

THE CURRENT GROUNDS OF RECOURSES AGAINST WIND FARMS IN FRANCE AND GERMANY

OFATE– MARCH 9, 2023

ME LAURENT BRAULT & ME BENOÎT WILLIOT, SK & PARTNER,
PARIS

I. GROUNDS FOR THE RECOURSES AGAINST WIND FARMS UNDER PRIVATE LAW IN FRANCE AND GERMANY

Recourses against Wind Farms under private law in France and Germany

FRANCE

Recourses under private law, meaning

- vs the operating company (not vs the authorization),
- under private law (not public law),
- before the Judicial Courts (not the Administrative Courts)

The question here: **Does the wind farm generate an unusual neighbour disturbance „*Trouble anormal du voisinage*“ ?**

The Cour de cassation has set the rule (Cass., Chambre civile 3, 17 septembre 2020, 19-16.937) : It has to be appreciated by the court case by case (*in concreto*) and the court has to take into account that wind farms serve the public interest.

Recourses against Wind Farms **under private law** in France and Germany

FRANCE

Case law is very rare

Some favourable case law:

- Cour d'appel de Rennes, 19 juin 2012, n° 11/02076 SALAUN c. VS ENERGIE
- Cour d'appel d'Amiens, 26 mars 2019, n° 1703407

Some unfavourable case law:

- Cour d'appel de Toulouse, 3ème chambre, 8 juillet 2021, n° 20/01384 (« syndrome éolien »)
-

Recourses against Wind Farms **under private law** in France and Germany

GERMANY

No possibility of a recourse against the Wind farm under private law.

II. GROUNDS FOR THE RECOURSES AGAINST WIND FARMS UNDER ADMINISTRATIVE LAW

1. IDENTIFICATION OF THE CURRENT GROUNDS OF RECOURSE WITHIN ADMINISTRATIVE LITIGATION CASES IN FRANCE

2. COMPARISON WITH THE GERMAN ADMINISTRATIVE LITIGATION

1. Identification of the current grounds of recourse within administrative litigation cases in France

- A. Insufficiency of the financial capacities of the SPV to operate the wind farm**
 - B. Significant impact on the protected species and derogation**
 - C. Information and concertation with local actors (Municipalities and inhabitants)**
 - D. Landscape and visual saturation**
-

2. Comparison with the German administrative litigation

A. Characteristics of the German administrative litigation

B. Comparison on current grounds of recourse / Specificities of litigation between France and Germany

1. IDENTIFICATION OF THE CURRENT GROUNDS OF RECOURSE WITHIN ADMINISTRATIVE LITIGATION CASES IN FRANCE

1. Identification of the current grounds of recourse within administrative litigation cases in France

A. THE INSUFFICIENCY OF THE FINANCIAL CAPACITIES OF THE SPV TO OPERATE THE WIND FARM

The insufficiency of the financial capacities of the SPV

Characteristics of the financing project for Wind farms

→ Based on the parent company financial capacities

Issue : How to evidence that such mechanism is sufficient ?

Evolution of the case law and the enforceable legislation

(petitionner to be able to demonstrate that it will effectively dispose of sufficient financial capacities to build and operate the wind farm)

What is challenged?

- Detailed and precise reference to the financial capacities of the parent company and its experience
 - The presence of a comfort letter of the parent company (or a letter of a financial institution on previous Wind farms projects financing of the Company and on the financing under conditions of the Wind farm project)
-

1. Identification of the current grounds of recourse within administrative litigation cases in France

B. SIGNIFICANT IMPACT ON THE PROTECTED SPECIES AND DEROGATION

Significant impact on protected species and derogation

→ Principle of non-harming of limited protected species but derogation possible
(3 criterias to fulfill to get such derogation – dep)

Issue : dep sometimes abusively requested

Main regions affected in france : Grand Est and Occitanie

Significant impact on protected species and derogation

What is challenged ?

- The residual impact on protected species qualified as „significant“
 - The insufficiency of the avoiding and reduction measures
 - The request of a derogation for protected species
-

Significant impact on protected species and derogation

- Evolution with recent case law (opinion of the Council of State, December 9, 2022, n° 463563 and subsequent case law) ;

 - New criteria to appreciate if a Derogation for protected species is required or not : risk „sufficiently characterised“
-

1. Identification of the current grounds of recourse within administrative litigation cases in France

C. INFORMATION AND CONCERTATION WITH LOCAL PEOPLE

Information and concertation with local people

Information and concertation to occur when all the options and solutions are possible (See Council of State, November 15, 2021, n° 434742)

→ In practice : first steps of the developement

Issue: information and concertation actions at this stage not required by a legal provision as such (public inquiry occurs at a later stage)

Information and concertation with local people

What is challenged ?

- The sufficiency of the information and concertation with local actors at the first steps of the project (public meetings, follow-up comitees)
 - In general, the sufficiency of information of the local actors on each part of the project:
 - On financial capacities
 - On visual impact of the Project
 - More generally on the impact study and related subjects
 - Within the Public inquiry and related documents
-

1. Identification of the current grounds of recourse within administrative litigation cases in France

D. LANDSCAPE AND VISUAL SATURATION

What is challenged ?

The visual saturation due to the wind farm for :

- the landscape
- the perception of the view of the inhabitants

→ Appreciation in concreto by the court (notably regarding the number of Wind farms, density and angle determination „angle de respiration visuelle“ with treshold)

Landscape and visual saturation

Especially in Hauts-de-France Region

NB : Loi d'accélération des énergies renouvelables recently passed :

Criteria of „visual saturation“ inserted in article L. 515-44 of the French environmental code

→ To be taken into account by the Prefect to deliver the authorization

2. COMPARISON WITH THE GERMAN ADMINISTRATIVE LITIGATION

2. Comparison with the german administrative litigation

A. Characteristics of the German administrative litigation

B. Comparison on current grounds of recourse / specificities of litigation between France and Germany

COMPARISON BETWEEN FRENCH AND GERMAN LITIGATION

Key figures (Germany) :

- Approx. 40 % of the administrative authorizations of wind farms are challenged
 - 60 % of the claimants are organizations
 - Approx. 60% of the recourses of organizations are successful
-

COMPARISON BETWEEN FRENCH AND GERMAN LITIGATION

Key figures (France) :

- Approx. 70 % of the Administrative authorizations of Wind farms are challenged in 2022 (NB : 50% in 2018)
 - 80 % of the claimants were organizations in 2018
 - Approx. 40/50 % of the recourses are successful in 2022
-

A. Characteristics of the German administrative litigation

3 type of claimants :

- Neighbours ;
- Municipalities ;
- Organizations / Environnemental protection associations

→ **Similar in France**

B. Comparison on current grounds of recourse between France and Germany (see above for France)

Germany :

- Protected species : only an organization is allowed to raise such ground (an individual could raise such ground only if it affects its own interest)
 - **As a neighbour (direct interest), a claimant could raise grounds related to:**
 - Visual impact (distance of the the localization of the Wind Farms to the housing depends on the Land : from 500 meters to 2 km) ;
 - Safety (risk of wake effect) ;
 - Public sanitation (risk of water pollution / drinkable water) ;
 - Procedural defect related to the public information/participation (if the competent authority would have ruled in an other way in the absence of such defect)
-

B. Comparison on specificities of litigation between France and Germany

Recourse delay of third parties :

- **Germany** : 1 month starting at the completion of the publicity measures of the authorization
- **France** : 4 months starting at the completion of the publicity measures of the authorization

Common movement to speed up the litigation duration in France and Germany :

- The removal of the first instance (2022 in Germany / 2018 in France)
 - **Only in Germany (until now)** : the specialization of jurisdiction in infrastructure projects
-

THANK YOU FOR YOUR ATTENTION !

→ WE ARE AT YOUR DISPOSAL FOR ANY QUESTION
