet och förhållandet till skälig anslutningstid

Tesla-målen aktualiserar frågan om hur nätföretagets anslutningsskyldighet förhåller sig till kravet på anslutning av anläggningar inom skälig tid. I vilken mån går det att särskilja tidsåtgången för att ansluta en anläggning från det faktiska fullgörandet av plikten att ansluta densamma? Artikel 6.1 i elmarknadsdirektivet föreskriver att medlemsstaterna ska *säkerställa en ordning* för tredje parts tillträde till elnätet. I denna ordning bör det rimligen finnas en möjlighet att med rättsliga medel genomdriva en fastställd anslutningsskyldighet, oberoende av särskilda regler om anslutningstid. Principiellt kan man fråga sig om nätföretag ska tillåtas disponera över tvister om anslutning genom att erkänna anslutningsskyldighet i syfte att förflytta tvisten till en fråga om skälig tid för anslutning. Om ja, så riskerar det att skapa en sorts *carte blanche* från EU-rättens mer begränsade undantag från rätten till tillträde, jämfört med undantagen från anslutning inom skälig tid i ellagen.

Nedan argumenteras för att gränsdragningen mellan anslutningsskyldighet och anslutningstid måste grundas i de faktiska förhållandena, med beaktande av skälen för att anslutningen inte genomförs och vilka utsikter som finns för dess fullgörande. På så vis kan det EU-rättsliga kravet på en ordning som säkerställer fritt tillträde för tredje part anses innefatta ett underliggande krav på anslutningstid. Dessförinnan inleds avsnittet med att klargöra viss terminologi och vissa begreppsliga distinktioner i förhållandet mellan ellagen och elmarknadsdirektivet, eftersom dessa har betydelse på ett materiellt plan för att förstå innebörden av rätten till tillträde. Dessutom belyses syfte och ändamål med reglerna om tredje parts tillträde, med beaktande av dess betydelse för ett effektivt genomförande av direktivet på nationell nivå.

3.1 Några begreppsliga distinktioner

I ellagen föreskrivs att nätföretag har en skyldighet att *ansluta* anläggningar till *ledningen eller ledningsnätet*. I elmarknadsdirektivet föreskrivs emellertid att medlemsstaterna ska säkerställa en ordning för tredje parts *tillträde* till *överförings- och distributionssystem*. Med anledning av detta finns det skäl att initialt redogöra för hur

[27] Förvaltningsrätten i Linköping domar den 10 februari 2026 i mål nr 7253–25 respektive mål nr 7254–25.

relevanta begrepp i elmarknadsdirektivet har överförts till ellagen.

3.1.1 Överföringssystem, distributionssystem och elnät

I elmarknadsdirektivet används termerna överföringssystem respektive distributionssystem. Eftersom EU-domstolens praxis om tredje parts tillträde i flera fall tagit utgångspunkt i dessa begrepp är det nödvändigt att klargöra dess innebörd.

Varken överföringssystem eller distributionssystem definieras i elmarknadsdirektivet. Däremot definieras *överföring* som: ”transport av el i sammanlänkade system med högspänningsnät samt nät med extra hög spänning för tillhandahållande till slutkunder eller distributörer, men inte leverans”[28], medan *distribution* definieras som: ”transport av el i system med högspännings-, mellanspännings- och lågspänningsnät för tillhandahållande till kunder, men inte leverans”[29]. Med leverans avses i sin tur: ”försäljning, inbegripet återförsäljning, av el till kunder”[30]. För definitionen av överföringssystem respektive distributionssystem kan orden ”ett sammanlänkat system” infogas i inledningen av respektive legaldefinition ovan.[31]

Följaktligen föreligger två avgörande skillnader mellan begreppen enligt definitionerna: a) spänningsnivån i nätet, och b) avsedda kunder. Vid överföring rör det sig om en högre spänningsnivå jämfört med distribution, även om dessa delvis överlappar vad avser högspänningsnät. Vidare transporteras elen vid överföring till slutkunder eller distributörer, medan distribution avser transport till kunder generellt. Med *kund* avses såväl grossister som slutkunder,[32] där grossist är ”en fysisk eller juridisk person som köper el i syfte att återförsälja den inom eller utanför det system i vilket personen är etablerad”[33] och slutkund ”en kund som köper el för eget bruk”[34]. Därmed föreligger även viss överlappning beträffande avsedda kunder för de två systemen.

EU-domstolen har i ett antal rättsfall rörande 2003 års elmarknadsdirektiv[35] och 2009 års elmarknadsdirektiv[36] behandlat vilka särskiljningskriterier som ska användas för distinktionen mellan överföringssystem och distributionssystem. Praxisen är fortsatt av relevans eftersom definitionerna av överföring respektive distribution överförts i princip oförändrade till nuvarande elmarknadsdirektiv. Domstolen uttalade i mål C-439/06 (*citiworks AG*) att endast graden av spänning med vilken elen överförs utgör kriterium för åtskillnad mellan överföring och distribution. Uttalandet har senare bekräftats i de förenade målen C-262/17, C-263/17 och C-273/17 (*Solvay Chimica Italia m.fl.*), mål C-31/18 (*Elektrorazpredelenie Yug*) och mål C-293/23 (*ENGIE Deutschland*). Beträffande de två nämnda överlappningarna mellan högspänningsnivå respektive avsedda kunder, har domstolen tydliggjort att medlemsstaterna har ett visst handlingsutrymme för att anpassa den nationella ordningen beträffande uppdelning i dessa avseenden. Däremot är det inte tillåtet för medlemsstaterna att införa egna särskiljningskriterier.[37] Vidare är

[28] Artikel 2.34 elmarknadsdirektivet.
[29] Artikel 2.28 elmarknadsdirektivet.
[30] Artikel 2.12 elmarknadsdirektivet.
[31] Jfr p. 46 i EU-domstolens dom den 22 maj 2008 i mål C-439/06, samt p. 45 i EU-domstolens dom den 17 oktober 2019 i mål C-31/18.
[32] Artikel 2.1 elmarknadsdirektivet.
[33] Artikel 2.2 elmarknadsdirektivet.
[34] Artikel 2.3 elmarknadsdirektivet.
[35] Europaparlamentets och rådets direktiv 2003/54/EG av den 26 juni 2003 om gemensamma regler för den inre marknaden för el och om upphävande av direktiv 96/92/EG [cit. 2003 års elmarknadsdirektiv].
[36] Europaparlamentets och rådets direktiv 2009/72/EG av den 13 juli 2009 om gemensamma regler för den inre marknaden för el och om upphävande av direktiv 2003/54/EG [cit. 2009 års elmarknadsdirektiv].
[37] C-31/18 p. 51–55.

medlemsstaterna skyldiga att införa definitioner för uppdelning mellan överföringssystem och distributionssystem genom att använda sig av kriterierna spänningsnivå respektive kundkategori för överföringen.[38]

I syfte att anpassa ellagen efter elmarknadsdirektivets terminologi togs begreppen *distribution* och *transmission* in i lagen i samband med 2022 års elmarknadsreform. Transmission ska motsvara det som i direktivet benämns som överföring.[39] Termerna har i sin tur knutits till den svenska indelningen av nätet i tre olika nivåer: lokalnät, regionnät och transmissionsnät. Indelningen har i sin tur betydelse för redovisning av nätverksamhet, anslutningsskyldighet och utformningen av nättariffer.[40] Distribution omfattar överföring av el för någon annans räkning genom ett lokalnät eller ett regionnät. Transmission definieras som överföring av el för någon annans räkning genom ett transmissionsnät.[41] Det särskiljningskriterium som används för indelning av nätnivåerna är huvudsakligen spänningsnivå; lokalnät saknar lägsta tillåtna spänning, transmissionsnät ska ha en spänning om 220 kilovolt eller mer, och regionnät definieras negativt genom att det har en lägsta tillåten spänning men inte är ett transmissionsnät.[42] Det kan även noteras att begreppet ”nätföretag” omfattar nätverksamhet oberoende av typ av nät.[43]

Sammanfattningsvis finns en tydlig korrespondens mellan terminologin i elmarknadsdirektivet och hur den införts i svensk rätt i detta avseende. Hur begreppen sammanhänger med varandra är av betydelse för att förstå EU-domstolens praxis rörande begreppet ”tillträde”, eftersom det bland annat anknyter till möjligheten att välja vilket typ av system som part vill ansluta sin anläggning till. Indelningen har följaktligen indirekt betydelse för innebörden av nätföretagens anslutningsskyldighet.

3.1.2 Tillträde respektive anslutning

I ellagen används begreppet *anslutning* för att benämna nätföretagets skyldigheter. I elmarknadsdirektivet anges emellertid att tredje part ska ha *tillträde* till överföringssystem och distributionssystem. Ur ett EU-rättsligt perspektiv är det skillnad mellan tillträde och anslutning. Begreppsdistinktionen har tydliggjorts primärt i mål C-239/07 (*Sabatauskas m.fl.*), varefter EU-domstolen befäst däri gjorda uttalanden i efterföljande praxis.

I mål C-239/07 begärde Litauens författningsdomstol ett förhandsavgörande med anledning av att en bestämmelse i den nationella ellagen begränsade kunders möjlighet att ansluta sig direkt till det nationella överföringsnätet. Anslutning till överföringsnätet var endast tillåtet om den systemansvarige för distributionsnätet nekat anslutning på grund av tekniska eller driftsmässiga skäl. Klagandena menade att bestämmelsen utgjorde en otillåten inskränkning av tredje parts rätt till tillträde enligt artikel 20 i 2003 års elmarknadsdirektiv. Frågan i målet var om tredje parts fria tillträde innebär att varje part som vill ansluta sig till elnätet ska ha en rätt att välja om den vill ansluta sin anläggning till överförings- eller distributionssystem.[44] I domen tydliggörs att tillträde närmast avser åtkomsten till elnätet, jämte regleringen om på vilka principer sådan åtkomst ska ske, till exempel tjänstens kvalité, regelbundenhet och kostnad. Därtill att

[38] C-31/18 p. 57.
[39] Se prop. 2021/22:153 s. 47 ff. samt 131 f.
[40] Prop. 2021/22:153 s. 131.
[41] Se definitioner i 1 kap. 4 § ellagen.
[42] Se definitioner i 1 kap. 4 § ellagen.
[43] Nätföretag definieras i 1 kap. 4 § ellagen som ”den som bedriver nätverksamhet”, varvid nätverksamhet enligt samma bestämmelse består i ”att med stöd av nätkoncession ställa en starkströmsledning till förfogande för överföring av el för någon annans räkning och vidta de åtgärder som behövs för överföringen”.
[44] C-239/07 p. 20–21.

tillträde sker på objektiva och icke-diskriminerande grunder. Anslutning å andra sidan – enligt direktivets terminologi – avser de tekniska aspekterna och den rent fysiska kopplingen. Exempelvis tekniska regler samt konstruktions- och driftkrav.[45] Mot bakgrund av detta uttalade domstolen att syftet är att tillträde ska grunda sig på objektiva kriterier, inte att tillträde ska ske efter tredje parts eget skön. Medlemsstaterna har därför ett utrymme för skönsmässig bedömning att implementera regler som styr systemanvändare[46] mot det ena eller andra systemet, så länge det sker på icke-diskriminerande grunder och objektiva skäl.[47]

Med hänvisning till nämnda förhandsavgörande har EU-domstolen i flera efterföljande mål fastslagit att medlemsstaternas skyldigheter i detta avseende endast gäller för tillträdet, vilket ska förstås som en rätt till åtkomst och användande av elnätet – inte den rent fysiska kopplingen.[48] Analogt har denna uppdelning även ansetts gälla för motsvarande begrepp i gasmarknadsdirektivet.[49]

Mot bakgrund av detta kan det förefalla som att ellagens regler om anslutningsskyldighet därför skulle vara mer långtgående än elmarknadsdirektivets krav på tillträde. Så är emellertid inte fallet. I stället för att låsa sig vid de specifika begreppen bör fokus riktas mot det materiella innehållet i rättsregeln som EU-domstolen fastställt. Tillträde innebär en rätt att få åtkomst till och kunna använda elnätet. Sådan användning förutsätter en fysisk anslutning, om än det inte ger tredje part rätt att styra över anslutningen som sådan – varken tekniska aspekter eller till vilken del av nätet som anslutning ska ske. Skillnaden är att lagstiftaren valt att använda begreppet anslutning genomgående i ellagen, både för det som avser tillträde och anslutning enligt EU-rättens terminologi.[50] Reglerna speglar alltjämt den begreppsdistinktion som görs på EU-nivå. Enligt 4 kap. 1 § ellagen har nätföretaget en skyldighet att ansluta en elektrisk anläggning. Regleringen avser emellertid primärt vilka principer och villkor som ska gälla för parts rätt att få åtkomst till nätet. Vidare görs en åtskillnad mellan anslutningsskyldighet för lokalnät, regionnät och transmissionsnät. Av lagen följer en turordning: anslutning sker i första hand till lokalnät, medan anslutning till regionnät eller transmissionsnät endast får ske om innehavaren av lokalnätet medgett det eller om nätmyndigheten beviljat tillstånd.[51] Dessutom gäller anslutningsskyldigheten för innehavare av lokalnät endast inom koncessionsområdet.[52] Bestämmelserna ligger följaktligen i linje med ovan nämnda rättspraxis. Tekniska regler samt konstruktions- och driftkrav för anslutningar regleras i sin tur i föreskrifter meddelade av Ei, med stöd av 17–18 §§ i förordning (2023:241) om det nationella elsystemet.[53]

Sammanfattningsvis, trots att ellagen har ett enhetligt begrepp för det som i elmarknadsdirektivet delas upp i tillträde respektive anslutning,

[45] C-239/07 p. 40–41.

[46] Enligt artikel 2.36 elmarknadsdirektivet: ”en fysisk eller juridisk person som levererar till eller får leveranser från ett överföringssystem eller distributionssystem.

[47] C-239/07 p. 46–49.

[48] Se de förenade målen C-272/17, C-263/17 och C-273/17, C-31/18 samt mål C-179/20.

[49] Se EU-domstolens dom i mål C-290/20.

[50] När nuvarande ellag stadgades fanns en definition av begreppet anslutning i 1 kap. 4 § ellagen som löd: ”Med anslutning av elektriska anläggningar avses också återinkoppling av en befintlig anläggning och höjning av avtalad effekt i inmatnings- eller uttagspunkt”; jfr prop. 1996/97:136 s. 140. Definitionen togs bort genom SFS 2023:238, se prop. 2021/22:153.

[51] 4 kap. 3 § ellagen.

[52] 4 kap. 1 § andra stycket ellagen.

[53] Se Energimarknadsinspektionens föreskrifter EIFS 2018:2 om anslutning av generatorer, EIFS 2019:6 om anslutning av förbrukare och EIFS 2019:3 om anslutning av system för högspänd likström och likströmsanslutna kraftparksmoduler. För vägledning, se även ställningstagandet Ei 2025:02 angående elnätsföretagens skyldigheter i anslutningsprocessen.

är det tydligt att de materiella reglerna ger uttryck för motsvarande uppdelning. Att det finns en skyldighet för nätföretag att ansluta anläggningar korresponderar med tredje parts rätt att få tillgång till elnätet.[54] Den fysiska anslutningen utgör trots allt en nödvändig förutsättning för överföring av el.[55] Däremot innebär anslutningsskyldigheten inte att den part som begär anslutning förfogar över teknisk utformning, ej heller till vilken del av nätet som anslutningen ska ske, utan det är åtkomsten som säkerställs.

3.2 Syftet med fritt tillträde till elnätet

EU-rättsliga bestämmelser ska tolkas utifrån inte bara deras lydelse utan också deras sammanhang och de ändamål som eftersträvas med rättsakten.[56] Nationella domstolar är i sin tur skyldiga att tolka och tillämpa nationell rätt direktivkonformt mot bakgrund av direktivets ordalydelse och syfte så att dess ändamål och avsedda resultat uppnås.[57] Den teleologiska tolkningsmetoden kan sägas vara särskilt framträdande i EU-domstolens praxis.[58] Så även vad beträffar elmarknadsregleringen. EU-domstolen har tydligt, i ett förhandsavgörande om tolkning av artikel 20 i 2003 års elmarknadsdirektiv, angett att elmarknadsdirektivet ska tolkas mot bakgrund av syftena med och bestämmelserna i direktivet.[59] Det finns därför skäl att fördjupa sig i vilka ändamål som är bärande för elmarknadsdirektivet, särskilt för reglerna om fritt tillträde för tredje part.

Energimarknadsregleringen inom EU har formats utifrån målet att upprätta en *inre energimarknad*. Den inre marknaden är avsedd att skapa konkurrenskraft samt en trygg och miljömässigt hållbar energiförsörjning.[60] Att just skapandet av en konkurrensutsatt inre marknad för energi varit det främsta ändamålet bör ses i förhållande till utvecklingen av EU:s lagstiftningskompetens. Det första elmarknadsdirektivet antogs år 1996,[61] men dessförinnan hade redan initiativ tagits i denna riktning genom olika direktiv.[62] EU saknade emellertid uttrycklig kompetens på energiområdet fram till år 2009, då Lissabonfördraget antogs och unionen tilldelades kompetens inom energiområdet genom artikel 194 funktionsfördraget. Dessförinnan hade rättsakter med avseende på energifrågor antagits med stöd av andra kompetenser, huvudsakligen den inre marknaden.[63] I 1996 års elmarknadsdirektiv framhölls att direktivet utgjorde ett viktigt steg mot fullbordandet av den inre marknaden för el. Ett öppet tillträde till systemen för överföring betraktades som en strikt nödvändig förutsättning för ett sådant fullbordande.[64] Det fanns även spår av miljöhänsyn i direktivet, även om det får anses ha varit underordnat målet om en inre marknad.[65]

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[54] Jfr prop. 2021/22:153 s. 45 f.
[55] Jfr prop. 1996/97:136 s. 139.
[56] Se bl.a. p. 10 i mål C-337/82 samt mål C-156/98.
[57] Se bl.a. C-337/82 p. 10, C-156/98 p. 50, C-12/08 p. 60, C-282/10 p. 27 och där angiven rättspraxis, C-684/16 p. 59, C-167/17 p. 34, C-407/18 p. 65, C-679/8 p. 41, C-555/23 och C-556/23 p. 85, C-370/24 p. 43, C- 87/24 p. 64.
[58] Reichel J., *EU-rättslig metod*, i Nääv, M. & Zamboni, M., *Juridisk metodlära*, 2 uppl., Studentlitteratur, 2018, s. 122 f.
[59] C-439/06 p. 37.
[60] Se skäl 2 samt artikel 1 första stycket i elmarknadsdirektivet.
[61] Europaparlamentets och rådets direktiv 96/92/EG av den 19 december 1996 om gemensamma regler för den inre marknaden för el.
[62] Se Rådets direktiv (90/377/EEG) av den 29 juni 1990 om ett gemenskapsförfarande för att främja öppenhet beträffande prissättningen på gas och el levererad till industriella slutanvändare, och Rådets direktiv (90/547/EEG) av den 29 oktober 1990 om transitering av elektricitet genom kraftledningsnät.
[63] Jfr Huhta, Kaisa, *The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector*, 2021, Vol. 70(4), Cambridge University Press, doi.org/10.1017/S0020589321000269.
[64] Se särskilt skäl 3 och 12 i direktiv 96/92/EG.
[65] Jfr skälen 4, 13 och 28 i direktiv 96/92/EG.

Utifrån ett nationellt perspektiv infördes emellertid skyldigheten för nätföretag att ansluta anläggningar till elnätet redan år 1994, dvs. innan det svenska inträdet i unionen. Elmarknadsreformen syftade till att skapa förutsättningar för en nordisk elmarknad, samt öppna upp för elhandel med andra unionsländer. Dessförinnan bedrevs både elnät och elhandel som naturliga monopol.[66] Mot denna bakgrund ter det sig naturligt att införandet av anslutningsskyldigheten motiverades av att tillgängliggöra hela elnätet för överföring av el och på så sätt konkurrensutsätta elhandeln. Regelverket utformades dock inte med målet att integreras som en del av en fullständig inre och öppen marknad inom unionen. Däremot framhölls det redan då att en anslutningsskyldighet som gäller lika i förhållande till elproducenter, elkonsumenter och andra koncessionshavare, utgör en nödvändig förutsättning för en fungerande konkurrens.[67]

Som nämnt var miljömässig hänsyn ett av ändamålen redan i första elmarknadsdirektivet, men med tiden har trygg och miljömässigt hållbar energiförsörjning successivt fått en mer framträdande roll. I 2003 års elmarknadsdirektiv lades större vikt vid energisystemens miljöpåverkan och vikten av att medlemsstaterna skulle ha möjlighet att införa regleringen för att främja miljömässigt hållbara energisystem.[68] Samtidigt fick försörjningstrygghet större genomslag i regleringen.[69] Utvecklingen har fortsatt i denna riktning och i nuvarande elmarknadsdirektiv framhålls både miljömässig hållbarhet och försörjningstrygghet i en betydande utsträckning i motiven.[70] Detta kommer även till uttryck genom en rad bestämmelser om såväl gynnande av förnybar energiproduktion som ökad energieffektivitet och flexibilitet i elnätet.[71] Vad beträffar den grundläggande skyldigheten för medlemsstaterna att säkerställa tillträde för tredje part är den däremot fortsatt starkt knuten till ändamålet om att skapa och upprätthålla en inre marknad för el.[72] Även om främjat tillträde för förnybar elproduktion numer ses som en åtgärd för att stärka konkurrenskraften,[73] vilket exempelvis synliggörs genom de strängare kraven för att få neka tillträde av anläggningar för mikroproduktion av förnybar el.[74]

I EU-domstolens rättspraxis rörande tredje parts tillträde är det tydligt att det är ändamålet om att skapa en välfungerande inre marknad för el som har tillmätts störst betydelse. Domstolen har i flera mål betonat att tredje parts tillträde utgör en fundamental rättighet på elmarknaden som ovillkorligen är ihopkopplad med rätten att fritt välja leverantör och att fritt leverera till sina kunder. Det har uttryckts som att det fria tillträdet för tredje part utgör en av de *grundläggande åtgärderna* som medlemsstaterna är skyldiga att vidta för att fullborda den inre marknaden för

[66] Prop. 1994/95:222 s. 34–36 samt 42–44.

[67] Prop. 1993/94:162 s. 149 f.

[68] Se skälen 2, 22, 25 och 26 samt artiklarna 3 och 14.1 i direktiv 2003/54/EG.

[69] Se skälen 19, 23 och 26 samt artiklarna 3, 4 och 7 i direktiv 2003/54/EG.

[70] En talande skillnad för skillnaden i synsättet framträder vid jämförelse mellan skäl 4 i direktiv 96/92/EG och skäl 2 i nuvarande elmarknadsdirektiv. I förstnämnda skäl anges att den inre marknaden för el är särskilt viktig för ökad effektivitet vid produktion, överföring och distribution *samtidigt* som miljöskyddet respekteras och försörjningstrygghet stärks. I nuvarande direktiv uttrycks det i stället som att den inre marknaden för el *ska bidra* till försörjningstrygghet och hållbarhet. Ändamålen ses som mer sammanflätade med varandra.

[71] Se bl.a. artiklarna 1.2, 8, 9, 15a, 19 och 32 i elmarknadsdirektivet, jämte ytterligare regler i energieffektiviseringsdirektivet (EU) 2023/1791.

[72] Se skälen 12, 39 och 65.

[73] Se skäl 13 i elmarknadsdirektivet.

[74] Se 4 kap. 2 § andra stycket, vilken implementerar artikel 17 i Europaparlamentets och rådets direktiv (EU) 2018/2001 av den 11 december 2018 om främjande av användningen av energi från förnybara energikällor (förnybartdirektivet).

el.[75] Miljömässiga skäl och försörjningstrygghet har däremot inte framhållits i denna kontext, utan betraktas snarare på regulatorisk nivå som positiva effekter av den inre marknaden, för vilken tredje parts tillträde anses utgöra en nödvändig förutsättning.

Sammanfattningsvis är nätföretagens anslutningsskyldighet sprungen ur upprättandet av den inre marknaden för el. För att ett legalt monopol för överföring av el ska kunna samexistera med en fri elhandelsmarknad, kan åtkomsten till samma nät inte vara beroende av nätföretagens godtycke. I rättspraxis har frågor om tredje parts rätt till tillträde ofta angripits med en teleologisk tolkningsmetod, där skapandet av en konkurrensutsatt inre marknad utgjort det främsta ändamålsskälet. Detta bör tas i beaktande vid en direktivkonform tolkning av de nationella regler som ska upprätta den ordning som säkerställer fritt tillträde för tredje part.

3.3 Förhållandet mellan anslutningsskyldighet och kravet på att ansluta inom skälig tid

Av förarbetena till ellagen går det att utläsa att paragraferna om anslutningsskyldighet respektive om anslutning inom skälig tid, primärt avser att implementera olika direktivbestämmelser. Medan reglerna om anslutningsskyldighet i 4 kap. 1–4 §§ anges syfta till att genomföra artikel 6 i elmarknadsdirektivet om tredje parts tillträde, har syftet med 4 kap. 5 § ellagen angetts vara att införliva andra artiklar i energieffektiviseringsdirektivet och elmarknadsdirektivet.[76] Oberoende av förarbetsuttalandena går det att argumentera för att det utgör ett underliggande krav enligt artikel 6 elmarknadsdirektivet – för att säkerställa en ordning för tredje parts tillträde på objektiva och icke-diskriminerande grunder – att det i nationell rätt finns någon form av krav på ett faktiskt genomförande av anslutningen. Om nätföretag godtyckligt tillåts erkänna anslutningsskyldighet i syfte att förflytta ärendet till att endast behandlas som en fråga om anslutningstid, så riskerar rätten till tillträde att bli illusorisk. Särskilt när det saknas rimliga utsikter för en anslutning. Skjuts genomförandet av anslutningen upp *ad infinitum* kan frågan om tidsåtgång knappast helt skiljas från den grundläggande anslutningsskyldigheten.

Kravet på anslutning inom skälig tid infördes i 3 kap. 7 a § i samband med 2014 års ändring av ellagen.[77] Reformen syftade till att implementera 2012 års energieffektiviseringsdirektiv i svensk rätt.[78] I punkt b i bilaga XII till direktivet föreskrivs bl.a. att systemansvariga för överföringssystem och systemansvariga ska se till att anslutningsprocessen för nya producenter av el från högeffektiv kraftvärme inte bör ta längre än 24 månader med beaktande av vad som är praktiskt möjligt och icke-diskriminerande. Direktivet upphörde att gälla i oktober 2025 och ersattes av det nya energieffektiviseringsdirektivet.[79] Motsvarande bestämmelser återfinns numera i artikel 27.8 jämte punkt b) i bilaga XIV i det nya direktivet. Vid implementering av 2012 års energieffektiviseringsdirektiv beaktade lagstiftaren att bestämmelsen avgränsas till vissa produktionsanläggningar, men valde ändå att

[75] C-439/06 p. 43–44, C-239/07 p. 33, C-492/14 p. 76, förenade målen C-262/17, C-263/17 och C-273/17 p. 54, C-31/18 p. 41 och C-179/20 p. 67.

[76] Jfr prop. 1996/97:136 s. 141 f., prop. 2013/14:174 s. 197 f. och 268 f., samt prop. 2021/22:153 s. 153 ff.

[77] Se lag (2014:270) om ändring i ellagen (1997:857) och tillhörande prop. 2013/14:174.

[78] Europaparlamentets och rådets direktiv 2012/27/EU av den 25 oktober 2012 om energieffektivitet, om ändring av direktiven 2009/125/EG och 2010/30/EU och om upphävande av direktiven 2004/8/EG och 2006/32/EG.

[79] Europaparlamentets och rådets direktiv (EU) 2023/1791 av den 13 september 2023 om energieffektivitet och om ändring av förordning (EU) 2023/955. Se artikel 38 i direktivet angående upphävande av 2012 energieffektiviseringsdirektiv.

genomföra det som ett generellt krav för alla typer av anläggningar.[80]

Ellagen genomgick en översyn år 2022 i syfte att genomföra elmarknadsdirektivet i de delar som avser nätverksamhet. Bestämmelsen om anslutningstid i 3 kap. 7 a § överfördes oförändrad i sak till nuvarande 4 kap. 5 § ellagen. I författningskommentaren lades till att paragrafen även genomför artikel 15.5 a i elmarknadsdirektivet.[81] Av nyss nämnda artikel följer att medlemsstaterna ska säkerställa att aktiva kunder[82] som äger en energilagringsanläggning[83] har rätt till nätanslutning inom rimlig tid efter att en begäran gjorts.

Utifrån ovan kan det vid en första anblick verka som att det i ellagen införts en mer omfattande skyldighet avseende anslutningstid än vad direktiven kräver. Tillämpningsområdet för 4 kap. 5 § ellagen omfattar som nämnt alla typer av anläggningar, inte endast vissa produktionsanläggningar och aktiva kunder som äger en energilagringsanläggning. Emellertid är det inte lagstiftarens uttryck för vilka artiklar som en viss bestämmelse avser att genomföra som är avgörande för en direktivkonform tolkning av nationell rätt, utan betydelse ska tillmätas direktiven och EU-rätten i dess helhet.[84] Artikel 6.1 i elmarknadsdirektivet anger att medlemsstaterna ska säkerställa att det införs en ordning för tredje parts tillträde till överförings- och distributionssystem. Artikeln lämnar ett relativt betydande handlingsutrymme för medlemsstaterna för hur en sådan ordning ska införas på nationell nivå.[85] Ur ett systematiskt och teleologiskt perspektiv ter det sig svårt att hävda att en ordning säkerställer tillträde för tredje part om det inte finns något som helst krav varken på när eller efter hur lång tid som anslutningen ska ha genomförts. Anslutningsskyldigheten blir då inte mer än en formalitet. Anslutningstiden knyter an till realiserandet av tillträdet och därmed fullgörandet av nätföretagens skyldighet. En formaljuridisk åtskillnad av dessa som helt olika typer av skyldigheter ter sig svårt att förena med direktivets ändamål; att skapa verkligt integrerade och konkurrensutsatta elmarknader.[86]

En potentiell invändning mot denna ståndpunkt skulle vara: varför finns det särskilda regler om anslutning inom skälig eller rimlig tid i elmarknadsdirektivet och energieffektiviseringsdirektivet i sådana fall? Att det för vissa typer av anläggningar gäller strängare krav på tidsfrister för anslutning innebär inte *é contrario* att det i andra fall saknas en bortre gräns för hur lång tid en anslutning får ta. Inte heller att nätföretag efter eget godtycke och skön ska kunna välja när anslutningen ska genomföras. Syftet med de tydligare och strängare reglerna om tidsfrister för vissa typer av anläggningar torde främst vara att främja hållbara energisystem, exempelvis att gynna förnybar energiproduktion.[87] Oberoende av dessa särskilda bestämmelser är det svårt att tänka sig en ordning som säkerställer tillträde genom en lagstadgad anslutningsskyldighet för nätföretagen, samtidigt som det saknas rättsme-

[80] Prop. 2013/14:174 s. 197 f. samt 268 f.

[81] Prop. 2021/22:153 s. 155.

[82] Aktiv kund definieras i artikel 2.8 som: ”en slutkund, eller en grupp av samarbetande slutkunder, som förbrukar eller lagrar el som producerats inom den egna fastigheten vilken är belägen inom ett avgränsat område, eller egenproducerad eller delad el på andra platser, eller som säljer egenproducerad el eller deltar i flexibilitets- eller energieffektivitetssystem, förutsatt att dessa verksamheter inte är deras huvudsakliga kommersiella verksamhet eller yrkesverksamhet.”

[83] Energilagringsanläggning definieras i artikel 2.60 som: ”en anläggning i elsystemet där energi lagras.”

[84] Jfr C-107/89, C-218/01 och C-371/02.

[85] Jfr C-439/06 p. 55, varvid EU-domstolen uttalar att det följer att medlemsstaterna, utifrån bestämmelsens utformning, är behöriga att bestämma form och tillvägagångssätt för genomförandet.

[86] Angående ändamål och syfte, jfr avsnitt 3.1 ovan.

[87] Jfr skäl 112 i energieffektiviseringsdirektivet ((EU) 2023/1791).

del för att genomdriva ett fullgörande av anslutningen.

Denna uppfattning får även visst stöd i förarbetena till ellagen. I författningskommentaren till 4 kap. 2 § ellagen anges att en åtgärd för att hantera kapacitetsbrist som ligger bortom tidsfristen enligt 5 § inte kan anses vara relevant och därmed får bedömas enligt undantagsregeln i 4 kap. 2 § första stycket p. 1.[88] Uttalandet visar på ett samband mellan anslutningsskyldighet och anslutningstid, åtminstone i så måtto att anslutningar som tydligt ligger bortom två år torde bedömas som en fråga om anslutningsskyldighet och inte anslutningstid. Systematiskt är även en sådan lösning att föredra – åtskillnad substantiellt mellan om det faktiskt rör sig om en vägran och enbart är fråga om tidsåtgång. En uppdelning mellan dessa situationer leder bland annat till att man skiljer på undantag för ”andra särskilda skäl” vid anslutningsskyldighet respektive anslutningstid. Exempelvis om anslutningen inte kan slutföras för att anläggningen som ska anslutas inte var färdigställd vid begäran, så kan det utgöra ett godtagbart särskilt skäl för en längre tidsåtgång.[89] Det utgör däremot inte skäl för att vägra anslutningen. Vidare är en vägran att ansluta en anläggning att betrakta som mer ingripande än en längre tidsfrist, varför det ligger i sakens natur att utrymmet för undantag för en utökad tidsåtgång i sistnämnda fall kan vara mer omfattande. För att distinktionen mellan ”andra särskilda skäl” i 4 kap. 2 och 5 §§ ellagen ska leda till ett effektivt genomförande av elmarknadsdirektivet måste, enligt min mening, en bedömning göras i det enskilda fallet huruvida nätföretagets ställningstagande *de facto* utgör en vägran eller inte. Kriterier som kan användas för en sådan bedömning skulle kunna vara:

- nätföretagets skäl till att anslutningen inte slutförs,
- nätföretagets plan för kvarstående åtgärder, vilka eventuella hinder som finns mot genomförandet av anslutningen och deras karaktär, och
- om anslutningen kan genomföras inom en överblickbar framtid.

Kriterierna relaterar till information som ska kunna tillhandahållas i enlighet med närliggande regler i ellagen. Till exempel följer det av 4 kap. 9 § ellagen att nätföretaget måste lämna information i samband med vägran att ansluta på grund av kapacitetsbrist. Regeln implementerar delar av artikel 6.2 elmarknadsdirektivet. Även vid vägran på grund av andra särskilda skäl bör sådan skyldighet gälla, även om det inte följer av direktivet eftersom sådan vägransgrund saknas. Vidare, i samband med en begäran om anslutning ska nätföretaget ta fram en tidsplan för anslutning (4 kap. 8 § ellagen). Gemensamt kokar de tre punkterna ned till att erhålla tillräckligt med information för att kunna avgöra om nätföretagets ställningstagande faktiskt utgör en vägran av anslutning eller inte.

Vidare bör beaktas vilka rättsmedel som står till förfogande för att genomdriva fullgörandet av en anslutning. Artikel 6.2 i elmarknadsdirektivet kräver att medlemsstaterna ger systemanvändare tillgång till ett tvistlösningsförfarande. Av 4 kap. 13 § ellagen följer att tvist om anslutningsskyldighet, tidsåtgång för anslutning eller information om nätförstärkning med anledning av en vägran att ansluta en anläggning, ska tas upp av nätmyndigheten.[90] För Sve-

[88] Prop. 2021/22:153 s. 153 f.
[89] Jfr prop. 2013/14:174 s. 268 f.
[90] Bestämmelsen implementerar även delvis artikel 60.2 i elmarknadsdirektivet, som ålägger medlemsstaterna att ha en ordning där varje part som har ett klagomål mot en systemansvarig angående dess skyldigheter ska få inge klagomålet till tillsynsmyndigheten. Tillsynsmyndigheten ska fatta beslut inom två månader från klagomålet.

riges vidkommande utgör Ei nätmyndighet.[91] Nätmyndigheten ska fatta slutligt beslut i ärendet och dess beslut gäller omedelbart (4 kap. 14 § ellagen). Ei:s beslut kan i sin tur överklagas till allmän förvaltningsdomstol (13 kap. 7 § ellagen). Uppkommer en tvist om anslutningsskyldighet kommer i regel den första frågan vara huruvida anslutningsskyldighet ska fastställas eller inte.[92] Sådant beslut gäller förvisso omedelbart och nätföretaget är därmed förpliktat att ansluta anläggningen. Ett beslut som endast fastställer anslutningsskyldighet reglerar dock inte nödvändigtvis *när* det åligger nätföretaget att ansluta. Ej heller kan sökanden genom beslutet om fastställelse få anslutningen direkt verkställd. Om nätföretaget inte genomför anslutningen trots beslutet så är det enda rättsmedel som står den enskilde till buds att vända sig till Ei med en begäran om att utfärda ett föreläggande mot nätföretaget att ansluta anläggningen inom viss tid. En sådan begäran kan förstås framställas redan i samband med ärendet om anslutningsskyldighet. Ett yrkande om att utfärda ett föreläggande mot nätföretaget att genomföra anslutningen är ofrånkomligen ihopkopplat med frågan om tidsåtgång. Anslutningsskyldigheten och tiden för att fullgöra densamma kan därmed inte helt separeras. En total åtskillnad innebär att den ”ordning” som ska säkerställa tillträde för tredje part inte kan tillhandahålla mer än ett beslut som fastställer denna rätt. Mot bakgrund av detta går det att ifrågasätta huruvida en dom som fastställer anslutningsskyldighet kan förenas med en senare dom där domstolen förklarar sig förhindrad att överhuvudtaget meddela ett föreläggande om genomförande av samma anslutning.

4. Andra särskilda skäl som undantag från anslutningsskyldigheten – är det förenligt med elmarknadsdirektivet?

I föregående avsnitt konstaterades att anslutningstid i viss utsträckning behöver betraktas som en integrerad del av den ordning som ska säkerställa tredje parts rätt till tillträde. Att fastställa anslutningsskyldighet och samtidigt anse sig förhindrad att förelägga nätföretaget att ansluta samma anläggning framstår som två logiskt oförenliga utfall. I ljuset av detta bör en pragmatisk inställning intas vid kategorisering av ett visst fall såsom en fråga om anslutningsskyldighet eller om anslutningstid. Utrymmet från undantag vid andra särskilda skäl enligt 4 kap. 5 § andra meningen ellagen torde vara något mer omfattande än enligt 4 kap. 2 § samma lag. Om det däremot tydligt saknas utsikter för anslutning inom en överblickbar tidsperiod bör prövning av undantag ske enligt 4 kap. 2 § ellagen. Med anledning av detta kommenteras i avsnitten nedan utrymmet för undantag från anslutningsskyldigheten vid andra särskilda skäl. Tolkningsfrågan blir belyst utifrån perspektivet huruvida undantaget är förenligt med EU-rätten utifrån rådande rättspraxis på området. Initialt görs även några anmärkningar angående prövningsordning, relaterat till hur förvaltningsrätten strukturerade prövningen av aktuella rättsfrågor i Tesla-målen.

4.1 Prövningsramen i Tesla-målen

I de två senaste målen i förvaltningsrätten begärde Tesla att förvaltningsrätten skulle fastställa att anslutningen inte genomförts inom skälig tid samt förelägga nätföretaget att ansluta anläggningen inom en månad från beslut.[93] Som ovan

[91] 1 kap. 5 § ellagen jämte 4 § förordning (2023:241) om det nationella elsystemet.

[92] Jfr Förvaltningsrätten i Linköpings dom 20 maj 2025 i mål 2092–25 (det första av Tesla-målen).

[93] Se Förvaltningsrätten i Linköpings domar den 10 februari i mål 7253–25 mellan TM Sweden AB och Ljungby Energinät AB, och mål 7254–25 mellan TM Sweden AB och Gävle Energi Elnät AB.

nämnt är fullgörandet av anslutningsskyldigheten i viss mån oskiljbar från frågor om tidsåtgång. Tesla torde därmed inte behövt kräva ett fastställande av oskälig anslutningstid, utan enbart kunnat yrka på ett föreläggande att fullgöra anslutningsskyldigheten. Det som emellertid ska diskuteras i det följande är förvaltningsrättens uppställda prövningsordning i dessa två mål. Förvaltningsrätten inledde domarna med att pröva huruvida ett föreläggande att ansluta Teslas anläggning skulle strida mot konflikträtten i 2 kap. 14 § RF. Domstolen konstaterade förvisso att anslutningsskyldighet förelåg i båda målen, men menade att förevarande mål *i stället* gällde frågan om tidsåtgång för anslutning. Detta indikerar att rätten betraktat anslutningsskyldighet och anslutningstid såsom separata frågor.[94] Domstolen menade att det skulle utgöra en otillåten inskränkning av konflikträtten i RF att förelägga respektive nätföretag att ansluta Teslas anläggningar. Först därefter uttalade sig förvaltningsrätten allmänt om anslutningstid och förhållandet till EU-rätten. Prövningsordningen – att inleda med att direkt pröva huruvida ett bifall skulle strida mot 2 kap. 14 § RF – liknar till stor del Svea hovrätts prövningsordning i mål T 14647–24 mellan Tesla och PostNord gällande utfående, utlämnande och avhämtning av postförsändelser.[95] I det målet uttalade hovrätten att:

> ”Som tingsrätten angett skulle ett bifall till Teslas talan innebära att stridsåtgärden i praktiken blir utan verkan och ha samma effekt som att förklara stridsåtgärden olovlig, vilket en allmän domstol inte får göra. Det skulle också medföra att domstolen utan stöd i lag eller avtal skulle begränsa en lovlig stridsåtgärd på ett sätt som strider mot 2 kap. 14 § regeringsformen. Hovrätten kan alltså inte ta ställning till om PostNord har möjlighet att dela ut försändelser till Tesla trots blockaden genom att till exempel anlita icke organiserade arbetstagare. En sådan prövning är inte möjlig att göra utan att gå in på frågor som gäller begränsningar av blockaden och stridsåtgärdens lovlighet. Hovrätten delar alltså de bedömningar som tingsrätten gjort och instämmer i slutsatsen att allmän domstol är förhindrad att fatta det beslut som ett bifall till Teslas talan skulle innebära.”[96]

På liknande vis redogjorde förvaltningsrätten för hur prövningsramen i respektive mål påverkas av grundlagsskyddet för arbetstagarorganisationers stridsåtgärder, varefter domstolen uttalade:

> ”I praktiken innebär ett sådant beslut [att genomföra anslutningen] att blockaden blir verkningslös. […] Även om förvaltningsrätten är behörig att pröva målet i sak kan rätten således inte fatta det beslut ett bifall till Teslas yrkanden skulle innebära. Överklagandet ska därför avslås.”[97]

Vid första anblick kan prövningsordningen te sig logisk; varför överhuvudtaget pröva frågan om anslutningstid om det ändå inte går att meddela ett föreläggande i enlighet med vad som yrkats? Förutom att det som ovan nämnt ter sig motstridigt att domstolen fastställer anslutningsskyldighet samtidigt som den anser sig inte kunna besluta om genomförande av samma anslutning, är prövningsordningen i sig problematisk. Särskilt mot bakgrund av att målen aktualiserar frågor om förhållandet mellan nationell rätt och EU-rätt.

[94] Jfr med resonemanget i avsnitt 3.3 ovan.

[95] Svea hovrätts dom den 30 september 2025 i mål T 14647–24.

[96] Svea hovrätts dom den 30 september 2025 i mål T 14647–24 s. 4.

[97] Förvaltningsrätten i Linköpings domar den 10 februari i mål 7253–25 respektive 7254–25, s. 8.

För det första bör en viss åtskillnad göras mellan Tesla och Lenab-målet respektive Tesla och Gävle Energi. I förstnämnda mål finns en sedan tidigare lagakraftvunnen dom som fastställer anslutningsskyldighet. Förvaltningsrätten var således förhindrad i det fallet att utgå från något annat än anslutningsskyldighet. Såsom redogjorts ovan är ett föreläggande om att genomföra anslutningen det rättsmedel som står till buds för att framtvinga fullgörande av plikten att ansluta en anläggning.[98]

För det andra ter sig prövningsordningen som problematisk därför att domstolen åsidosatte ellagens regler med tillämpning av tolkningsprincipen *lex superior*, utan att först pröva om relevanta undantag i ellagen var tillämpliga. Hade så funnits vara fallet hade någon normkonflikt med 2 kap. 14 § RF inte aktualiserats.

För det tredje ska aktuella bestämmelser i ellagen tillämpas direktivkonformt. Låt anta att en direktivkonform tolkning ger vid handen att det inte finns grund för att vägra tillträde eller att anslutningen måste ske inom en viss tidsfrist. Ett avslag av yrkandena enkom med hänvisning till nationell grundlag tar inte med EU-rättens ställning i beaktande. I ett sådant fall hade även förhållandet mellan ett effektivt genomförande av elmarknadsdirektivet och konstitutionella rättigheter behövt iakttas, med beaktande av företrädesprincipen samt principen om medlemsstaternas nationella identitet.[99] Hänsyn hade också behövt tas till att konflikträtten på arbetsmarknaden skyddas i artikel 28 i EU:s rättighetsstadga.[100]

Enligt min mening borde förvaltningsrätten inlett med att, i linje med ovan, ta ställning till hur yrkandena sammanhänger med anslutningsskyldigheten. Om ett föreläggande att ansluta en anläggning betraktas som ett uttryck för fullgörande av nätföretagets plikt, borde domstolen ha vidhållit tidigare dom som fastställer anslutningsskyldighet, i den mån sådan finns.[101] I annat fall kan eventuella undantag till grund för vägran prövas, såsom andra särskilda skäl. Finner sig domstolen förhindrad att meddela föreläggande med anledning av 2 kap. 14 § RF, väcks frågan om ett sådant undantag från rätten till tillträde för tredje part är förenligt med artikel 6 i elmarknadsdirektivet. Blir det fråga om andra särskilda skäl som undantag måste detta tolkas direktivkonformt. Knäckfrågan i Tesla-målen borde sammantaget ha varit vilket utrymme det finns för andra undantag i nationell rätt från tredje parts tillträde än avsaknad av nödvändig kapacitet. Mot bakgrund av detta riktas fokus i nästföljande avsnitt på undantaget ”andra särskilda skäl” från anslutningsskyldigheten.

4.2 Undantagsregeln ”andra särskilda skäl” och förhållandet till EU-rätten

I enlighet med artikel 6.1 elmarknadsdirektivet ska medlemsstaterna säkerställa en ordning för tredje parts tillträde till elnätet. Av artikel 6.2 följer att det finns utrymme för att vägra tillträde till elnätet om det saknas nödvändig kapacitet. I övrigt saknas uttryckliga grunder i direktivet för att ett nätföretag ska få vägra tillträde. I ellagen finns emellertid en ventil som innebär att undan-

[98] Jfr avsnitt 3.3 ovan, samt notera att förvaltningsrätten även i mål 7254–25 mellan Tesla och Gävle Energi hänvisade till att anslutningsskyldighet sedan tidigare var fastställt, trots att det tidigare avgörandet gällde mellan Tesla och Lenab. På s. 7 i mål 7254–25 uttalade domstolen: ”Förvaltningsrätten konstaterar inledningsvis att Gävle energi har en skyldighet enligt 4 kap. 1 § ellagen att ansluta Teslas laddningsstationer till elnätet. *Detta fastslog förvaltningsrätten i mål 2092–25*.” (egen kursivering).

[99] Se C-6/64 Costa mot ENEL, C-11/70 Internationale Handelsgesellschaft, C-399/11 Melloni, C-430/21 RS och NJA 2014 s. 79 p. 15.

[100] Europeiska unionens stadga om de grundläggande rättigheterna (2016/C 202/02).

[101] Med mindre nya omständigheter tillkommit mellan den första domen och det senare målet, jfr läran om *facta supervenientia*.

tag även kan göras vid andra särskilda skäl. Vad omfattas av undantaget och är det överhuvudtaget förenligt med direktivet? Principiellt står intresset av en välfungerande konkurrens på den fria marknaden för el mot behov av undantag för att förhindra stötande utfall i enskilda fall, med beaktande av de offentligrättsliga skyldigheter som följer med en anslutning.

4.2.1 Andra särskilda skäl i 4 kap. 2 § ellagen

Undantaget från nätföretags anslutningsskyldighet på grund av andra särskilda skäl går tillbaka till lag (1902:71 s. 1) innefattande vissa bestämmelser om elektriska anläggningar (äldre ellagen). När anslutningsskyldigheten infördes genom 1994 års reform av äldre ellagen stadgades samtidigt undantag från denna skyldighet vid särskilda skäl. Dock bör beaktas att denna reform genomfördes före det första elmarknadsdirektivet, som ett led i att konkurrensutsätta den svenska elhandeln och ta steg mot en nordisk elmarknad.[102] Trots detta har undantaget levt kvar genom alla därefter genomförda elmarknadsreformer.

Den rättsliga systematiken var redan vid införandet på så vis att anslutningsskyldighet utgjorde huvudregeln, medan undantag var möjligt vid kapacitetsbrist eller särskilda skäl.[103] Särskilda skäl kan ses som en generalklausul vilken ger nätföretag utrymme att i enskilda fall vägra tillträde, och därmed undgå en avtalsrelation med motparten där resultatet riskerar att bli stötande. Det visas genom de exempel som angavs i förarbetena till den äldre ellagen, nämligen att motparten inte följt tidigare avtal eller att det kan förväntas bli svårt att få betalning.[104] Med andra ord tidigare bristande vandel eller anteciperade betalningssvårigheter. Skyddsintresset verkar därmed vara att ge nätföretaget skydd mot anteciperade avtalsbrott. Nämnda exempel på särskilda skäl upprepades i samband med att nuvarande ellag infördes.[105] Regeln överfördes i sak oförändrad vid 2022 års omstrukturering av ellagen, även om exemplifieringen av särskilda skäl däri anges vara att det finns anledning att befara framtida avtalsbrott med hänsyn till att part inte följt tidigare avtal.[106]

En subjektiv tolkning ger vid handen att skyddsobjektet för undantagsregeln är nätföretaget. Nätföretaget, vilket har en rad offentligrättsliga skyldigheter som följer med att ha en ansluten kund till elnätet, har i svensk rätt ansetts behöva kunna undgå skyldigheten att ansluta motparten. Anslutningen framtvingar typiskt sett ett avtalsförhållande och när det finns tydliga indikationer på att motparten inte kommer att fullgöra sina skyldigheter ska detta kunna undvikas. Efter en anslutning är nätföretaget skyldigt att överföra el med god kvalitet som dessutom uppfyller uppställda funktionskrav.[107] Vid brister, exempelvis avbrott i överföring, har elanvändare rätt till avbrottsersättning.[108] Samtidigt är motpartens främsta skyldighet i avtalsförhållandet att erlägga nätavgift.[109] Men även att hålla anläggningar i enlighet med elsäkerhetskrav och vårda dem så att skada inte orsakas för nätföretaget eller på andra anslutna anläggningar.[110] Utifrån detta perspektiv ter det sig som ett

[102] Jfr avsnitt 3.2 ovan om syftet med regeln om tredje parts tillträde.
[103] Se 2 § 4 mom. samt 2 § 7 mom. i den äldre ellagen (1902:71 s. 1).
[104] Prop. 1993/94:162 s. 150.
[105] Prop. 1996/97:136 s. 141 f.
[106] Prop. 2021/22:163 s. 153 f.
[107] Se 4 kap. 16–20 §§ ellagen, samt Energimarknadsinspektionens föreskrift EIFS 2023:3 om leveranssäkerhet och spänningskvalitet, ofta benämnd kvalitetsföreskrifterna.
[108] Se 4 kap. 20 § jämte 10 kap. 10 § ellagen.
[109] Se 4 kap. 26–36 §§ ellagen, Energimarknadsinspektionens föreskrift EIFS 2022:1, samt jfr Allmänna avtalsvillkor Elnät 2025 K avsnitt 7 för konsumenters del.
[110] Se 1 kap. 3 § och 11 kap. 11 § ellagen jämte 6–7 och 28–32 §§ elsäkerhetslag (2016:732), samt jfr Allmänna avtalsvillkor Elnät 2025 K avsnitt 5 för konsumenters del.

skyddsvärt intresse att nätföretaget ska kunna frångå sin anslutningsskyldighet på grund av motpartens tidigare bristande vandel och i övrigt skäl som utgör grund för anteciperat avtalsbrott. Intresset av att utan inskränkning få utöva lovliga, grundlagsskyddade, stridsåtgärder på arbetsmarknaden får emellertid anses väga än tyngre. Åtminstone när stridsåtgärderna vidtas mot den part som önskar få sin anläggning ansluten. Vidtas åtgärderna mot nätföretaget själv sätts situationen möjligen i annat ljus.[111] En subjektiv tolkning talar således för att de fackliga stridsåtgärderna i Tesla-målen skulle falla inom undantagsregeln särskilda skäl. Frågan är dock om en sådan tolkning är direktivkonform.

4.2.2 Är undantaget "andra särskilda skäl" förenligt med EU:s elmarknadsdirektiv?

Artikel 6.1 i elmarknadsdirektivet stadgar att medlemsstaterna ska säkerställa att det införs en ordning för tredje parts tillträde till överförings- och distributionssystem. Tillträdet ska grundas på offentliggjorda tariffer och gälla för alla kunder, samt tillämpas objektivt och icke-diskriminerande. Bestämmelsen ger till synes uttryck för ett relativt betydande handlingsutrymme för medlemsstaterna. Formerna för hur denna ordning ska inrättas står det dem fritt att bestämma över. I första elmarknadsdirektivet kunde medlemsstaterna välja mellan att ha ett förhandlat tillträde eller ett förfarande för ensamköpare.[112] I efterföljande direktiv ändrades det till att medlemsstaterna ska säkerställa en ordning för tredje parts tillträde.[113] Regleringsansatsen tyder på att det framför allt är ändamålet snarare än formen som är det essentiella, nämligen att genom fritt tillträde undanröja hinder mot en välfungerande och konkurrensutsatt marknad.[114] Den enda uttryckliga grunden för att vägra tillträde i ett enskilt fall,[115] som anges i artikel 6.2, är att systemansvarig saknar nödvändig kapacitet i elnätet. Även denna regel går tillbaka till 2003 års elmarknadsdirektiv.[116] Vid sådan vägran ska väl grundade skäl som särskilt tar hänsyn till artikel 9 anges. Det bör beaktas att bestämmelsens språkliga lydelse inte ger vid handen att grunden för vägran enligt artikel 6.2 är uttömmande. Följaktligen skulle ordalydelsen i sig inte utgöra hinder för EU-domstolen att uttolka eventuellt ytterligare undantag, även om ett sådant inte skulle ha explicit stöd.

EU-domstolen har dock tolkat utrymmet för att vägra tillträde restriktivt, med grund i direktivets systematik och ändamål. Mål C-439/06 (*citiworks AG*) gällde tolkning av artikel 20 i 2003 års elmarknadsdirektiv. Bakgrunden i målet var att den tyska tillsynsmyndigheten hade nekat citiworks AG:s begäran om tillträde till elnätet vid flygplatsen Leipzig/Halle, med hänvisning till att elnätet var att betrakta som ett privat nät enligt 110 § i tyska lagen om el- och gasförsörjning.[117] Frågan var om den aktuella lagregeln, vilken utgjorde hinder för fritt tillträde, var förenlig med nämnda artikel. Som utgångspunkt för denna prövning uttalade domstolen:

> "Med hänsyn till betydelsen av principen om fritt tillträde till överförings- eller distributionssystem, innebär emellertid inte detta

[111] Mot bakgrund av rättsregelns primära skyddsintresse enligt ovan blir det en annan sak om stridsåtgärderna vidtas mot nätföretaget, som i förhållande till tredje part har offentligrättsliga skyldigheter. Jfr NJA 1950 s. 188, JO 1968 s. 423 och JO 2004/05 s. 363.

[112] Se artiklarna 16–18 i direktiv 96/92/EG.

[113] Se artikel 20 i direktiv 2003/54/EG.

[114] Jfr skälen 2–6 i 2003 års elmarknadsdirektiv (2003/54/EG).

[115] Det finns även undantag på systemnivå, exempelvis i artikel 9.5 elmarknadsdirektivet om skyldighet att tillhandahålla allmännyttiga tjänster. Dessa är inte aktuella för denna artikel och lämnas därhän.

[116] Se artikel 20.2 i direktiv 2003/54/EG.

[117] Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz)) av den 7 juli 2005 (BGBl. 2005 I, s. 1970).

> utrymme för skönsmässig bedömning att medlemsstaterna har rätt att frångå nämnda princip, förutom de fall där det i direktiv 2003/54 *särskilt föreskrivs undantag eller avvikelser*."[118]

Med andra ord tolkade domstolen kravet på att säkerställa en ordning med fritt tillträde för tredje part, med beaktande av direktivets systematik och ändamål, som att det endast finns utrymme för vägran när det finns uttrycklig grund härför i elmarknadsdirektivet. Likaså påpekades att en nationell bestämmelse endast är förenlig med direktivet om den omfattas av tillämpningsområdet för dessa undantag eller avvikelser, till exempel avsaknad av nödvändig kapacitet.[119] Detta har senare bekräftats av EU-domstolen i de förenade målen C-262/17, C-263/17 och C-273/17.[120] Ellagens undantag från anslutningsskyldighet vid andra särskilda skäl ter sig svårförenlig med dessa uttalanden. Hänsyn bör tas till den betoning som EU-domstolen har lagt vid det fria tillträdets betydelse för att uppnå ändamålet om en fullt fungerande och konkurrensutsatt inre marknad. Att det utgör en av de grundläggande åtgärder som medlemsstaterna är skyldiga att vidta för fullbordande av den inre marknaden, samt att rätten är ovillkorligen kopplad till rätten för konsumenter att fritt välja elleverantör.[121] En restriktiv tolkning av undantag från tredje parts tillträde framstår därmed som motiverad.

Den avgörande betydelse som tredje parts tillträde har för att fullborda den inre marknaden har bekräftats i efterföljande rättspraxis.[122] Inte i något av fallen har EU-domstolen öppnat upp för andra typer av undantag i nationell rätt som tar hänsyn till skälighet eller andra skyddsintressen som grund för att vägra tillträde. Domstolen har emellertid infört en form av *proportionalitetsprövning* vad gäller nationella regler inom ramen för icke-diskrimineringsprincipen, vilken ger uttryck för en allmän likhetsprincip. Enligt denna prövning är en skillnad i behandling mellan anläggningar motiverad om den grundas på ett objektivt och rimligt kriterium som sammanhänger med ett lagligt godtagbart mål, och om denna skillnad står i proportion till det mål som eftersträvas.[123] Det bör dock noteras att proportionalitetsprövningen har tillämpats inom ramen för likhetsprincipen i situationer där det föreligger avsaknad av nödvändig kapacitet i elnätet. Exempelvis när nationell rätt, genom införlivande av bland annat elmarknadsdirektivets regler om prioriterad inmatning och garanterat tillträde,[124] vid kapacitetsbrist medger företräde för exempelvis vissa typer av produktionsanläggningar. Med andra ord handlar det i dessa fall inte om allmänna regler som går utöver de i elmarknadsdirektivet uttryckligt föreskrivna grunderna för vägran av tillträde.[125]

Avslutningsvis bör dock nämnas att EU-domstolen inte i något av målen uttryckligen har tagit ställning till en nationell bestämmelse om att vägra tillträde på grund av omständigheter som hänför sig till den part som önskar få en anläggning ansluten. Utifrån kravet på objektivitet och icke-diskriminering, samt ändamålet med fritt tillträde, finns dock lite som talar för en annan bedömning än i de fall där nationell rätt haft undantag för vissa typer av system. Att öppna upp för den typen av undantag riskerar att motverka elmarknadsdirektivets främsta ändamål: att skapa verkligt integrerade, konkurrens-

[118] C-439/06 p. 55 (egen kursivering).
[119] C-439/06 p. 56–57.
[120] Se p. 54–61 i nämnda mål.
[121] C-439/06 p. 39–44.
[122] Se bl.a. C-239/07 p. 31, C-492/14 p. 76, förenade målen C-262/17, C-263/17 och C-273/17 p. 54, C-31/18 p. 40 och C-179/20 p. 67.
[123] Se C-492/14 p. 79–81 samt C-179/20 p. 70–72.
[124] Se artikel 42 i elmarknadsdirektivet, samt jfr artiklar 15–16 i 2009 års elmarknadsdirektiv.
[125] Jfr C-492/14 och C-179/20.

utsatta, konsumentorienterade, flexibla, rättvisa och transparenta elmarknader i unionen.[126] Det kan därför ifrågasättas om undantagsregeln om särskilda skäl är förenlig med elmarknadsdirektivets artikel 6.

5. Avslutande ord

Den grundläggande rätten för tredje part att få fritt tillträde till elnätet – i ellagen formulerat som en anslutningsskyldighet för nätföretaget – har sedan första elmarknadsdirektivet ansetts utgöra en nödvändig förutsättning för förverkligande av EU:s inre elmarknad. Länken mellan ett legalt monopol och en konkurrensutsatt elhandel. Ett effektivt genomförande av denna rätt torde kräva mer än en box att ticka i – mer än ett formellt erkännande från nätföretaget som bekräftar dess skyldighet. Medlemsstaterna behöver inom ramen för deras handlingsutrymme att upprätta en ordning som säkerställer denna rätt för tredje part, tillhandahålla mekanismer för att genomdriva ett fullgörande av denna skyldighet. Detta oberoende av de mer specifika reglerna om anslutningstid. Med hänsyn till den vikt som unionen lagt vid tredje parts tillträde som katalysator för fullbordande av den inre marknaden för el bör rätten till tillträde inte behandlas som blott en formalitet. Rätten till tillträde riskerar att bli tandlös om inte nätmyndigheten och domstolen genomskådar de faktiska grunderna till varför en anslutning ännu inte genomförts, liksom utsikterna för att anslutningen ska slutföras framgent. I artikeln har det argumenterats för att nätföretaget inte ska tillåtas att disponera över en tvist om anslutning genom att styra över huruvida dess ställningstagande om anslutningen ska betraktas som ett nekande av anslutning eller en angivelse om tidsåtgång för genomförandet av anslutningen. I dessa ärenden/mål bör nätmyndigheten, och senare förvaltningsdomstolen, granska de faktiska omständigheter som ställningstagandet vilar på. Med beaktande av den information som nätföretaget ska kunna tillhandahålla enligt anknytande regler i ellagen, bör ledpunkter för denna bedömning vara:

- nätföretagets skäl till att anslutningen inte slutförs,
- nätföretagets plan för kvarstående åtgärder, vilka eventuella hinder som finns mot genomförandet av anslutningen och deras karaktär, och
- om anslutningen kan genomföras inom en överblickbar framtid.

Vidare att prövningen bör vara enhetlig, i stället för att dela upp och behandla frågorna isolerade från varandra. Det skulle vara till gagn både för parter och prövningsmyndighet om frågorna hanterades koncentrerat i ett ärende. Om frågorna om anslutningsskyldighet, tidsåtgång och genomförande ändå delas upp, så behöver ett senare beslut eller dom rörande skälig anslutningstid baseras på det föregående beslutet eller domen om huruvida anslutningsskyldighet gäller. Föreligger anslutningsskyldighet innebär det även att det inte föreligger rättsligt hinder för genomförande av anslutningen.

Vad beträffar utrymmet för att vägra tillträde för tredje part kan det hävdas att EU:s elmarknadsreglering saknar viss flexibilitet, en ventil, för intresseavvägningar i enskilda fall där resultatet av en anslutningsplikt riskerar att bli stötande. Lite hänsyn visas i regleringen för nätföretagets eventuella skyddsintressen. Dessa får stå tillbaka vad gäller tredje parts rätt till tillträde; en kompromiss för att balansera den maktposition en aktör med ensamrätt till nätet besitter. I rättspraxis har ett antal situationer där denna typ av konflikter uppkommit lösts genom distinktionen mellan ”tillträde” och ”anslutning”, exempelvis vad avser tredje parts möjlighet att

[126] Jfr artikel 1 och skälen 1–12 i elmarknadsdirektivet, samt ovan hänvisad rättspraxis.

fritt välja vilken nivå av nätet som denne önskar ansluta sig till. Notera dock att nätföretagets intresse endast har skyddats indirekt i dessa mål. Det primära skyddsintresset torde i stället ha varit att säkerställa ett stabilt och driftsäkert nät för den inre energimarknadens funktion. Andra typer av fall där nätföretaget historiskt skyddats i svensk rätt genom en möjlighet att neka anslutning, såsom vid anteciperat avtalsbrott, bristande vandel eller extraordinära händelser – helt enkelt av andra särskilda skäl – har inte fått samma genomslag på EU-rättslig nivå. Regleringen, liksom tillhörande rättspraxis, präglas tydligt av ändamålet att upprätta en konkurrensutsatt inre marknad, för vilket alla potentiella hinder mot tillträde på icke-diskriminerande och objektiva villkor ansetts behöva undanröjas. Det gäller inte endast för elmarknaden, utan motsvarande reglering förekommer även för andra delar av energimarknaderna, såsom gasmarknaden.[127] Ett undantag grundat på andra särskilda skäl ter sig svårförenligt med hur EU-domstolen har tolkat elmarknadsdirektivets bestämmelser i praxis, vilket blir tydligt i ljuset av EU-domstolens uttalande i *citiworks AG*: att principen om tredje parts rätt till tillträde endast får frångås om det särskilt föreskrivs undantag eller avvikelser. Att nätföretagen möjligen ändå inte skulle anses förpliktade att ansluta de enskilda anläggningarna just i Tesla-målen relaterar snarare till den potentiella normkonflikten mellan reglerna om fritt tillträde respektive arbetsmarknadens konflikträtt, för vilket konflikträttens ställning inom EU-rätten också behöver beaktas. Det rör sig då inte om ett undantag från en huvudregel i strikt bemärkelse, utan just om företräde för vissa rättsregler i normhierarkin. I slutändan kan dock konstateras att flera av dessa frågor om förhållandet mellan ellagen och elmarknadsdirektivet, dessvärre, i det närmaste förbigåtts hittills i Tesla-målen.

[127] Jfr 4 kap. 6 § naturgaslag (2005:403) samt artikel 30–38 i Europaparlamentets och rådets direktiv (EU) 2024/1788 av den 13 juni 2024 om gemensamma regler för de inre marknaderna för förnybar gas, naturgas och vätgas, om ändring av direktiv (EU) 2023/1791 och om upphävande av direktiv 2009/73/EG. Se även C-290/20 där EU-domstolen gjorde analogier till tolkning av elmarknadsdirektivet i mål om tolkning av gasmarknadsdirektivet.