Barriers to Wind

Prepared by

CLS Risk Solutions

fieldfisher

Wind EUROPE

faber

Opportunities, unlocked.

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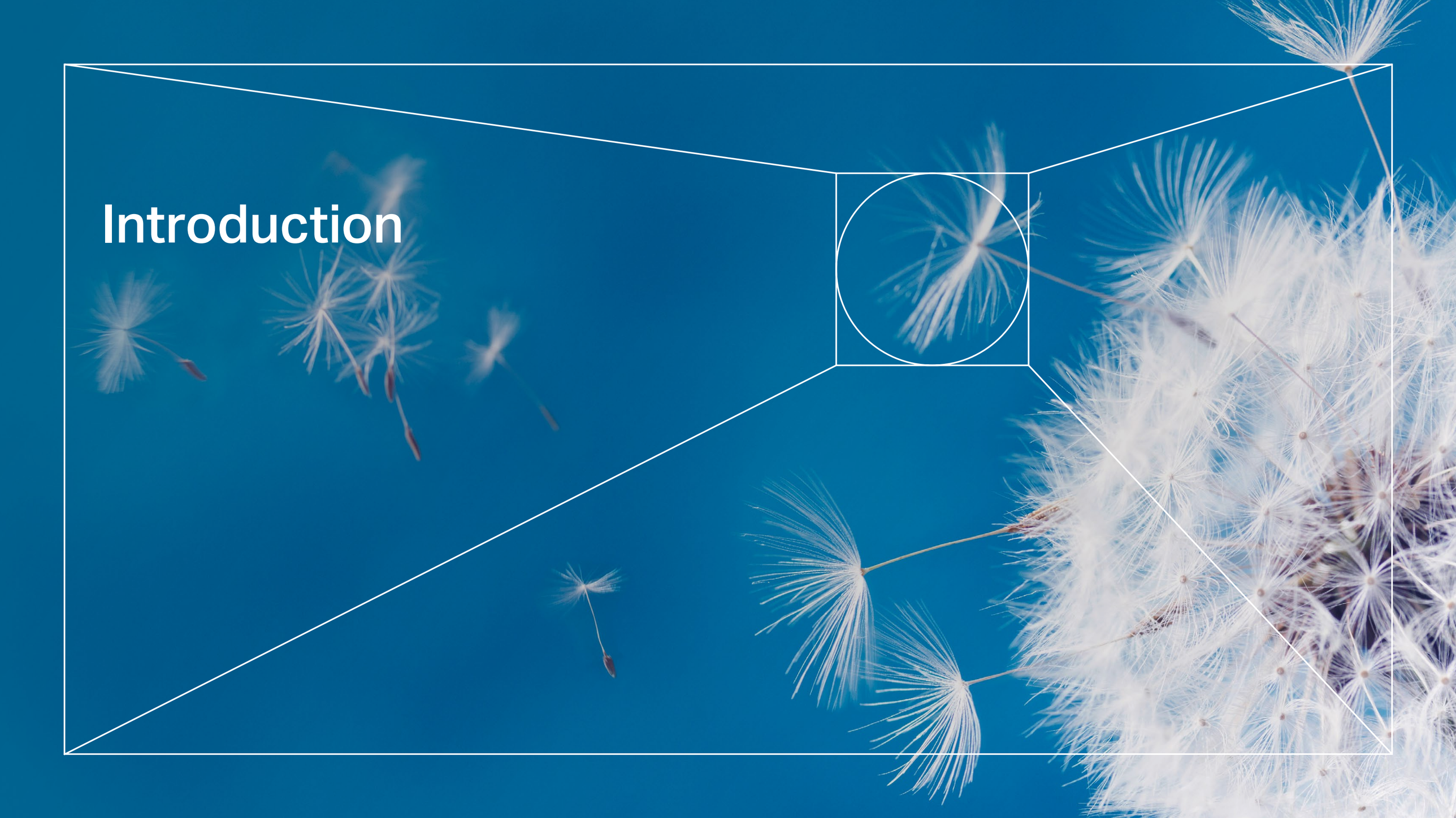
Introduction



Introduction

About CLS Risk Solutions

CLS Risk Solutions is a European agent and part of the CLS Group, which was founded in London in 2009. Since then the company has expanded into nine businesses operating from five offices.

In Europe the company operates through the fully regulated CLS Risk Solutions Ltd, licenced in 2017. With a team of underwriters, CLS Risk Solutions Ltd supports clients in Ireland, Spain, France, Germany, Benelux, Denmark and Sweden, providing insurance cover utilising its carriers' insurance capacity for financial and legal risk in real estate, infrastructure, renewable energy development projects and transactions.

About Fieldfisher

Fieldfisher is a European law firm with market-leading practices in many of the world's most dynamic sectors with a particular focus on energy and natural resources, technology, financial services and life sciences.

The firm's international renewables and sustainability practice offers one of the strongest networks of skilled legal advisers in Europe's renewable energy industry. Fieldfisher acts for various clients across the low-carbon sector, including project developers, financial institutions, investors and suppliers. Its specialist lawyers understand and can pre-empt the issues that often arise in developing wind, solar, geothermal, energy from waste (EfW), storage, energy efficiency and biomass projects. Fieldfisher has 25 offices across 11 countries.

About WindEurope

WindEurope is the voice of the wind industry, actively promoting wind energy across Europe. They have over 400 members, active in over 35 countries from across the whole value chain of wind energy: wind turbine manufacturers, component suppliers, power utilities and wind farm developers, financial institutions, research institutes and national wind energy associations.

About LERIA

Created by experts in the field of insurance of litigation, legal and environmental risk, LERIA assists its clients by offering a quality insurance solution to enable and facilitate the development and financing of projects under recourse. After having spent several years developing a solution specific to the Renewable Energy market (mainly wind power), LERIA is now a leading player in the field of legal risk insurance in France.

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Foreword by CLS Risk Solutions Ltd

High expectations and hopes are vested in Europe's wind energy industry as it is one of the EU's key pillars to meet its carbon emission targets for 2050 and transform its energy supply from its reliance on fossil fuels to renewable energy. However, with the growing presence of wind turbines across Europe's landscapes, opposition increases and although the overall popularity of the wind energy industry remains high, people prefer it to be placed elsewhere, rather than in their immediate vicinity.

As a consequence, wind energy regulation and permitting have become lengthy and complex, often resulting in an approval process of several years. Lawsuits against wind farm installations and appeals against permits have become commonplace in most markets, threatening to further prolong and even derail Europe's energy targets.

Insurers have long been familiar with guarantees and warranties, insuring the potential costs or losses incurred due to a deferred or annulled delivery or completion of a project.

It will thus come as no surprise that with the growth in wind energy and the increasing prevalence of judicial reviews of permits, insurers applied their expertise gained with performance risks in real estate transactions to the construction of wind farms.

However, the possibility to transfer the risks caused by a permit challenge to an insurer is still fairly unknown in the industry, although more and more banks make it contingent to funding. Permit challenge insurance not only allows developers to continue building while the permit challenge is ongoing, it also helps to assess and quantify the magnitude of the risk and define a structured process to mitigate its impact.

As an important insurer of permit challenges in Europe, we wanted to demonstrate the impact of permit challenges on the wind energy sector, present the legal perspective based on the expertise of our partner, the European law firm Fieldfisher, and learn from the market how it assesses and mitigates the risk of a permit challenge. Together with Fieldfisher and Faber Consulting, our consultancy based in Zurich, we embarked on an in-depth research project and survey with developers, banks, lenders and law firms operating in the wind energy sector in France, Germany and Spain.

Our gratitude goes to all executives and companies who participated in this survey. We would like to thank everybody for the information and the expertise they shared so openly with us. In addition, we would like to thank our partners – Fieldfisher and WindEurope – who helped to make this report happen and largely contributed to its content as well as LERIA in France, for supporting us with their market contacts.

We hope you will find their responses interesting and wish you an inspiring read.

Foreword by Fieldfisher

Legal challenges frequently encountered by funders and investors, developers and manufacturers when developing onshore wind energy projects in Europe are a major source of risks affecting renewable energy penetration in the EU.

As with many other sectors, legal risk and regulatory complexity can serve as deterrents to market entrants, holding back growth and stifling the development of mechanisms to better manage risks.

Perhaps more importantly, these risks are hampering the EU's efforts to combat climate change and reach its target of net zero carbon emissions by 2050.

Giving businesses the confidence and the tools to tackle challenges to wind farm development permits will therefore be vital to the success of delivering cleaner energy for Europe.

Many challenges to wind farm permits are well founded and represent the exercise of legal rights to protect other valid interests that deserve due consideration and respect. However fear of facing such challenges should not discourage developers from putting forward strong proposals, investors from acquiring such projects, or funders from funding them.

This report aims to outline the existing legal framework governing onshore wind farm permits in France, Germany and Spain and to establish to what extent legal risks relating to the permitting of such projects are shaping the onshore wind energy market in these countries.

Fieldfisher has contributed to this report from its perspective as a European law firm with a specialist focus on energy and natural resources that advises clients on large and small-scale wind projects in France, Germany and Spain as part of our wider European network.

It is this experience, combined with that of our clients and industry contacts and the expertise of CLS and WindEurope that we have brought to bear in this report.

We trust that you find this report a useful resource for considering the legal and insurance related issues affecting your current and future wind energy projects.

Foreword by WindEurope

Europe is committed to limiting greenhouse gas emissions in line with the Paris agreement and contribute to limiting global temperature rises to 1.5 degrees. To achieve this ambitious goal, our economic activity needs to decarbonise. And this journey starts with the transformation of the energy system. Renewable energies are poised to become the backbone of a larger and more interconnected power system. But for the system to run on renewables by 2050, the pace of installations of wind and solar projects needs to increase significantly. The European Commission proposed in July 2021 to raise EU's 2030 renewable energy target from 32% to 40%. This means the EU will need 452 GW of wind power capacity by 2030, up from 180 GW today. This means the EU will need to install 30 GW of new wind farms every year between now and 2030 – double the current rate of installations.

As it stands, we expect to build only 15 GW a year over 2021-25. The main hurdle to a rapid expansion of wind energy in Europe remains the complex rules and procedures for permitting new wind farms. Not only do developers need to tackle complex procedures, but more and more often projects go through arduous legal challenges that add on additional uncertainty for project promoters lead to further delays and jeopardise the achievement of countries' energy and climate goals.

As this report highlights, wind farms in Germany and France have systematically become the target of legal challenges, which lead to delays of up to 3 years. The appeal of approved permits is also becoming more common, putting into question the planning authorities and the overall governance.

It is in the interest of the wind industry that National Governments provide a robust, transparent and inclusive planning and permitting process that both accelerate the time to obtain the permits and minimise any potential opposition by social and nature protection groups. And it is also key that judicial processes, when applied, are fast and clear for all the parties.

Permit challenge insurance is one potential tool for developers and investors to help mitigating risks. And if this can help them to focus resources where they are best at: building wind farms, then it should be a better-known product.

This report helps uncover the details of the complex national permitting processes and their judicial review systems. And by doing so, help policy makers across Europe better understand the hurdles in turning Europe into a truly renewables-based economy.

WindEurope has contributed to this work with assessments of the permitting national frameworks and market data; we aim to amplify the messages and findings of this report. We hope you find it useful.

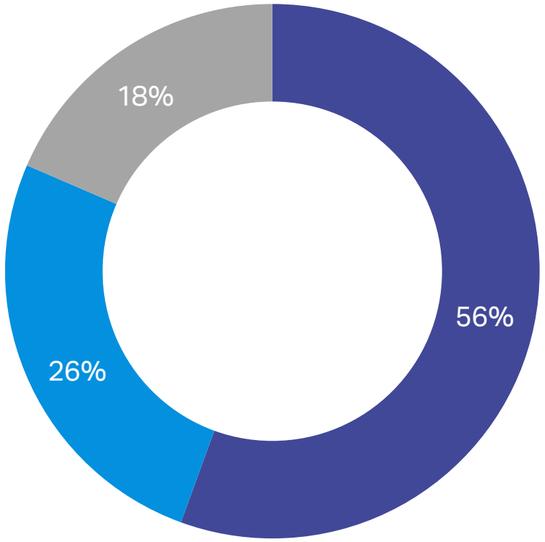
Methodology

The findings of this report are based on in-depth and structured telephone interviews with executives representing 27 wind farm developers, investors, law firms and associations operating in France, Germany and Spain. The interviews took place from April to July 2021 and were conducted by Fieldfisher, the European law firm and Faber Consulting AG, a Zurich-based business development and communications consultancy dedicated to the global insurance markets.

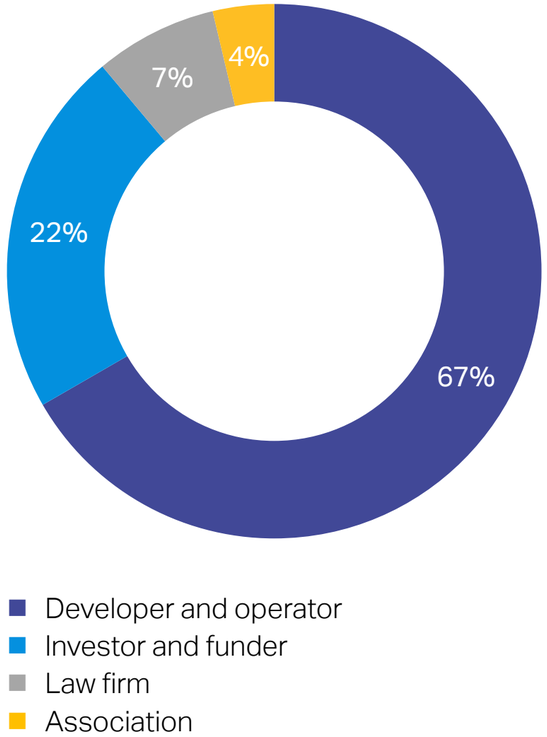
Most interviewees were developers of wind farms, many of whom build wind farms from near inception to their completion. In addition, we interviewed investors in wind farms as well as some law firms, who also provide consultancy to clients from the wind energy industry. This survey does not claim to be representative, although all of our interviewees have been dedicated to this industry for many years and could tap into a wealth of experience.

WindEurope has contributed by providing market insights and by reviewing the report.

Interviewees by country



Interviewees by business sector



Key findings

By 2030 the EU aims to reduce its carbon emissions by 55% as compared to the level in 1990. Renewable energy is expected to contribute at least 40% to the energy mix by 2030[1]. This means that the European wind industry must accelerate its pace of turbine installations to 30 GW annually, up from currently only 15 GW.[2]

However, the pace of installations remains subdued. With the increasing presence of wind farm installations, the permitting and judicial review process has become complex and convoluted. While the actual permitting of wind farms can take two-to-six years, judicial reviews or permit challenges, which are typically launched when the approval process is well advanced, can add another two-to-seven years. During the ongoing permit challenge, construction might be paused and only continue once the judicial review has been concluded. Meanwhile, developers will find it difficult to access debt financing as banks tend to only commit funds to those projects where a permit challenge is not pending.

Permit challenge insurance can contribute to removing some of the risks that a permit challenge presents. As it transfers the risk to the insurer, projects become bankable again as investors will accept an insurers' security.

Developers can continue with their building while the risk rests with the insurer. Apart from the insurance cover, the legal resolution of a permit challenge is also a key component of every judicial review. Legal frameworks for challenging wind farm permits vary from country to country, as do grounds on which challenges can be mounted and who can file them.

The three countries assessed in this report, France, Germany and Spain, each offer administrative and judicial recourses, in conjunction with other measures and forms of interim relief that give objecting parties various routes to challenge wind farm permits. Pro-renewable energy policies by national and local administrations and general public approval for cleaner forms of energy have prompted governments to take steps to simplify and shorten the legal process for wind farm permit challenges. Despite these improvements, the perception of the legal process as being complicated, slow, expensive and risky remains.

"By 2030 the EU aims to reduce its carbon emissions by 55% as compared to the level in 1990.

1 European Comission. 14 July 2021.
2 WindEurope. 14 July 2021.

Key findings

The survey findings

The lengthy approval process of wind farm installations is a major concern for developers. Once a permit is granted, lawsuits further delay the construction, threatening access to financing and the commercial viability of the construction. More than 50% of our interviewees stated that they would insure against such events. They expect the rate of permit challenges to increase and assume that the number of lawsuits, which will exhaust all their legal options, to rise.

Those who are most likely to use insurance to protect against the risks of a permit challenge finance their construction with equity. They use insurance selectively as one of multiple measures. Others, who rely on debt financing, insure to improve the bankability of their project. Finally, there are those to whom permit challenges have become commonplace. They assume a challenge rate of almost 100% – regardless of the quality of the project – and therefore insure all projects, treating the coverage as a cost of doing business.

However, permit challenge insurance is still new to the European wind energy market. There is a substantial lack of awareness about the insurability of the risk, the coverage and the pay-out. Interviewees use the cover to protect their financial downside, access financing and continue with their construction. To the majority of our interviewees, insurance forms part of a broad spectrum of measures which may include entering into a dialogue with claimants, adjusting the planning proposals, settling out of court, defining a legal defence and insuring the residual risk.

Market section

Legal challenges and insurance solutions in the development of onshore wind energy projects

Wind energy in France, Germany and Spain

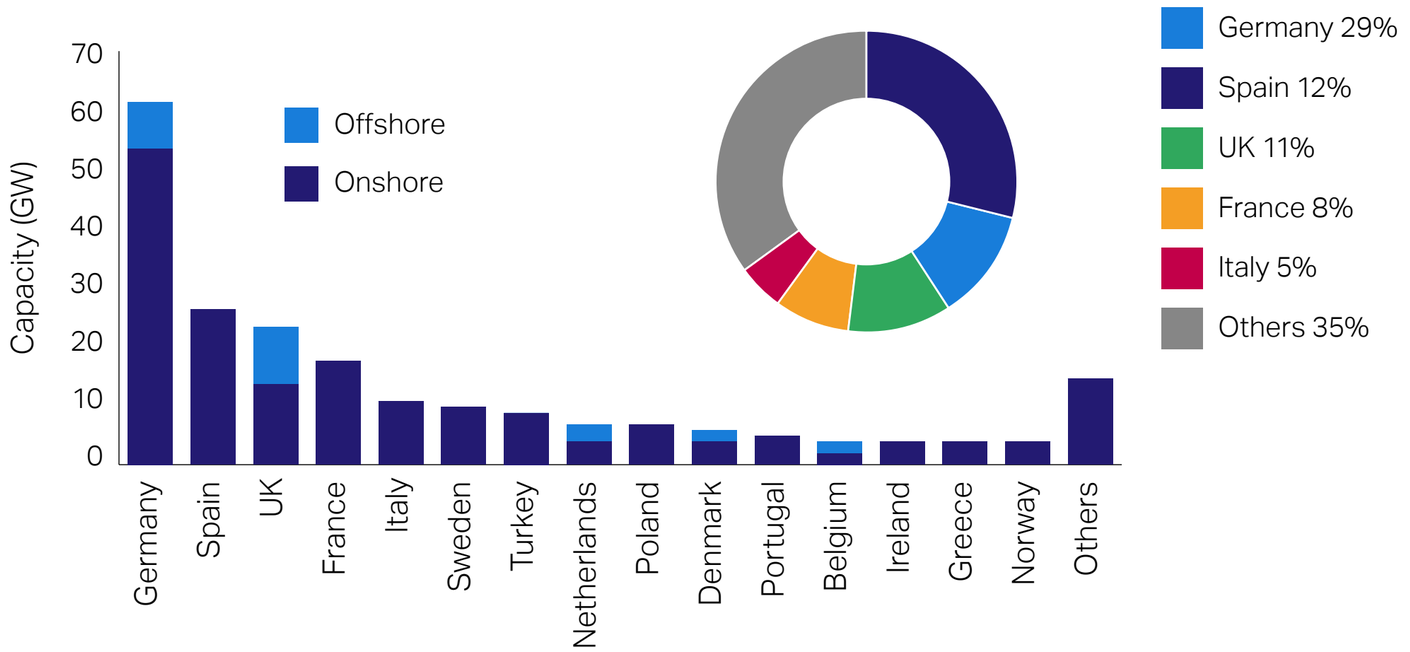
Current wind energy capacity installed and outlook

Wind energy is one of the key components of the EU's strategy to reach its target of reducing its carbon emissions by 55% compared to 1990 levels by 2030.[1] According to this new target, the EU aims to generate at least 40% (up from 32%) of its energy from renewable sources by 2030. This means the EU will need to install 451 GW of wind energy by 2030, up from 180 GW today. In other words, 30 GW of new wind farms need to be installed per year from 2021 until 2030.[2]

In May 2021, Germany further expanded on the EU's targets and announced that it aims to reduce its carbon emissions by 65% compared to 1990 levels. Under the new, more ambitious goal, Germany also aims to reach carbon neutrality by 2045, five years before the 2050 deadline set by the EU. Also in May 2021, the French parliament decided that the country would reduce its carbon footprint by 40% by 2030. Under this new goal, France will have to triple its current rate of emission reductions.

Meanwhile, the Spanish government has also tightened its carbon emission targets and announced in 2021 that it intends to reduce its carbon emissions by 23% by 2030, and that by then 42% of its energy consumption must come from renewable energy sources.

Figure 1: Total wind installations by country

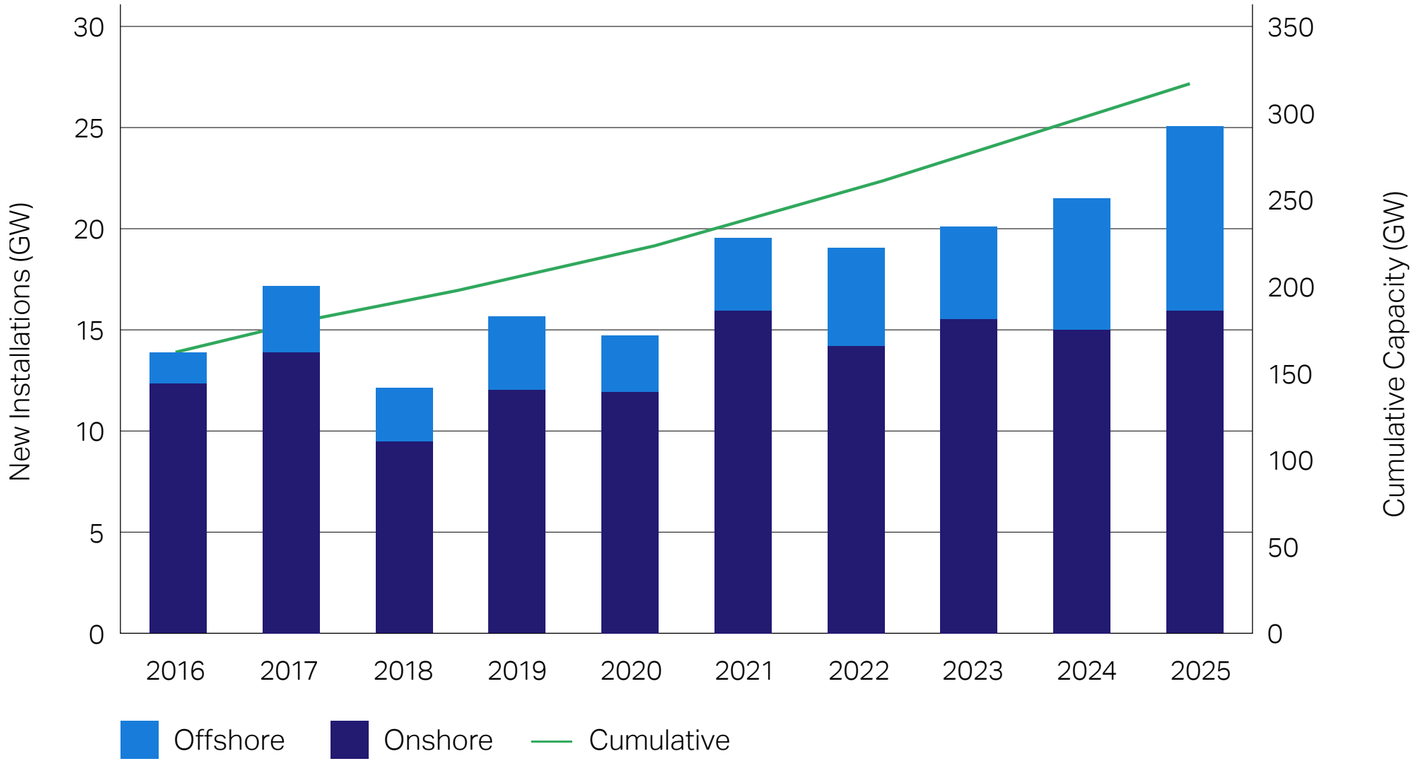


Source: WindEurope

1 European Commission 14 July 2021.
2 WindEurope. 14 July 2021.

By the end of 2020, Europe had installed 220 GW of wind power capacity, covering about 16% of its energy demand. Going forward, the EU27 would need to install an additional 18 GW of wind energy per annum to meet the national energy and climate plan (NECP). However, under the Realistic Expectations Scenario of WindEurope, the EU27 will only install 15 GW p.a. until 2025, well short of the 18 GW p.a. needed to fulfil its NECP target. Under this scenario, by 2025 Germany would have a wind energy capacity of 75 GW (up from 63 GW in 2020), France's capacity would amount to 30 GW (up from 18 GW in 2020) and Spain's to 31 GW (up from 27 GW).[3]

Figure 2: New and total (cumulative) installations in Europe – Realistic Scenario



Source: WindEurope

3 WindEurope. 2021a.

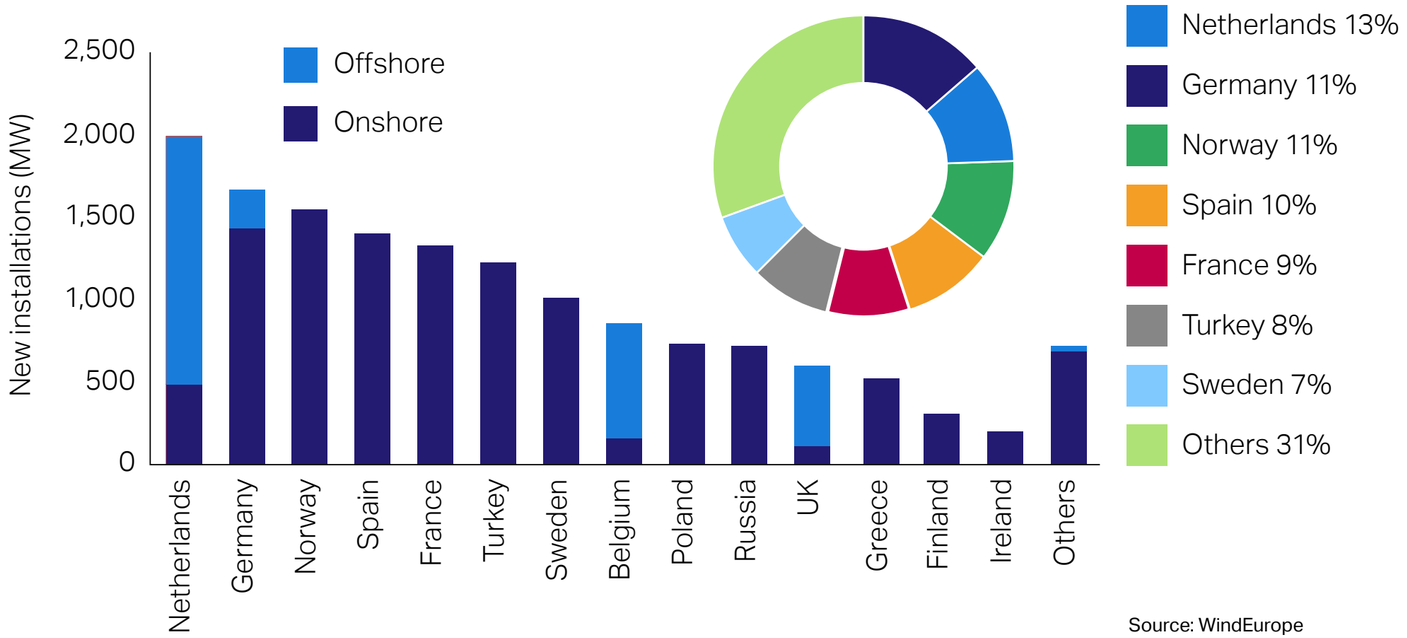
Legal challenges and insurance solutions in the development of onshore wind energy projects

These best estimates consider the current pipeline of wind energy projects, auctions and tenders, legislative and regulatory changes as well as targets set to meet these and longer-term targets and assume that projects are accomplished on schedule. Still, they depend on the enforcement of effective repowering strategies, but foremost on further improvements in the permitting process, particularly in countries such as Germany and France. In case these 'realistic' estimations are not met, WindEurope also developed a low scenario, which – among other factors – reflects the risk that European governments fail to improve their permitting processes. Under this low scenario, total wind energy capacity would only amount to 292 GW by 2025 with an average installation rate of 16 GW p.a.

The year 2020 saw installations of just 14.7 GW in Europe (EU27 installed 10.7 GW), mainly due to the impact of the COVID-19 pandemic on supply chains and restrictions on movements of goods and people. Germany managed to install 1.6 GW, thanks to slight improvements in its permitting process, but this is still its lowest rate since 2010. Similarly, Spain deployed another 1.7 GW and France 1.3 GW of capacity.[4]

In 2021, WindEurope expects a record year of installation as some of the projects delayed in 2020 due to the pandemic will be completed. Depending on the long-term impact of the pandemic, Germany is likely to implement about 2 GW, a slight improvement over 2020, while France should grow by 1.7 GW and Spain by 1 GW.[5]

Figure 3: New onshore and offshore wind installations in Europe in 2020



Source: WindEurope

4 AEE Asociación Empresarial Eólica. 2021.
5 WindEurope. 2021a.

Legal challenges and insurance solutions in the development of onshore wind energy projects

Under/over subscription of auctions in France, Germany and Spain[6]

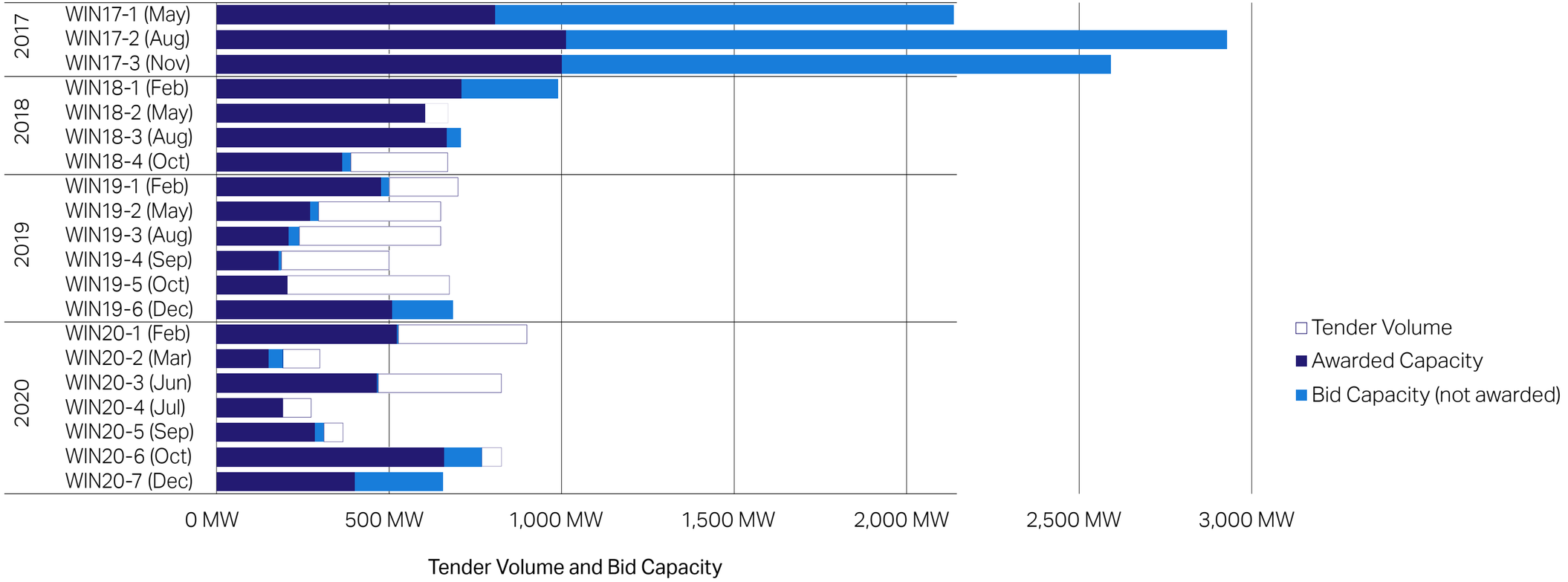
Further to the completion of installations in 2020 as well as the outlook for 2021, wind energy developers secured about 8 GW in new projects that were auctioned in 2020. More than 90% of these are onshore wind projects and about 10% are offshore projects.

In Germany, seven auctions took place with a tendering capacity of up to 3.9 GW. However, the number of projects submitted was insufficient. Six of the seven auctions were undersubscribed and as a result, only 2.7 GW or 68% of the tendered capacity was awarded. However, compared to the previous year, when only half of the tendered volume of 1.8 GW was eventually awarded, the 2020 auctions presented a significant improvement.

Although Germany plans to auction another 17 GW of wind energy over the next five years, the country's government has been criticised heavily for its recent changes to the Renewable Energy Act (EEG). The new law will allow the German Network Agency (BNetzA) to reduce auction volumes where there is a risk of the auction being undersubscribed. While this might be meant to address the lack of demand in recent auctions and maintain pressure on the market to secure attractive rates, investors are concerned that they no longer have certainty about the amount of capacity tendered and that the capacity tendered in Germany will remain below the volume needed to meet the targets for 2030. Across the auctions, projects fetched prices ranging €55.9/MWh to €62/MWh.

6 WindEurope. Intelligence Platform.

Figure 4: Results of Tender Rounds



Source: Deutsche Windguard

Legal challenges and insurance solutions in the development of onshore wind energy projects

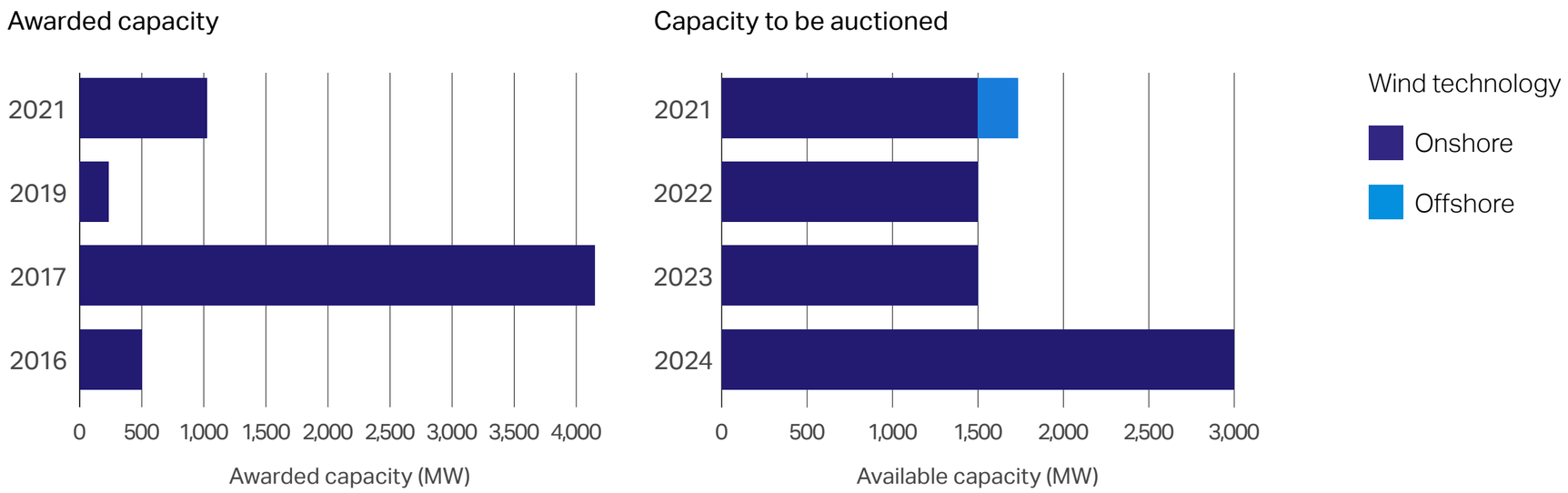
According to its National Climate and Energy Plan, France will expand its onshore wind capacity to 35 GW by 2028, up from 17 GW in 2021. Onshore wind farms with at least seven wind turbines or one turbine exceeding 3 MW must be tendered. Launched in 2017, the current procedure was expected to auction off a cumulative capacity of 3.4 GW over six periods until November 2020. Successful bidders sign a Contract for Difference (CfD) with EDF, the French utility largely owned by the French government[7]. Due to the COVID-19 pandemic, the procedure was extended by two more auctions in 2021. The results of the latest tenders show strong demand for wind energy projects, with auctions being well oversubscribed. In 2020, 1.5 GW was tendered in three auctions, followed by a further auction in February of another 0.5 GW and a final auction under the current scheme in April 2021. The average prices for the auctions ranged from €62.9/MWh to €59.5/MWh.

Spain rescheduled its auction planned for December 2020 to January 2021, in which wind farm capacity of 1 GW was awarded. The auction was the first one under the new system of Spanish auctions designed in 2020 and resulted in the lowest prices ever secured for onshore wind energy in Europe. Wind energy bids were awarded ranging from €20/MWh to €28.89/MWh. Going forward, the Spanish government aims to auction wind energy capacity of 1.5 GW annually between 2021 and 2025.[8]

"Going forward, the Spanish government aims to auction wind energy capacity of 1.5 GW annually between 2021 and 2025.

7 ICLG.com
8 WindEurope. 27 January 2021.

Figure 5: Wind auctions/tenders in Spain[9]



Awarded capacity was in some cases calculated based on the planned budget

9 WindEurope. Intelligence Platform.

Legal challenges and insurance solutions in the development of onshore wind energy projects

Duration of planning process: permitting process

Wind energy has become central to the EU's strategy in reducing its carbon footprint and meeting its target of carbon neutrality by 2050. However, with the rising prevalence of wind farms, in particular onshore wind, the overall planning and permitting process has become increasingly complex, demanding and controversial. Apart from the necessary commercial and financial considerations, such as support schemes, cost and profitability or investors' risk and return expectations, developers must take into account the technological requirements of a site, such as grid connections and supporting infrastructure as well as the right turbine technology for the site.

In addition to these operational aspects of the planning process for a wind farm, developers also have to take into consideration a multitude of institutional, socio-cultural and environmental challenges and regulatory requirements.

First, developers need to provide assurances for the protection of wildlife, endangered species, natural habitats and reserves. Second, there are community concerns such as the flicker and noise of turbines or the visual impact on landscape and historical sites. Wind farm installations also have to comply with the minimum distance to settlements as well as military and aviation controls and radar.

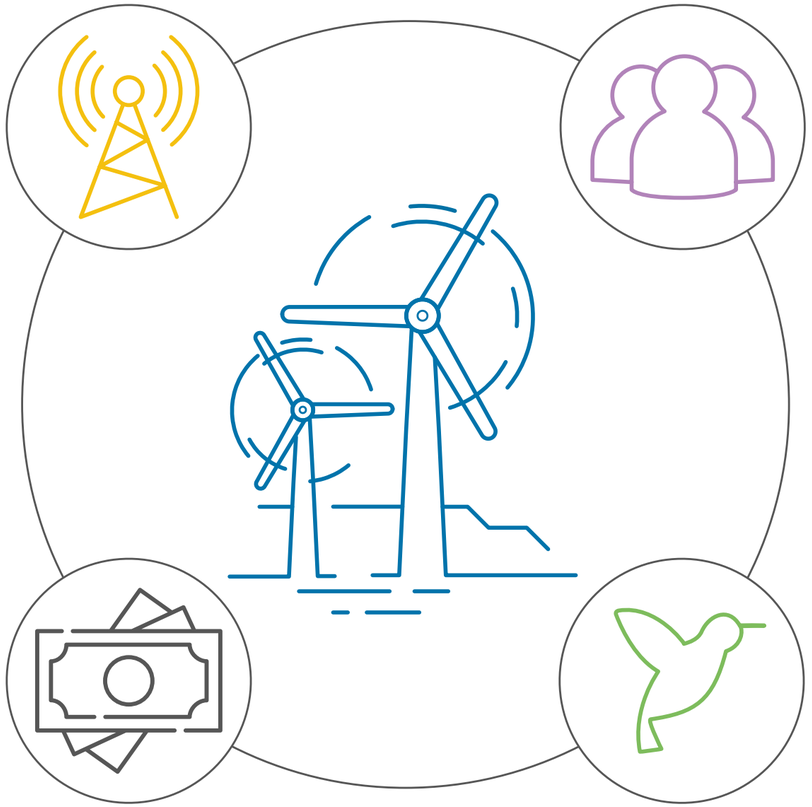
Legal challenges and insurance solutions in the development of onshore wind energy projects

Figure 6: Existing barriers in wind energy sector

Source: Irena

TECHNOLOGICAL BARRIERS

- Grid connection and integration challenges
- Lack of supporting infrastructure
- Concerns about technology maturity and performance
- Harsh offshore natural conditions



REGULATORY, POLICY AND SOCIAL BARRIERS

- Complex/outdated regulatory frameworks
- Insufficient financial policy support
- Lack of relevant standards and quality control measures
- Lack of skilled professionals and experience
- Lack of long-term and stable policy targets and well-coordinated policy mix
- Transport of wind turbine components (ex: blades)

ECONOMIC AND MARKET BARRIERS

- High initial cost of capital and long payback periods
- Limited financing channels
- Immature offshore supply chains
- Evolving policies with impact on remuneration
- Carbon emissions and local air pollutants are not priced or fully priced

ENVIRONMENTAL BARRIERS

- Impacts on marine life and species
- Visual impact
- Flicker
- Radar interference
- Noise
- Land area usage
- Public opposition – NIMBY “Not in my back yard”

Legal challenges and insurance solutions in the development of onshore wind energy projects

Developers also have to be mindful of changing public opinion, growing resistance to wind farms in general, including 'not in my back yard' (NIMBY) objections. Finally, developers have to deal with complex, often outdated or incoherent administrative procedures, policies and regulations, which are central to the approval of a permit but, depending on their organisation, can prolong the licensing procedure substantially. To speed up the process, the Renewable Energy Directive 2018/2001/EU required that member states define single points of contact for the administrative process or that they digitise the whole application process. However, while this is partly the case for Germany and France, Spain still lags behind in most aspects of improving the administrative process.

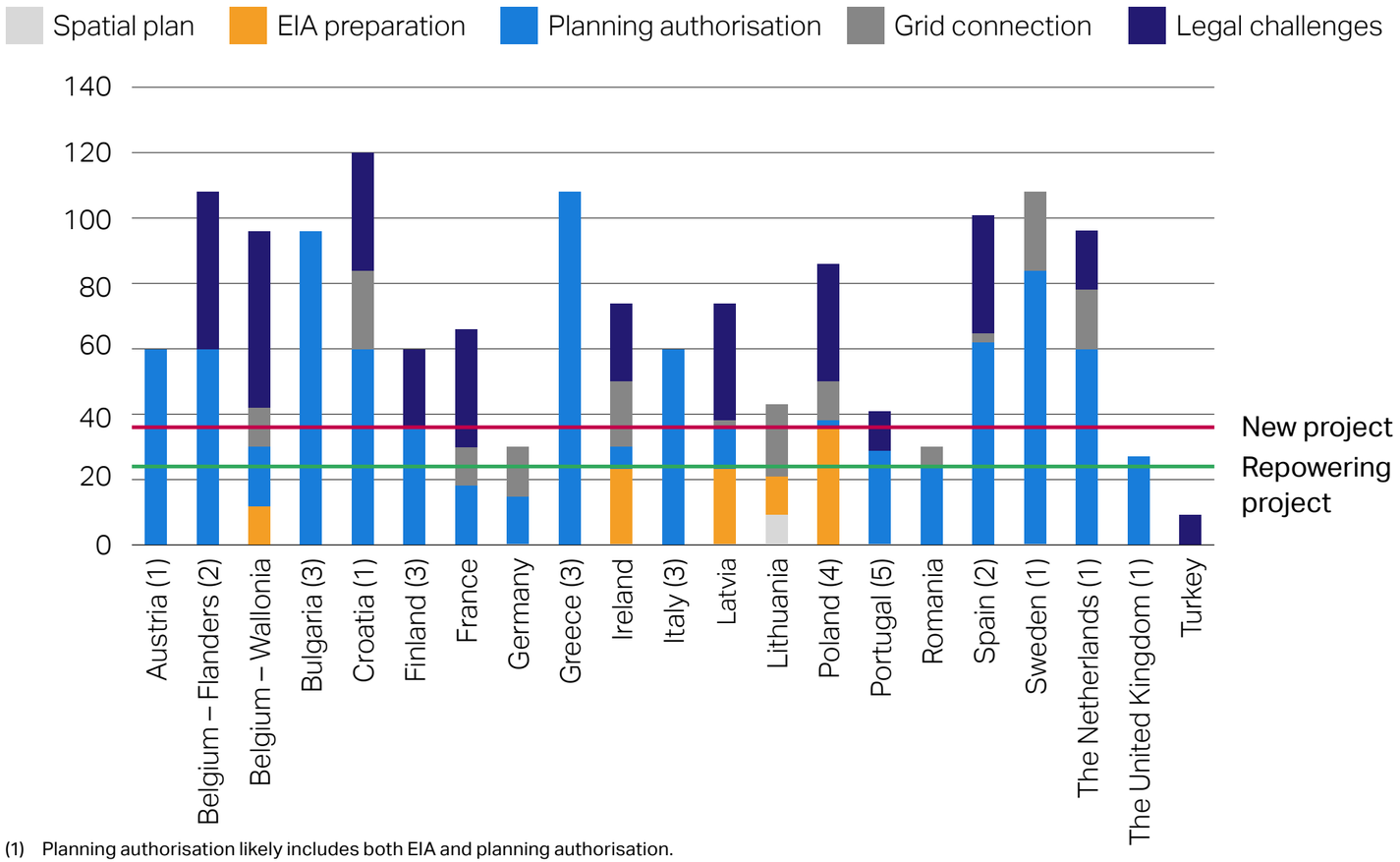
The wind energy industry and its associations have voiced concerns that authorities and policymakers need to act and deliver on their promises to speed up and simplify the permitting processes.

The European Commission has recognised these barriers and tried to simplify the permitting process and limit the time to obtain the administrative approvals with the Renewable Energy Directive 2018/2001/EU. It introduces a maximum lead time for the entire permitting process including the procedures necessary to carry out the grid connection, which should not exceed 36 months for the entire permit granting process. However, the legal procedures and the environmental impact assessment (EIA) that the developers need to carry out are very complex.[10]

10 WindEurope, 2021b.

Legal challenges and insurance solutions in the development of onshore wind energy projects

Figure 7: Onshore wind permitting lead-time in months*



(1) Planning authorisation likely includes both EIA and planning authorisation.
(2) Planning authorisation includes both EIA and planning authorisation.
(3) Planning authorisation includes EIA , planning authorisation and grid connection permit.
(4) EIA preparation includes obtaining Spatial Plan and Environmental Decision. Planning authorisation only includes obtaining the building permit.
(5) Planning authorisation includes planning authorisation and grid connection permit.

Source: WindEurope

*Timing is not fully comparable as this is based on a survey and there is a lack of information for most countries.

Permitting wind energy in France

The requirements for onshore wind farm developers in France and Germany are quite similar. The permitting process is perceived as slow, bureaucratic, and complex. The key barriers to receiving a permit for a wind farm are seen mainly in the uncertain administrative and legislative process. Until December 2017, the environmental authority, which was in charge of issuing the opinion on the project, had been the same as the authority in charge of granting the permit. However, the Conseil d'Etat, the French government body that acts both as legal adviser of the executive branch and as the Supreme Court for administrative justice, held that this authority (the regional prefect) was faced with a conflict of interest, and therefore annulled the corresponding provision of the French Environmental Code.[11]

This decision left the French wind energy industry temporarily in limbo, as it was uncertain who would be in charge of the mission ascribed to the environmental authority. As a result, approval rates for onshore wind farms dropped by more than 20% in 2018 compared to the previous year.

11 Euractiv. 18 January 2019.

Legal challenges and insurance solutions in the development of onshore wind energy projects

According to Euractiv[12], in France the lead time for getting onshore projects off the ground takes six to eight years. One of the reasons for the onerous process is the large number of authorities involved in granting the permit. In an assessment of administrative procedures in France, the Boston Consulting Group[13] observes a 'vicious cycle' faced by the project developers, as failing to obtain one permit can result in the refusal of additional permits and involves as many as 25 different offices according to the French electricity board.

Apart from the convoluted administrative process, military and aviation are the main barriers to building wind farms in France. Since France's population is quite spread out, it is difficult to find suitable wind farm locations. France Énergie Éolienne estimates that 45%-47% of French territory is effectively banned from hosting wind farms as the turbines would not fulfil the required 30km distance to a radar installation.[14]

In response to the lengthy approval, the French government introduced a streamlined permitting process with the objectives of establishing a one-stop-shop and reducing the authorisation process for the administrative procedure to 12-18 months while the authorisation for the grid access would take another year[15]. In addition, the government launched a three-year tender programme for an initial 3 GW of capacity from 2018 to 2020. Despite the COVID-19 pandemic, the programme was scheduled to conclude in April 2021 with the auction of the final 925 MW under this scheme. Auctions were well oversubscribed and met with significant interest. However, the proceeding 8th tender was again undersubscribed with applications only filing for 540 MW out of the 700 MW capacity available[16]. In August 2021, the French energy regulator CRE launched another series of tenders for 10 onshore wind installations to be held until 2026, each with a volume of 925 MW. As part of this ambition, the French government also promised to further simplify and speed up the permitting process to meet its ultimate goal to install 35 GW of wind energy by 2028.

12 Ibid.
13 Boston Consulting Group. 2004.
14 Politico. 22 December 2020.
15 WindEurope. 2020a
16 Windpower Monthly, France awards just 57% of capacity in onshore wind tender, August 2021

Legal challenges and insurance solutions in the development of onshore wind energy projects

Permitting wind energy in Germany

The timings for planning authorisation and grid connections that Germany and France – for instance – comply with, only reflect part of the reality. According to the German Wind Energy Association (BWE), the planning and permitting process for a German wind farm takes on average four to five years[17]. Administrative planning difficulties, the lack of land where wind turbines are allowed to be built, the complicated application process for developers and unresolved conflicts between wind energy developers and climate action and species protection, and ongoing court battles with pressure groups, have slowed down wind energy's expansion rate.

In its 2020 report on national policy and regulatory development, WindEurope listed more than 10 GW of capacity stuck in the permitting process due to aviation concerns, interference with radio signals or military restrictions, as well appeals against permits by pressure groups.

As a result, following years of steady growth, wind power capacity expansion came to an almost complete halt. In 2019, five in six auctions or half of the auctioned capacity had been undersubscribed. 2020 saw a slight improvement, as six in seven auctions or a third of the auctioned volume had been undersubscribed. In 2021, two auctions had been held by mid-year. Although both were again undersubscribed – with volumes of 1.5 GW in January and 1.2 GW in May – the auctioned capacity had been high. While in the first auction, less than 50% have been awarded, the second auction secured capacity of 1.1 GW, almost in line with the auctioned volume. This was the first time since 2017 that a German onshore wind tender surpassed again the 1 GW mark, which has been interpreted as an important signal.

17 BWE – Bundesverband WindEnergie. Planung.

Figure 8: Realising an onshore wind farm in Germany

Realisation (6 ⅓ years or 76 months)

Planning – 36 months

- Pre-assessment
  - Site suitability assessment
    - Planning law situation
    - Area requirements and availability
    - Resource evaluation
    - Infrastructure layout
  - Securing the area
    - Coordination with municipality and property owner
    - Finalisation of lease /purchase contract
- Preparing permit application
  - Preparing of scientific assessments
    - Stability report
    - Immission protection report
    - Species protection report
    - Detailed plan of wind farm
  - Integration of wind farm within development plans

Licensing – 18 months

- Licensing procedure according to the Federal Immission Protection Law
  - Submission of permit application
  - Assessment of the need for an EIA by the immission protection authority and conduct of EIA (if necessary)
  - Participation of specialised authorities
  - Participation of stakeholders and the public
  - Assessment of all statements by the immission protection authority and decision on whether to grant permit

Auctioning – 6 1/2 months

- Required for all onshore wind power projects above 750 kW
- Auctions are technology-specific, held several times a year and subject to a ceiling price (currently at €6.2 ct/kWh)
- Requirements for participation (as of 2018)
  - Valid permit for participating project
  - Deposit of €30,000 per MW (expires in case a contracted project is not implemented within two years)
- Contract is granted to project with lowest bid price (ct/kWh)
- Contract guarantees premium payment (equivalent to winning price) for a period of 20 years

Implementation – 15 months

- Order of turbines and parts
- Finalisation of plans for construction site
- Opening of site and preparation for installation
- Securing road access for turbine delivery
- Installation of turbine, grid connection and commissioning

Source: Pietrowitz and Quentin 2015; Endell and Quentin 2017, WindEurope

Legal challenges and insurance solutions in the development of onshore wind energy projects

Permitting wind energy in Spain

Spain, Europe's second largest wind energy market with a capacity of 27.4 GW in 2020, currently covers about 22% of its electricity demand with wind energy. By 2025, the country aims to add another 5.7 GW in onshore capacity, slightly more than 1 GW per year. For 2021, the country seems to be on track to reach its target with another 1 GW of wind energy earmarked for installation.

To date, Spain's wind energy growth had been affected by a lack of government support policies and a complicated licensing process, requiring different permits from local, regional and national authorities, each based on its own set of documentation. On top of this, the various administrative bodies required for approval lack coordination and thus prolong the licensing process.

However, the key challenge for onshore wind energy developers was to connect their project with the local grid. Developers were often required to apply for both the permit for the wind farm and the connecting line. While negotiations with the landowners for a future wind farm site were usually pragmatic, finding an agreement with landowners for the connecting grid proved quite complicated. With a new law coming into force in mid-2020, the Spanish government aimed to tidy up the growing backlog of grid access permits. Ahead of that, Spain's royal-decree-law generated requests for grid access of 430 GW capacity, the majority of which were believed to be purely speculative, to secure the rights to the land needed to pass through when connecting to the grid. According to the new law, grid access permits will only be granted if connected to a mature wind farm project. This process has begun in June 2021, but the government has reserved most of the capacity to be awarded through tenders.

In connection with the same law, Spain also restarted its auction process, which had been paused since 2017 but fully stopped as of June 2020. With the new process, Spain switched to a contract for difference (CfD) auction model, which is thought to deliver lower prices for renewables as it minimises financing costs. The recent oversubscribed 1 GW auction held in early 2021 – the first one under the new scheme – confirmed that prediction as it achieved the lowest price ever awarded for onshore wind energy of €20/MWh.

Judicial reviews and permit challenges in France, Germany and Spain

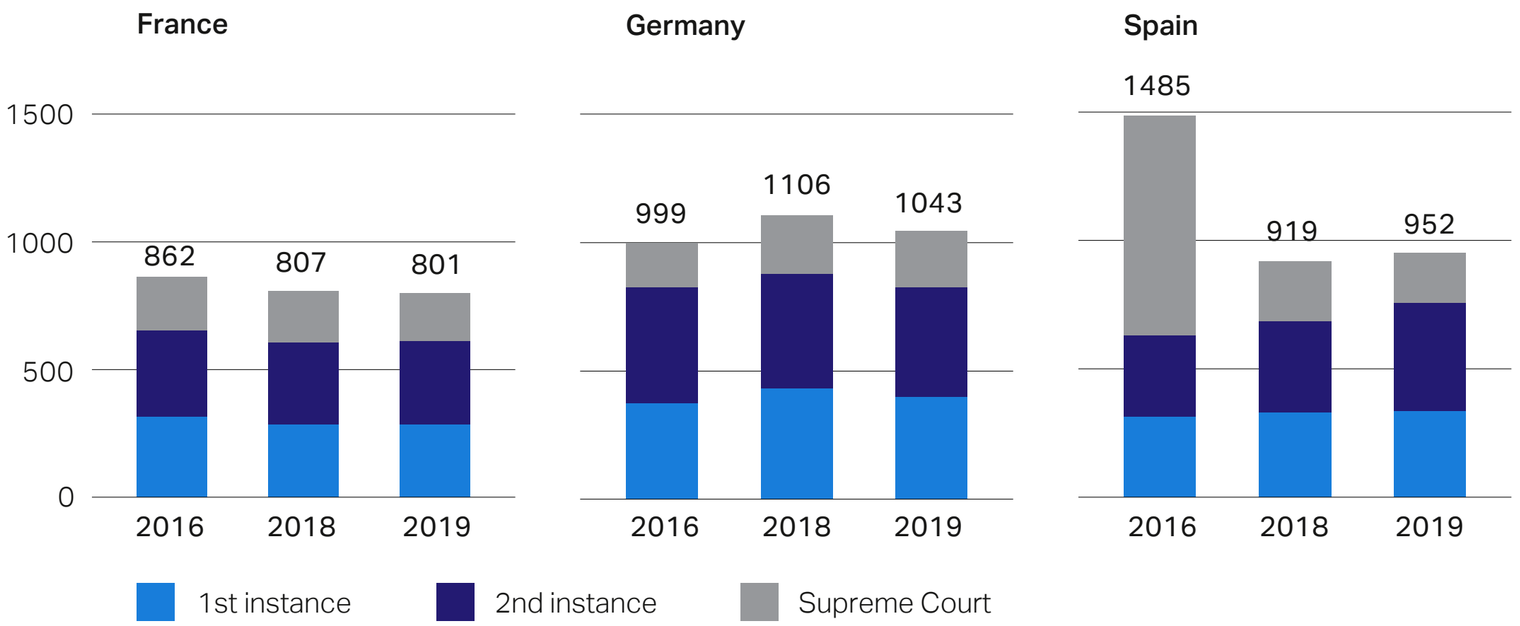
The complex and bureaucratic permitting process is just one of the reasons why the development of wind farms in countries like France, Germany and Spain takes an excessively long time. While people mostly support the growing share of renewable energy, including wind energy, the number of court cases in which people complain about the impact of turbines on wildlife, natural scenery and their immediate neighbourhood in the form of noise emissions or flicker, and appeal against permits, has risen steadily and further contributes to the protracted development of wind farms.

If one were to assume that a judicial review or challenge against a permit were to be followed though all instances in France, Germany or Spain, a case could take on average roughly three years until all legal remedies are exhausted. Against this backdrop France has taken measures and decided that a suit filed against a wind farm authorisation will pass the administrative tribunal in the first instance and go straight to the administrative appeals court, a legal short-cut that already exists for offshore wind farms and other sectors a such as applications to build retail and shopping centres.

Figure 9: Administrative court cases trigger further delays

Estimated time needed to resolve administrative cases, 2016 – 2019 (in days)

On average it takes close to three years to resolve an administrative case up to the Supreme Court



Sources: European Commission for the Efficiency of Justice (CEPEJ); Faber Consulting

Judicial reviews and permit challenges in France, Germany and Spain

Permit challenges in France

In its 2030 national energy and climate plan that the French government shared with the European Commission in 2020, the country committed itself to 33% of renewable energy in its energy mix by 2030. The plan foresees that onshore wind energy will increase to almost 35 GW by 2028. However, one of the preconditions for the plan is to maintain a stable and simplified legal framework for permitting new and repowered wind farms. Historically it could take more than a decade to get a French wind farm project up and running, according to renewable energy lobby SER.

In 2018, the French government installed a working group to speed-up the legal approval process for wind farms, as it found that almost 70% of all wind farm authorisations are appealed. Later that year, the French government ruled that going forward cases filed against a permit have to go straight to the administrative appeal court as the exclusive jurisdiction of first and last instance. Furthermore, applicants must submit arguments more swiftly, reducing the possibility for cases to be dragged out.[1]

In France, most appeals are filed by associations fighting against the development of wind energy at local level. It is very common for a few private persons, particularly residents, to join the appeal. Analysis of the jurisprudence of the Conseil d'Etat shows that the substantive issues mainly involved in contentious objections to planned wind farms concern the impairment of landscapes or protected species and the disruption of surveillance radar or air navigation systems.[2]

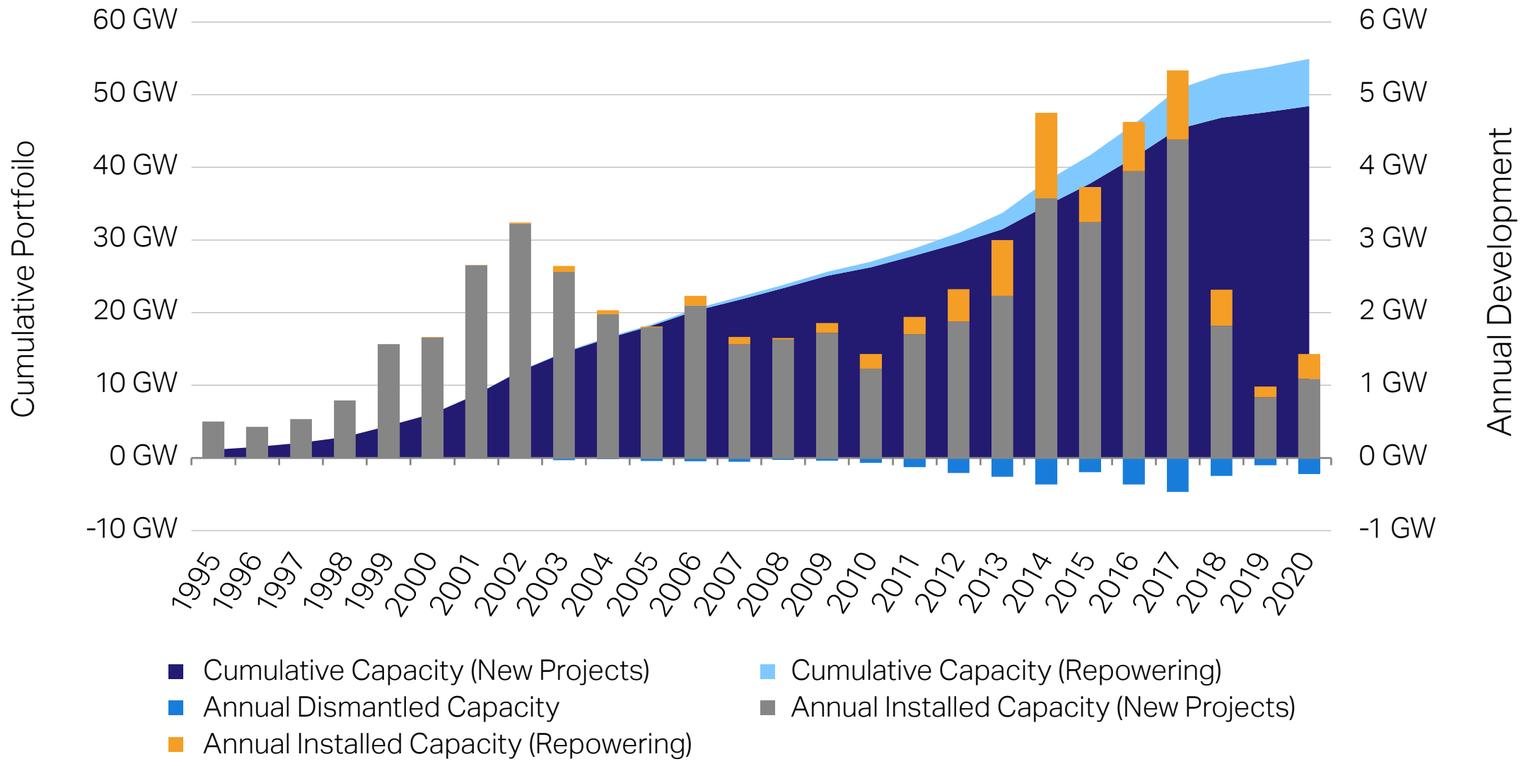
1 Dodd, Jan. Windpower monthly. 13 December 2018.
2 Boussageon, Josépha. OFATE. 2020.

Judicial reviews and permit challenges in France, Germany and Spain

Permit challenges in Germany

Opposition is most fierce in Germany. Currently the country has about 30,000 turbines installed with an average hub height of over 130 meters and a capacity of more than 3 MW. If the country is to achieve its goal of reducing its carbon emissions to 55% by 2030 (compared to 1990 levels) it will have to install approximately another 1,000 turbines annually. However, the combination of the slow permitting process and the high number of lawsuits filed against wind farm permits is perceived to have contributed to the decline in new wind energy installations since 2017. In addition, the uncertainty caused by these factors is also seen as a key reason for the subdued appetite and high degree of undersubscription of Germany's wind energy auctions in recent years.

Figure 10: Development of Germany's onshore wind power capacity



Source: Deutsche Windguard

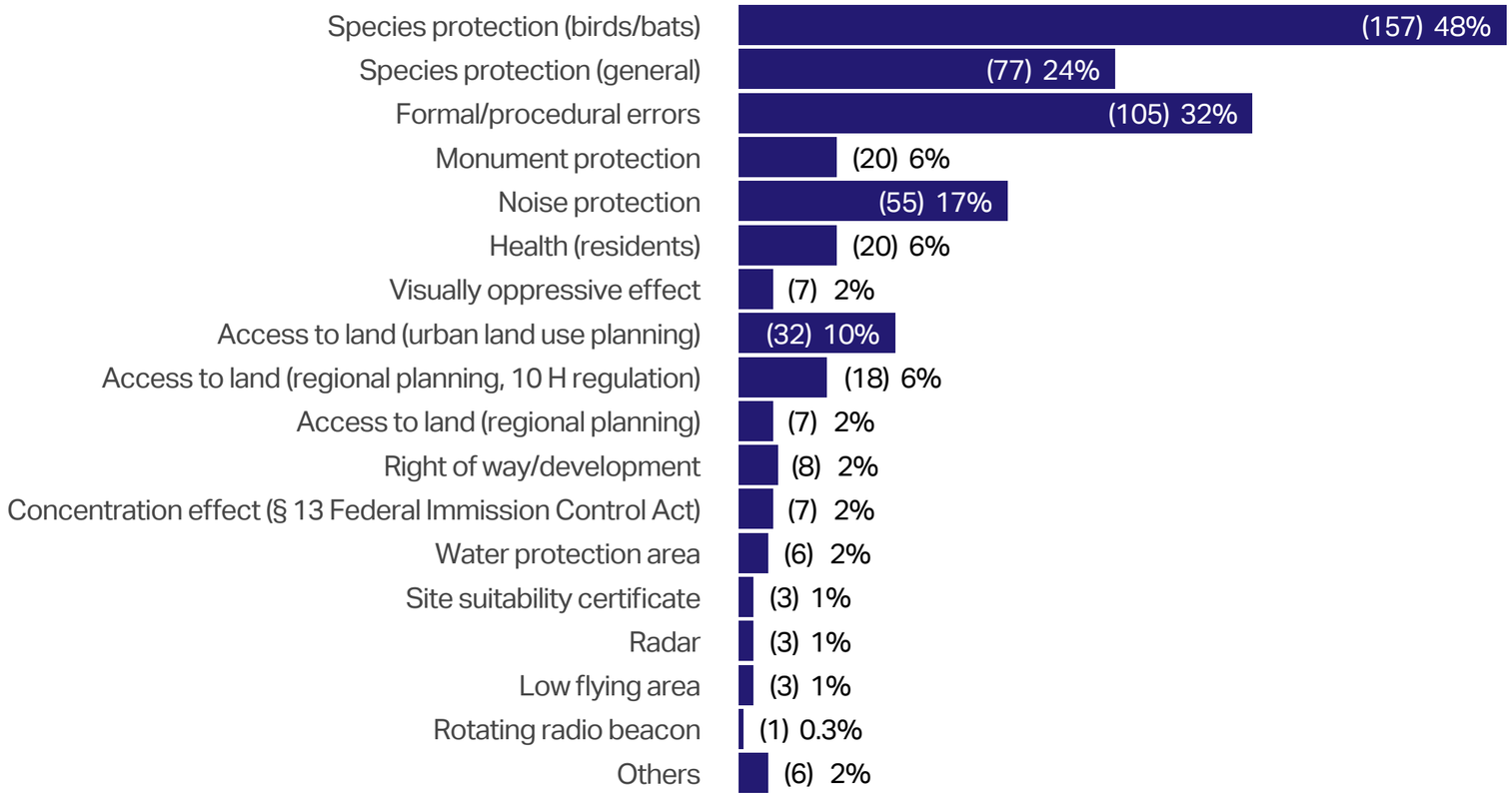
Judicial reviews and permit challenges in France, Germany and Spain

According to a survey by the 'Fachagentur Windenergie an Land' from June 2019 among German wind energy developers in charge of approximately 30% of the country's upcoming installations, up to 40% of all wind farms are faced with permit challenges. According to a different pole, 660 citizens' initiatives were active in appealing against wind farms. As a result, the German Wind Energy Association said growing resistance against new projects had become a key barrier for keeping wind energy expansion in line with emission reduction goals. New capacity additions halved in 2018 and 2019 as projects that had won renewable auctions in 2017 were not realised because they lacked the necessary permits or their permits were challenged in court.[3]

The same survey found that about half of the claims filed concerned wind farms that were feared to endanger protected species. A quarter of all claims concerned the general protection of species, followed by about one third of claims filed due to assumed formal or procedural errors in the permit filing. Another 20% of lawsuits were filed because of the noise emission of turbines. The study also found that about 60% of all suits were filed by environmental and ecological pressure groups while another third was launched by individuals.[4]

Figure 11: Main reasons for claims against wind farms [5] (numbers = affected installations)

Source: Fachagentur Windenergie an Land. 2019



3 Fachagentur Windenergie an Land. 2019.
4 Clean Energy Wire. 27 March 2019.
5 Claims and number of affected wind turbines with multiple responses (n=325 wind turbines); data and graphic FA Wind (as of Q2/2019)

Judicial reviews and permit challenges in France, Germany and Spain

Permit challenges in Spain

With 28.4 GW of wind power capacity and roughly 21,500 turbines, Spain is currently Europe's second largest wind market. By 2030, the country aims to install 50 GW of wind energy. However, last year's newly installed capacity of 1.7 GW (according to Spanish Wind Energy Association AEE) falls short of the 2.2 GW the country was meant to install annually, according to its NECP. The recent auction in January 2021, which tendered 1 GW to the market and a further announcement in September-October 2021 for another tender with 3.3 GW, demonstrate strong demand for wind energy in the market. With its auctions, Spain's government aims to accelerate the transformation of the power sector and counter rising electricity costs as the economy struggles to get back on its feet after the COVID-19 pandemic.[6]

Public opinion in Spain seems more favourable towards increasing domestic wind power capacity, relative to some other European countries. A recent study by AEE stated that nearly 90% of the Spanish citizens are in favour of expanding the use of wind energy and building further wind farms. The main barrier to the installation of wind farms remains the cumbersome administrative process and speculative tendencies concerning grid connections, which the government addressed in its royal decree in March 2020.

6 Mathis, Will. Bloomberg Green. 17 August 2021.

Insuring permit challenges

With the steady increase in the number of wind farms, the number of appeals against permits has multiplied. As a result, the time to the completion of an installation may increase considerably, potentially causing a delay of more than three years until a judicial review has exhausted all legal instances. In the worst case, where a permit is revoked or cancelled and an appeal or regularisation are not possible, the developer cannot complete the project. In addition, almost as a side effect, if a permit is challenged developers will struggle to obtain financing until the judicial review process has concluded putting the feasibility of the project in jeopardy.

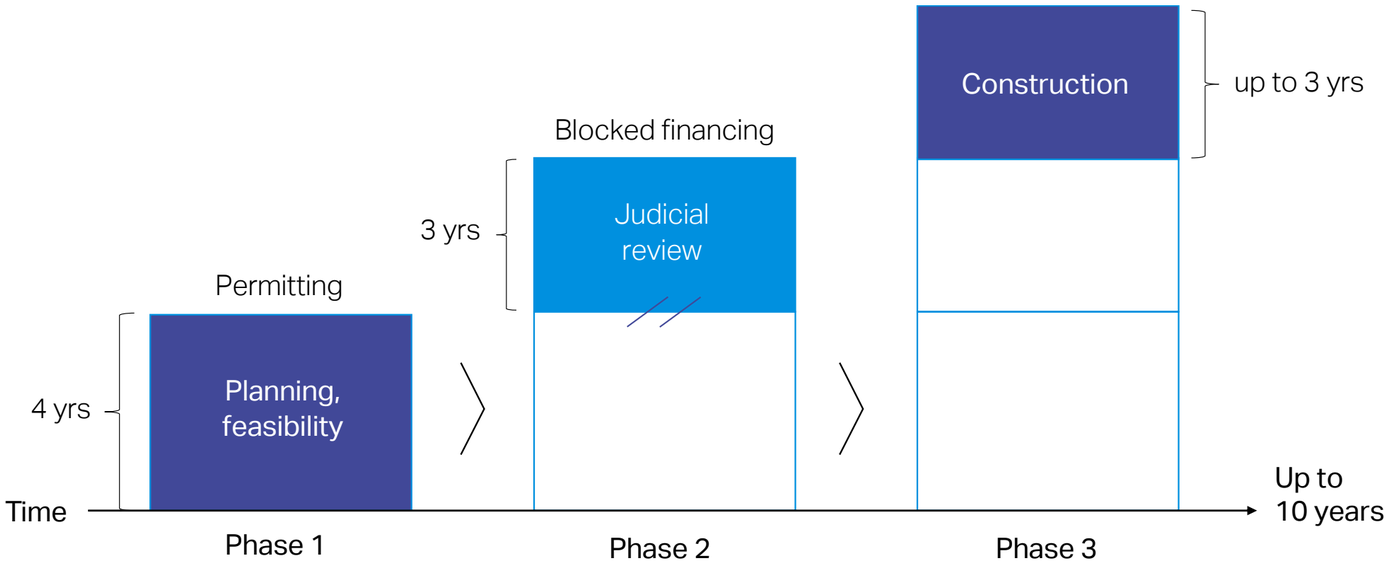
Permit challenge insurance has been developed to address these challenges and transfer the risk from the developer to the insurer. The insurer is more accustomed to dealing with risks in general, but being able to offset these risks against a multitude of other, uncorrelated risks, often with a larger capital base, lowers the cost of carrying such liabilities.

Once a permit has been granted developers need to raise and commit considerable financial resources to launch the construction. However, a pending or looming permit challenge causes considerable financial and legal uncertainty. Manufacturers of turbines and, more importantly, investors and funders may be unwilling to commit capital or funding. Lending will be held up until a permit challenge has been cleared. Likewise, land proposers who take care of the planning phase of a wind farm will find it difficult to attract finance or a buyer for as long as the legal challenge is unresolved. In the event of an interruption to the project while the legal process continues, for example, due to suspension, or non-definitive cancellation, of the permit by an administrative court, the significant delays caused can impact the viability of a project as it might be unable to meet its deadlines or debt service commitments.

Permit challenge insurance is a financial tool to protect and unlock financing or funding, and is particularly relevant in renewable energy projects and transactions. First, the cover provides assurance that developers can meet their financial obligations towards their investors and lenders, including the timely repayment of their loans. Equally important, the insurance cover improves the bankability of the project, enabling debt to be secured to allow construction to proceed while the judicial review is ongoing. This means developers can draw down funds sooner to order turbines and commence construction in anticipation of a favourable outcome of the permit challenge process. Further, permit challenge insurance improves a project's valuation by removing the contingent risk from the investment. It thereby helps to unlock financing as it allows lenders and investors to commit funding while complying with their own risk tolerance.

Insuring permit challenges

Figure 12: Without insurance a 3-year wait puts the viability of the scheme at risk

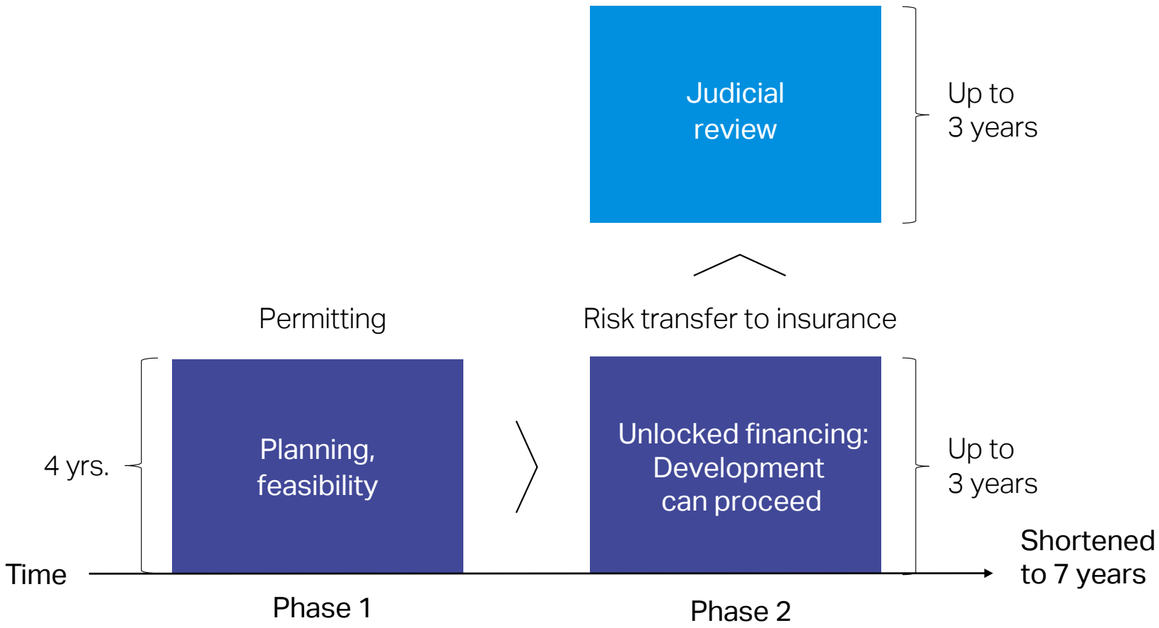


Source: Faber Consulting

Unless a project is equity financed and does not rely on third party funding, a judicial review will often deter debt finance and delay continuation of the project by the length of the review, in the worst case until all legal options are exhausted – which in countries like Germany or Spain can take more than three years. Frequently, construction is only continued once the legal threat is resolved.

Insuring permit challenges

Figure 13: Resolving the barrier with insurance



Source: Faber Consulting

Given these factors, whenever debt financing is needed, permit challenge insurance has become a requirement. Also, demand for insurance cover is on the rise in line with the increasing prevalence of appeals against permits. In some regions of France and Germany, it has become a certainty that each project will be challenged regardless of its quality.

Permit challenge insurance remains a complex and sophisticated insurance product. It involves an insurer, a sponsor and a beneficiary, collaborating to understand the shared risk and assume or transfer elements of that risk between them. The beneficiary, i.e. the investor or funder, who provides financing to the developer ultimately benefits from the insurance cover through enhanced security with regard to his invested assets. And finally, in case of claims the insurer will indemnify the investor for the financial loss incurred.

Insuring permit challenges

While commonly permit challenge insurance is used to address a judicial review challenge that has been issued in the Administrative Courts, with the increasing maturity of the product, there is an emerging trend among policyholders to approach the insurance market sooner to underwrite the risk on a pre-emptive basis, since insurers and developers have come to the understanding that almost all projects will eventually be challenged and the bases for challenge have a common theme. Consequently, insurance has quickly become a necessity and part of the cost of doing business.

As part of the underwriting process, the insurer and developer will first have to develop a common understanding about the risk. This requires a detailed review and evaluation of the data, defining scenarios of what can go wrong, what the implications and cost are and develop a joint timeline that defines deliverables, triggers and the indemnity. As a result of the detailed underwriting process developers' risk management strategy will have been scrutinised with the objective of achieving the best outcome for the project and a cost-effective transfer of risk. Indeed, the permit challenge insurance process jointly seeks ways to reduce the risk of escalation and develop measures to address the various potential scenarios flowing form the legal threat and resolve it as smoothly as possible.

The legal landscape

Provided by Fieldfisher

The legal landscape

Legal challenges frequently encountered by funders and investors, developers and manufactures when developing onshore wind energy projects in Europe are a major source of risk affecting renewable energy penetration in the EU.

Below, we summarise the legal context for each of the jurisdictions under consideration in this report – France, Germany and Spain – regarding challenges to permitting wind farms that can block or revoke their execution. We also briefly address legal measures available to mitigate or overcome the impact of such challenges and outline procedural aspects and timelines. For each jurisdiction, we consider:

- The legal framework for challenging wind farm permits;
- The types of claimants that typically mount legal challenges;
- The types of pleas submitted;
- The legal provisions to reduce effects of permit challenge; and
- How permit challenges work in practice.
- This document is intended as a general guide to this topic and is not intended to provide legal advice.

France

i. Introduction

The EU has set a target to reach 40% renewable energy in its gross final consumption by 2030, requiring a significant expansion of wind, solar and other renewable power generation capacity

Recourses against administrative permits and their consequences constitute an obstacle to the development of renewable energy projects in France, in particular wind farm projects.

Permits issued for the development of wind farm projects in France are very often challenged by third parties, and the absence of recourse against these permits is usually a condition precedent for financing of wind farm projects.

In France, several measures have been enacted to simplify judicial proceedings against permits issued for the development of wind farm projects and reduce the effects of such recourses on their development.

Therefore, obstacles to the financing of wind farm projects are less important today than in the past.

ii. Legal framework regarding wind farm permit challenges in France

1 Different kinds of recourses

In France, permits required to develop a wind farm project may be challenged by third parties through administrative or judicial recourse.

a) **Administrative recourse**

The administrative recourse is filed before the administrative authority that has issued the permit, or before the minister in charge of classified facilities for protection of the environment. This authority may reject the recourse, withdraw the permit if it is illegal or amend the permit with new prescriptions.

The time period to file this recourse is two months from completion of the publication of the challenged permit.

b) **Judicial recourse**

The judicial recourse is filed before the territorial competent administrative court of appeal, which has jurisdiction in first and last resort.

The administrative court of appeal may reject the application, annul (totally or partially) the challenged permit or amend it. The court may also stay the proceedings and invite the parties to take the necessary steps to regularise the flaws vitiating the challenged permit.

As the recourse against an administrative permit does not suspend its effects, the project may be implemented notwithstanding the existence of an administrative or judicial recourse.

Nevertheless, the claimant can also file an application for suspension of the effects of the permit, which is granted if the suspension is justified by an emergency and an obvious illegality of the permit.

Claimants must file their judicial recourse within four-months of the publication of the permit.

In the event that an administrative recourse has been filed, this time period is extended for two months. Therefore, the claimant who has filed an administrative recourse has a six-month period from the publication of the permit to file a judicial recourse.

France

2 Simplification of judicial proceedings

Several measures have been recently enacted in France to simplify and speed up judicial proceedings regarding wind farm projects.

(i) Jurisdiction of administrative courts of appeal

Since the entry into force of the decree no. 2018-1054 dated 29 November 2018, administrative courts of appeal have jurisdiction in first and last resort to rule on appeals against environmental permits required to develop a wind farm project.

Consequently, judicial recourses are directly filed before administrative courts of appeal. The suppression of the first level of jurisdiction (administrative courts) leads to an acceleration of the proceedings.

Prior to this reform, decisions of administrative courts were almost systematically challenged before administrative courts of appeal.

(ii) Automatic crystallisation of pleas

Pursuant to decree no. 2018-1054, parties are unable to raise new pleas after two months from the date of the first statement in defence, following the filing of the application.

This measure, which is denominated “cristallisation automatique des moyens” (automatic crystallisation of pleas), also aims to expedite proceedings by preventing new pleas being raised at a late stage.

The same kind of measures have been enacted as regards offshore wind farm projects in France.

3 Legal provisions to reduce effects of permit challenge

By the ordinance n° 2017-80 dated 26 January 2017, the French regulator has enacted various measures to reduce the consequences of judicial permit challenges.

a) A single permit

Prior to the entry into force of ordinance n° 2017-80, the development of wind farm projects in France was subject to many administrative permits, including: a building permit; a permit to operate a classified facility for the protection of environment (ICPE); and several other permits related to the impact of the project on its environment (in particular the protected species derogation).

Pursuant to the provisions of this ordinance, the development of a wind farm project is now subject to a single permit, the “environmental authorisation”, which brings together the permit to build the wind farm and all the permits formerly required to operate the project.

This has led to a significant reduction in wind farm permit litigation.

b) Regularisation process inside the proceedings

The administrative judge may stay the proceedings to enable the regularisation of the challenged permit within a timeline provided by the judge.

In this event, the judge: (i) issues a preliminary decision specifying that the flaw affecting the legality of the challenged permit may be corrected and explaining how to regularise this flaw; and (ii) rules on the case only after notification of the amended permit correcting the identified flaw (article L.181-18-I-2° of the Environmental Code).

The judge may decide to suspend the effects of the challenged permit pending the completion of the regularisation process, but is not obliged to do so.

c) Partial annulment (part of the authorisation)

The judge may also partially annul the challenged permit if only a part of the permit is vitiated.

A partial annulment avoids the need to restart the entire permit procedure and allows the competent administrative authority to resume the investigation on the basis of the elements that are not vitiated and to issue an amended permit regularising the vitiated part of the initial permit (article L.181-18-I-1° of the Environmental Code).

The judge may decide to suspend the effects of the non-vitiated parts of the challenged permit pending the issuance of the amended permit, but is not obliged to do so.

The judge may also decide, as can the administration, to temporarily authorise the continuation of the project pending the issuance of the amended permit.

d) Partial annulment (phase of the procedure)

If the judge rules that the flaw identified only affects one of the three phases (application review, public enquiry and decision) of the procedure followed to issue the challenged permit, the judge may cancel this vitiated phase only, and invite the administration to resume this phase (article L.181-18-I-1° of the Environmental Code).

Therefore, ordinance n° 2017-80 dated 26 January 2017 enables the judge to ask the administration and the developer to regularise the identified flaws of an environmental permit prior to its decision, or to annul the vitiated part (or phase of the procedure) of the environmental permit only, rather than totally annulling it.

These measures apply to permits issued for onshore and offshore wind farm projects in France.

iii. Wind farm permit challenges in practice

1 Claimants

The most common types of claimants in wind farm permit challenges in France are as follows:

(a) Associations for the protection of nature, landscapes and architectural heritage

(b) Associations of opponents to wind farms

(c) Neighbours affected by wind farms

2 Pleas submitted in support of claims

The pleas most commonly submitted in support of challenges against wind farm permits in France include:

a) Procedural flaws

(i) Insufficiency of the environmental impact assessment (EIA)

Claimants frequently allege the EIA is not sufficient in view of the nature of the works and their likely consequences on the environment.

However, according to the case law of the Conseil d'Etat (the administrative supreme court in France), such a defect can only vitiate the procedure (and thus lead to the illegality of the permit issued on the basis of the EIA) if it had the effect of hindering information available to the public, or if it was of such a nature as to influence the administrative authority that issued the permit.

(ii) Irregularity of the public enquiry

Claimants also frequently allege the public enquiry carried out for the purposes of the permit does not comply with the provisions of the Environmental Code.

However, as for the EIA, the Conseil d'Etat considers that non-compliance with these provisions can only vitiate the procedure and lead to the illegality of the permit if it had the effect of hindering information relevant to persons interested in the project, or if it was of such a nature as to influence the results of the enquiry and, consequently, the administrative authority that issued the permit.

(iii) Absence of autonomy of the environmental authority ("duality" issue)

According to a case law of the Conseil d'Etat initiated in 2017, which is based on the "Projects" European Directive of 13 December 2011, an administrative authority cannot issue an opinion, as an environmental authority, on a project for which the same authority is also competent to deliver a permit.

Although the Conseil d'Etat has since provided guidance on how such a defect can be regularised under Article L. 181-18 of the Environmental Code (see above), this ground continues to be invoked by claimants and to jeopardise many wind farm projects.

b) Substantial flaws

(i) Damage to landscapes and/or biodiversity

Claimants frequently allege the project does not comply with the interests protected by Article L. 511-1 of the Environmental Code, such as the protection of natural landscapes or biodiversity.

Claimants may also argue that the permit prescriptions to avoid, mitigate or compensate for the damage caused by the project on the environment are not sufficient in view of these interests.

(ii) Insufficiency of the developer's technical and financial capacities

Claimants often argue that the developer fails to establish that it has the technical and financial capacities to implement and decommission the project, as provided for by article L. 512-1 of the Environmental Code.

According to the case law of the Conseil d'Etat, administrative courts must therefore assess the relevance of the elements provided by the developer in this respect in the application file and, if they rule after the commissioning of the wind farm, the reality and sufficiency of these capacities.

(iii) Non-compliance with the Natura 2000 legal framework

Where a project is located inside (or in the vicinity of) a Natura 2000 site, claimants may submit that scientific doubt remains as to the absence of adverse effects of this project on the integrity of the site, either alone or in combination with other projects. Therefore, they may allege that the competent authority should not have allowed the project and delivered the permit.

(iv) Absence of a derogation for protected species or non-compliance with conditions to obtain such a derogation

Claimants frequently argue that since a project may cause the destruction of protected species, the developer should have filed an application in order to obtain a derogation under articles L. 411-1 and L. 411-2 of the Environmental Code.

They may also submit that the conditions provided in the Environmental Code for obtaining such a derogation are not met (in particular as to whether the project is justified by imperative reasons of overriding public interest).

3 Length of proceedings

Prior to Decree No. 2018-1054 of 29 November 2018, which provided administrative courts of appeal jurisdiction to rule on appeals against permits relating to wind farm projects (see above), judicial proceedings from administrative courts to the Conseil d'Etat could last from four to six years.

While it is too soon to evaluate the effects of Decree No. 2018-1054 in this respect, it is possible to consider that the length of proceedings may be reduced by two to three years.

iv. Conclusion: Legally challenging wind farm permits in France

The legal provisions mentioned above, which suppressed the first level of jurisdiction and provided administrative courts with new powers to rule on cases relating to environmental permits, have reduced some of the negative effects of permit challenges in France.

This is particularly true with regard to the regularisation powers granted to courts, which are now almost systemically used to avoid the cancellation/suspension of permits on the grounds of flaws that can be rectified by the administrative authority.

Courts rarely suspend the effects of the challenged permit pending completion of the regularisation process.

However, the implementation of the regularisation process raises new practical and legal difficulties, which the case law of administrative courts of appeal and the Conseil d'Etat will have to remedy to provide a more secure framework for developers.

Germany

i. Introduction

Despite public understanding of and support for renewable energy and the underlying concern to preserve the environment, there are some significant obstacles to the realisation of renewable energy projects in Germany, especially wind projects.

“Not in my backyard” attitudes and the activities of environmental associations whose purpose is to protect nature and species are two of the most common sources of challenges to planned wind projects in the permitting procedure.

Generally, there is support from the legislator in Germany for renewable energy projects and carbon emission reduction targets, as well as political support in line with the EU’s target to reach 32% of renewable energy in its gross final consumption by 2030.

Barriers therefore mostly tend to arise from the specific interests of local residents affected by individual wind projects.

ii. Legal framework regarding wind farm permit challenges in Germany

1 Different types of recourses

Third parties, as private individuals or environmental organisations may, under certain conditions, challenge the issued permit according to the applicable German Federal Immission Control Act (permit) in an administrative recourse proceeding before the competent authority and/or in a (subsequent) court procedure before the territorial competent administrative court.

a) Administrative recourse

The administrative recourse is normally filed before the administrative authority that issued the permit. This authority may reject the recourse, withdraw the permit if it is illegal or amend the permit with new ancillary provisions.

The time period to file the administrative recourse (if applicable in the federal state) is four weeks from notification of the permit to third parties as neighbours possibly affected by it.

In case of failure to properly notify the third party, the time for the administrative recourse may run for one year from the date of possible knowledge (which is in most cases is the start of construction) about the wind project by the respective appellant.

In practice, public consultation in the permitting process is initiated by public announcement of the wind project and the granting of the permit. Thus, the start of the period for the administrative recourse is normally the public announcement of the permit.

b) Judicial recourse

If the administrative recourse is unsuccessful, the appellant may file an action with the locally competent administrative court within one month of being issued with the notice of appeal.

If the appellant does not do so, the decision of the administrative authority becomes binding and incontestable.

If the claimant files an action, the first instance will be decided by the locally competent administrative court or, in exceptional cases, by the Higher Administrative Court.

The court may (totally or partially) revoke the disputed permit by way of a judgment or issue a so-called obligation judgment, according to which the approving authority must issue the desired permit or parts of it as further ancillary provisions to the permit.

c) Interim relief

The approving authority generally declares the permit immediately enforceable, which means the permit holder can start construction and put the wind turbines into operation immediately, even if a third party raises administrative recourse.

Parallel to an administrative or legal recourse, interim relief is available against the immediate enforceability of the permit. In this case, an application is made for suspension of immediate enforcement.

This is successful if, after a summary examination, the permit infringes rights of the appellant and, after weighing the interests of the permit holder and the interests of the appellant, the appellant's interest in the cancellation of the permit prevails.

In most cases, if the application is rejected by the Administrative Court, the applicant will appeal against this decision to the Higher Administrative Court in interim relief proceedings.

In many cases, the decision of the Higher Administrative Court has considerable influence on the decision of the Administrative Court in the main proceedings (in the action proceedings), because the Higher Administrative Court is the next highest instance in both interim relief proceedings and the main action proceedings.

d) Procedural consequences of a permit challenge

Regardless of whether the applicant has filed an administrative objection or a lawsuit against the permit, the permit remains immediately enforceable unless the applicant successfully applies for a suspension of the immediate enforceability of the permit.

This means the permit holder can start or proceed with the construction and operation of the wind farm.

At the end of the judicial recourse, the permit holder may be threatened with the revocation of the permit or the imposition of other conditions that may restrict operations. For example, stricter conditions may be imposed to reduce sound emissions, which may affect energy yields.

2 Simplification of the judicial proceedings

(i) Administrative recourse

Germany allows federal states to decide by law whether an administrative appeal procedure should take place before a lawsuit is filed.

In the windy federal states in the north of Germany, an appeal procedure is carried out and is intended to simplify court proceedings.

This means not all requests relating to the permit, both by the permit holder and any third parties, have to be litigated all the way to the courts. Instead, they can be resolved in advance in the administrative appeal procedure.

However, because the various views have already been explained and justified in the administrative appeal proceedings, this can be advantageous for subsequent legal action on the disputed issues.

3 Legal provisions to reduce effects of permit challenge

Administrative procedural law, which is also applicable in the approval procedure for wind installations, provides for simplifications and measures that bundle competences.

This does not necessarily lead to a reduction of the effects of permit challenges.

a) Simplified permitting procedure without public participation

The Federal Immission Control Act applicable to the approval of wind projects provides for a simplified approval procedure for certain types of installations for which a formal procedure would be too burdensome.

This is intended to simplify the permitting process and avoid unnecessary administrative burdens through public participation.

If a simplified procedure is unlawfully carried out instead of a formal procedure, third parties, such as environmental protection associations, can demand the cancellation of the permit under the new regulation of the Umweltrechtsbehelfsgesetz (UmwRG) in 2017, if the EIA was not carried out at all and it is no longer reasonably possible to make up for it.

b) Bundling competences in a single permit/reformatio in peius

Permits for wind projects in Germany bundle a number of permits.

A permit covers approval under building law, nature conservation law, species protection law, emission control law, monument law and, where necessary, air traffic law.

Consequently, one authority is solely competent for granting the permit and asks other authorities for their respective assessments.

This approach simplifies both the permit granting process and the administrative appeal procedure before the same authority.

Often, the permit holder uses the bundled approach as an opportunity to challenge certain burdensome conditions set by the permit.

However, in German administrative law, the so-called reformatio in peius principle applies, which means the entire permit is or can be subjected to a comprehensive re-examination by the authority. This re-examination goes beyond the points of attack of the appellant.

It also allows the permitting authority to revoke the permit, impose conditions on it or tighten existing conditions.

Since, in most German federal states, an administrative appeal procedure must be carried out before an administrative lawsuit is filed, this intensification through bundling the effects of a challenge has an intermediate effect on the lawsuit.

Therefore, the permit holder must carefully consider whether it wishes to challenge parts of the permit.

c) Right to appeal – infringement of own rights

To limit the possible group of plaintiffs and potential legal proceedings against public law approvals, under German law, objectors or plaintiffs can only be third parties that can claim to have had their own subjective rights violated.

Both administrative and legal recourses raised by a third party are only successful for the appellant as a third party if the granting of the permit and the permitted erection and operation of wind turbines violates regulations meant to protect that third party's interests.

Third parties cannot sue for compliance with objective law (for example, regarding legal provisions on regional planning, nature conservation, species protection, landscape or monument protection, railways, development of building land or the defacement of the landscape); it can only argue against the approval on the grounds that its own rights have been infringed.

Whether and to what extent a regulation conveys third-party protection is to be determined by legal interpretation.

As part of the process of issuing a permit, provisions of federal immission control law, building law, nature conservation law and species protection law are examined.

Only some provisions of these laws are meant to also directly protect third party interests. Their protective effect is further limited to the group of persons living in the area of influence of the wind energy installation.

Regarding environmental laws, environmental organisations have the right to challenge permits, which they regularly also make use of.

iii. Wind farm permit challenges in practice

1 Claimants

The most common types of claimants in wind farm permit challenges in Germany are:

(a) Neighbours as private individuals affected by wind farms;

(b) Associations for the protection of nature and landscape: A recognised nature conservation association may appeal a permit if (i) it claims the decision violates regulations on nature conservation and landscape protection, (ii) if it is affected in its statutory area of responsibility and (iii) if it was entitled to participate in the approval and has expressed its opinion on the matter or has not been given the opportunity to express its opinion; and

(c) Municipalities in the event that the planning sovereignty of the municipality has been violated.

2 Pleas submitted in support of claims

a) Procedural errors

(i) Absolute procedural errors

The first step in a permit challenge is always arguments why the procedure for granting the permit includes mistakes.

These are so-called absolute procedural errors, especially when public participation under the German Federal Immission Control Act has been completely omitted.

Pursuant to s.4 para 1 UmwRG, absolute procedural errors generally lead to the revocation of the permit, irrespective of whether the error had an effect on the content of the permit and whether the infringed provisions serve to guarantee an own right, except for equivalent errors which require a violation of a legal position which grants a right to the respective claimant.

The administrative court can order that legal proceedings are suspended until the absolute procedural error has been remedied.

The permit would be declared unlawful and unenforceable until remedied, so the permit holder could not start or continue with the construction or operation of the wind project until the EIA procedure had been carried out.

Other procedural orders, which are not absolute procedural orders, will be reviewed in the legal proceeding but generally do not result in the revocation of the permit but may be remedied.

(ii) Claiming procedural errors by third parties through legal proceedings

For the assertion of procedural errors in the context of legal actions, s.4 para 1 UmwRG only concerns the merits of the action.

With regard to the question of whether a plaintiff may bring an action at all, s.42 para 2 German Administrative Court Law (VwGO) is regarded as a permissible restriction by national procedural law, according to which the plaintiff must argue a violation of their own rights in addition to procedural errors.

Procedural rules can also serve to protect certain persons; in particular, rules on public participation can protect third parties.

b) Substantive errors

Permits may be challenged based on alleged violation of substantive law. Third parties can only claim substantive errors and infringements of rights if the approval procedure of a wind project provides them with rights of their own.

Harmful environmental impacts that can emanate from onshore wind farms and have a third party protective character include noise emission, shadow casting, optical harassment and infrasound.

The interests of competitors arising from a loss of wind yields are not protected.

c) Optical harassment from wind turbines

Wind turbines can constitute a violation of the building law principle of mutual consideration stipulated in s.35 para 3 s. 1 German Building Law (BauGB).

Oppressive effects of wind installations can result from the height and location of the wind turbine, the dimensions of the rotor blade diameter and the location of the neighbour's dwelling in relation to the wind installation and must always be proven in a case-by-case examination.

d) Noise emissions

(i) Compliance with TA-Lärm

The permit of an onshore wind farm will be lawful and thus lead to the failure of a lawsuit by a neighbour if the regulations and limit values for noise emission of the German technical guidance for noise regulation (TA-Lärm), which is a binding regulation in Germany, are complied with during the construction and operation of the wind turbines.

(ii) Subsequent noise reduction

If the wind turbines are louder than permitted by TA-Lärm and the permit, the authority must order noise-reduced operation.

The reduced operation is taken into account for the assessment of whether a permissible noise emission exists.

(iii) Prior exposure from other wind turbines

It may be disputed how the operation of additional wind turbines affects existing emissions in the area, including other wind installations, or what is considered as existing emission and what technical software should be used to calculate it.

Provided all existing impacts to be considered do not lead to an exceedance of the permissible emission of TA-Lärm, the permit cannot be challenged on the basis of noise.

(iv) Scope of TA-Lärm

A neighbour that wishes to a invoke a noise emission challenge under TA-Lärm must live in the vicinity or in the area of influence of the wind turbine, which defines the area of impact as an area with a noise level higher than 10 dB(A) or more above the value permissible for the place of emission.

Guideline values for residential areas are more sensitive than those in outdoor areas or industrial estates.

(v) Infrasound

Infrasound is airborne sound below the frequency of 20 Hz – i.e. low-frequency sound barely audible to humans.

According to the latest scientific knowledge, infrasound from wind turbines does not generally cause health dangers, which is also the assumption of the higher administrative courts of Germany's federal states.

By adhering to the distances required between the wind turbine and adjacent residential buildings as stipulated by German building law, it can be assumed that a relevant health risk to neighbours is excluded.

(vi) Nature and species conservation

The protection of nature and species does not provide protection for private third parties.

However, environmental organisations have the right to raise legal action if they allege breaches of environmental standards based on EU law.

When approving wind energy installations, effective bird protection must be taken into account. According the Federal Nature Conservation Act (BNatSchG).

Projects that (solely or in combination with other projects) are likely to have a significant impact on a Natura 2000 site must be examined for compatibility with conservation objectives before they are permitted.

The prohibition of disturbance and killing of animals must be complied with. The latter is violated if the killing risk for a local population would be significantly increased by the wind project. The results of the nature conservation survey relating to the site must be taken into account.

The inadmissibility of the wind energy installation can also result from a violation of building law, irrespective of whether protected species are affected.

e) Remediation of material and non-absolute procedural errors

Since the amendment of the UmwRG in 2017 (pursuant to s.7 para. 5), errors that are not absolute procedural errors, do not lead to the cancellation of the permit if they can be remedied or cured by an amendment to the permit or by a supplementary procedure.

With regard to substantive provisions, this means the subsequent ordering of ancillary provisions – for example, for noise reduction – renders the permit lawful and in this respect cures the substantive errors.

Any non-absolute procedural errors in the formal authorisation procedure and any procedural errors in the simplified authorisation procedure will only lead to a finding of illegality and unenforceability of the permit if it cannot be remedied.

If it is possible to remedy an error, the approval procedure is not repeated in its entirety, but the competent authority resumes the approval procedure and carries it out again in a supplementary proceeding to the extent that it is defective.

A supplementary procedure may not result in an amendment or adjustment of the permit, but may involve ancillary provisions or conditions.

In accordance with s.4 para 1b p.2 no. 1 UmwRG, s.45 para 2 of the German Administrative Procedural Law (VwVfG), it is possible to remedy errors in the approval procedure during court proceedings until the end of the last instance of facts.

The permit cannot be revoked if a (non-absolute) procedural or substantive error can be remedied in a supplementary procedure.

It is not possible to resolve a deficiency in the supplementary procedure if it is clear at the time of the court decision that the deficiency relates to a “central point” that cannot be resolved (in the foreseeable future) without conducting a completely new approval procedure, or because the purpose of the procedural act that was not complied with can no longer be achieved because it had to be carried out before the permit was granted.

iv. Timeline to obtaining certainty about the legal validity of a permit

The time period for submitting an objection against a permit is four weeks from the date of notification to the permit.

If the notice was wrongly not issued or also in cases of a simplified procedure which can be chosen by developers for certain projects, the period of forfeiture of a complaint is exceptionally one year from the time when any third party can learn about the wind project, i.e., the start of construction.

In the appeal proceedings preceding an administrative court action, the permitting authority will comment on the appeal and give the permit holder the opportunity to respond.

An objection is often issued within three-to-six months. The opponent that has received a negative decision then has four weeks to file a lawsuit, which it must substantiate within a further four weeks.

A lawsuit in the first instance before the administrative court takes about 18 months. If the plaintiff proceeds to the second instance before the Higher Administrative Court, it takes another two years to reach a decision.

If the case is then appealed to the highest administrative court, the Federal Administrative Court, a further two years are to be expected before a binding judgment is delivered.

v. Conclusion: Legally challenging wind farm permits in Germany

The procedure for granting a permit under the Federal Immission Control Act (BImSchG) for onshore wind farms is very formalised in Germany.

There are numerous environmental protection standards in both EU and German law that must be taken into account in the approval process. Although many permits are subject to legal proceedings, such proceedings can be evaluated and the related risks can be controlled.

The substantive provisions of German building law and TA-Lärm, which are the central regulations designed to prevent harmful impacts on humans under the BImSchG, set a clear framework for potential complaints against wind project permits and for the necessary evaluation of each project.

Challenges to permits are frequent and can lead to further restrictive provisions in the permit but less often to the revocation of the permit and complete cancellation of the wind project. Immediate enforceability of permits is normally allowed and not revoked in a challenge, which allows the wind project to continue to be built.

Spain

i. Introduction

The Spanish Government approved the Climate and Energy National Plan (PNIEC) on 16 March 2021, setting a target for 42% of power generation in Spain to come from renewable sources by 2030.

This provision is also included Spain's Climate Change Act 7/2021, which came into force on 22 May 2021, and aligns with the European Commission's target to achieve 55% of power generation from renewable sources in the EU by 2030, before ultimately achieving net zero carbon emissions by 2050.

When renewables required a specific remuneration regime (subsidies), in addition to selling power through the wholesale market, this created conflict over the most appropriate way to implement and subsidise payments to support the competitiveness of renewable power.

However, the maturation of renewable energy technology has been such that the majority of projects can operate profitably without subsidies, substantially reducing this barrier to market penetration.

The processes by which regional governments (or Autonomous Communities (CCAA)) awards tenders for wind farm construction has also become less controversial.

Although tenders have been held for granting investment aid for wind farm projects (for example, in the Canary Islands, Andalusia and Extremadura) grid access and connection issues and permitting bureaucracy continue to present obstacles to wind farm development.

Below is a brief analysis of these obstacles and regulatory measures taken to alleviate barriers to onshore wind farm development in Spain.

ii. The legal framework regarding wind farm permit challenges in Spain

1 Different types of recourse

In Spain, third parties, through both administrative and judicial appeals, may challenge permits required to develop a wind farm project. Additionally, there is also a third type of claim related to conflicts regarding access and connection to the grid, which is the first permit necessary for the development of wind projects.

a) Claims in relation to access and connection to the network

Wind farm developers must obtain access and connection permits. These permits are granted by the entities that own the power distribution and transportation lines.

These entities are not public administrations, but any denial of access and connection may be the subject of a claim before the Spanish regulator, the National Commission of Markets and Competition (CNMC).

Arguments for and against denials of access permits must be filed with the CNMC within one month of access being refused, and the CNMC must resolve the conflict within two months.

In the event that the CNMC is unable to resolve the dispute within the statutory period, the appellant may seek the protection of the judicial bodies (i.e., may take the claim to court).

b) Administrative recourse

Administrative appeals must be submitted before the administrative authority that issues the permit within one month of the date at which the permit is published, or interested parties are notified of its publication.

This appeal can either be filed with the same authority, or with its hierarchical superior, if one exists. In the latter case, the administrative appeal is mandatory.

It should be taken into account that the organisation of each authorising authority depends on each CCAA. The CCAA will be competent if the capacity of the onshore wind farm in question is equal to, or less than, 50MW. In the rest of the cases (i.e. for larger wind farms), competence for granting the permit corresponds to the Spanish Central Administration (AGE).

The administrative appeal can be filed by any person (individual, corporation or association) with a legitimate interest in the case. If the appeal is based on environmental issues, anyone can file an administrative appeal.

The competent authority may disallow the appeal (for example, due to lateness, lack of legitimacy of the appellant, etc.); reject the appeal if the permit has been granted in accordance with the law; or may totally/partially allow the appeal to proceed if the permit suffers from legality defects.

Additionally, the appellant may request the precautionary suspension of the effectiveness of the permit, if the appeal is based on very serious legality defects or the effectiveness of the permit may generate damages that are difficult or impossible to repair. If the authority does not respond to this precautionary request, the permit is understood to be suspended.

Finally, in the event that the permit suffers from a defect of nullity by law, any interested party may exercise the administrative nullity action requesting the ex officio review of the permit before the authority that granted it. There is no deadline for this action.

c) Judicial recourse

In the case of inadmissibility or total or partial dismissal of the administrative appeal, a contentious-administrative appeal can be filed before the courts.

In the case of building licenses, the competence corresponds to the local judge. Regarding regulatory permits, the competence corresponds to Regional High Courts, but sometimes the appeal can reach the Spanish Supreme Court.

The court may reject the appeal or annul (totally or partially) the challenged permit. However, it cannot modify the permit, since this would mean invading the powers of the administration.

As in administrative appeals, challenging the permit before the court does not suspend its effects, so the project may be implemented.

Nevertheless, the claimant can also file an application for suspension of the effects of the permit. This may be granted if the implementation of the permit may render the purpose of a judicial review useless, taking account of the relevant interests (those of the plaintiff against both the general interests embodied in the permit, and the objectives of the energy transition and the interests of the developer).

Courts rarely suspend the effects of the challenged permit, especially if the renewable installation is already in operation or under construction. The prima facie case is not a relevant reason for the courts to adopt the precautionary suspension except very specific situations.

The claimants must file their judicial recourse within two months of the publication/notification of the permit. However, if the administration has not resolved the administrative appeal, there is no time limit to file a judicial appeal.

2 Simplification of judicial proceedings

No judicial simplification measures have been adopted regarding the permitting of wind farms.

There is only one exception: the resolutions of grid conflicts issued by CNMC must be challenged directly before the court, and no administrative appeal is admissible.

In general, there are procedural mechanisms that can expedite any process, such as the accumulation of procedures, and the appointment of lawsuit-witnesses, although these mechanisms are not well used and have not had the desired effect.

It is also possible that the plaintiff does not request the taking of evidence and that the lawsuit is resolved once the administration and the rest of the defendants (especially the holder of the challenged permit) have answered the claim.

However, this possibility has similarly not been widely used, particularly when the issues under discussion are solely and strictly legal in nature.

3 Legal provisions to reduce effects of permit challenge

The Spanish authorities have enacted the following measures to reduce the consequences of judicial permit challenges.

a) Geoportal

In response to the increasing number of requests to install new wind farms in Spain, the Ministry for the Ecological Transition and Demographic Challenge created a geoportal that allows developers to identify the areas of the national territory that present the best environmental conditions to support wind farm projects.

Through this geoportal, the development of renewable energy generation projects is streamlined.

b) New regulation of access and connection permits

Through Royal Decree Law 23/2020, Royal Decree 1183/2020 and Circular 1/2021, of 20 January 2021, the CNMC established various measures to expedite the granting of permits and avoid conflicts.

These include:

(i) Joint processing of the access and connection permit, with streamlining of procedures;

(ii) The automatic expiration of access and connection rights is foreseen;

(iii) Procedures have been simplified to support the hybridisation of existing facilities;

(iv) The role of the single node interlocutor has been eliminated, which until recently was in charge of processing access and connection permits when there were connection requests from multiple generators for the same node. Now, each promoter will be directly related to the network manager.

c) Simultaneous processing of applications

Simultaneous processing of applications for administrative authorisation and approval of the execution project and declaration of public utility (DUP) may be carried out consecutively, concurrently or jointly. The DUP will be necessary in cases where the compulsory expropriation of the goods and rights necessary for the establishment of the facility, or the imposition of right of way, is required.

d) Regional measures

Some CCAA have adopted specific measures. Some examples are:

(i) Canary Islands: Shorter deadlines for authorisation proceedings, compliance with authorisation requests with current planning law, submission of technical documentation in digital format and substantial non-relevant amendment procedure regulations.

(ii) Castilla-La Mancha: Emergency processing procedure, priority clearance of files regarding the authorisation of renewable energy facilities (the latter also applies in Andalusia).

e) Regularisation process inside the proceedings

During the administrative granting proceeding, the administrative authority may impose on the promoter the obligation to regularise the flaws of the permit application. If these defects are relevant, then it will be necessary to repeat some procedures (public inquiry, official reports, environmental assessment, etc.).

f) Partial annulment (part of the permit)

Both the administrative authority and the Court may partially annul the challenged permit if only a part of the permit is vitiated.

g) Partial annulment (phase of the procedure)

If both the administrative authority and the court rules that the flaw identified only affects one of the phases of the granting proceedings (application review, public inquiry and decision), they can annul that phase and subsequent phases of the procedure that depend on it.

They can also proceed to the conservation of those acts and procedures that are not affected by the defect.

h) Amendment of the permit

If the permit is already granted, the promoter may apply for the permit to be amended. If this amendment affects certain features of the project (such as the number or location of wind turbines, nominal capacity, etc.) the amendment proceedings will be conducted in the same manner as the initial granting proceedings. In other cases, simplified proceedings must be expedited.

iii. Wind farm permit challenges in practice

1 Claimants

The most common types of claimants in wind farm permit challenges in Spain are as follows:

a) Associations for the protection of nature, landscapes and historical heritage

b) Association of opponents to wind farms

c) Neighbours affected by wind farms

d) Municipalities

2 Pleas submitted in support of claims

The pleas most commonly submitted in support of challenges against wind farm permits in Spain include:

a) Procedural flaws

(i) Insufficiency of the environmental impact assessment (EIA)

Claimants frequently allege that the specific EIA is not sufficient in view of the nature of the works and their likely consequences on the environment. The lack of rigorous analysis of project design alternatives is also frequently discussed.

(ii) Irregularity of the public enquiry

Claimants also frequently allege that the public inquiry carried out for the purposes of the permit does not correspond to the reality of the authorised and executed project. This can affect both the technical characteristics of the procedure and the identification of the land whose occupation is projected.

(iii) Irregularity in the processing of reports

During the permitting process, reports must be obtained from other administrative authorities, competent regarding aviation safety, urban and territorial planning. Sometimes the deadlines provided in the regulations have not been observed so that these entities can issue their reports on time.

b) Substantial flaws

(i) Lack of capacity to access and connect the facility to the network

The lack of access capacity or the technical impossibility of connecting the wind farm installation to the grid are reasons that pose a barrier to the penetration of renewables.

Royal Decree-Law 23/2020 established a moratorium on requests for access to the grid until the entities that own the transmission and distribution networks provide information on the available capacity at each of the nodes. The moratorium was lifted on 1 July 2021.

(ii) Damage to natural scenery, historical heritage and/or biodiversity

Claimants frequently allege that the project does not comply with the interests protected by the regulation regarding protection of landscape, historical heritage, and synergistic visual effects with other electrical facilities, and nesting and rearing areas of endangered animal species.

(iii) Failure to consider energy use in rural areas in urban and territorial plans

Not all urban and territorial planning instruments are sufficiently up-to-date or have included the general objectives of energy transition or the penetration of renewables.

(iv) Impact on the production of other power generation facilities

In certain locations, there is overexploitation, with proximity between different wind farms and detrimental effects on other local renewable generation facilities (e.g. photovoltaic).

(v) Occupation of lands for the execution and operation of the project that have not been expropriated

The DUP only enables the occupation of the land and rights specified within it. However, execution of a project sometimes requires the occupation of unforeseen land. The lack of coverage of this occupation is frequently alleged by the affected landowners.

(vi) Disputes over the price of land and rights affected by the wind farm project

Those with ownership, access or other rights to land affected by a proposed wind farm project frequently allege major price in expropriation proceedings.

3 Length of proceedings

The following approximate terms can be considered at the typical length of proceeding in wind farm permit challenges in Spain:

- Administrative proceedings: 2-3 years (longer in case of AGE permits)
- Administrative appeals: three months.
- Judicial proceedings: 2-3 years (in case of appeal before Spanish Supreme Court, two more years).

iv. Conclusion: Legally challenging wind farm permits in Spain

The Spanish authorities have approved measures aimed at promoting and facilitating the development of renewable energy projects in Spain, in order to achieve energy transition objectives.

The legal provisions mentioned above have helped reduce some of the conflicts regarding wind farm permitting in Spain, although some judicial remedies have not worked as expected.

The frequency of appeals and the length of proceedings remain obstacles to the development of renewable energy projects in Spain.

Conclusion

Similar measures have been enacted in France, Germany and Spain with the aim of promoting and facilitating the development of renewable energy projects to achieve energy transition objectives set by each of the jurisdictions and the EU.

The domestic courts of these countries have to date applied these measures in a way that is favourable to the development of wind energy projects.

Nevertheless, the frequency of recourses against permits and the length of judicial proceedings remain obstacles to the development of renewable energy projects.

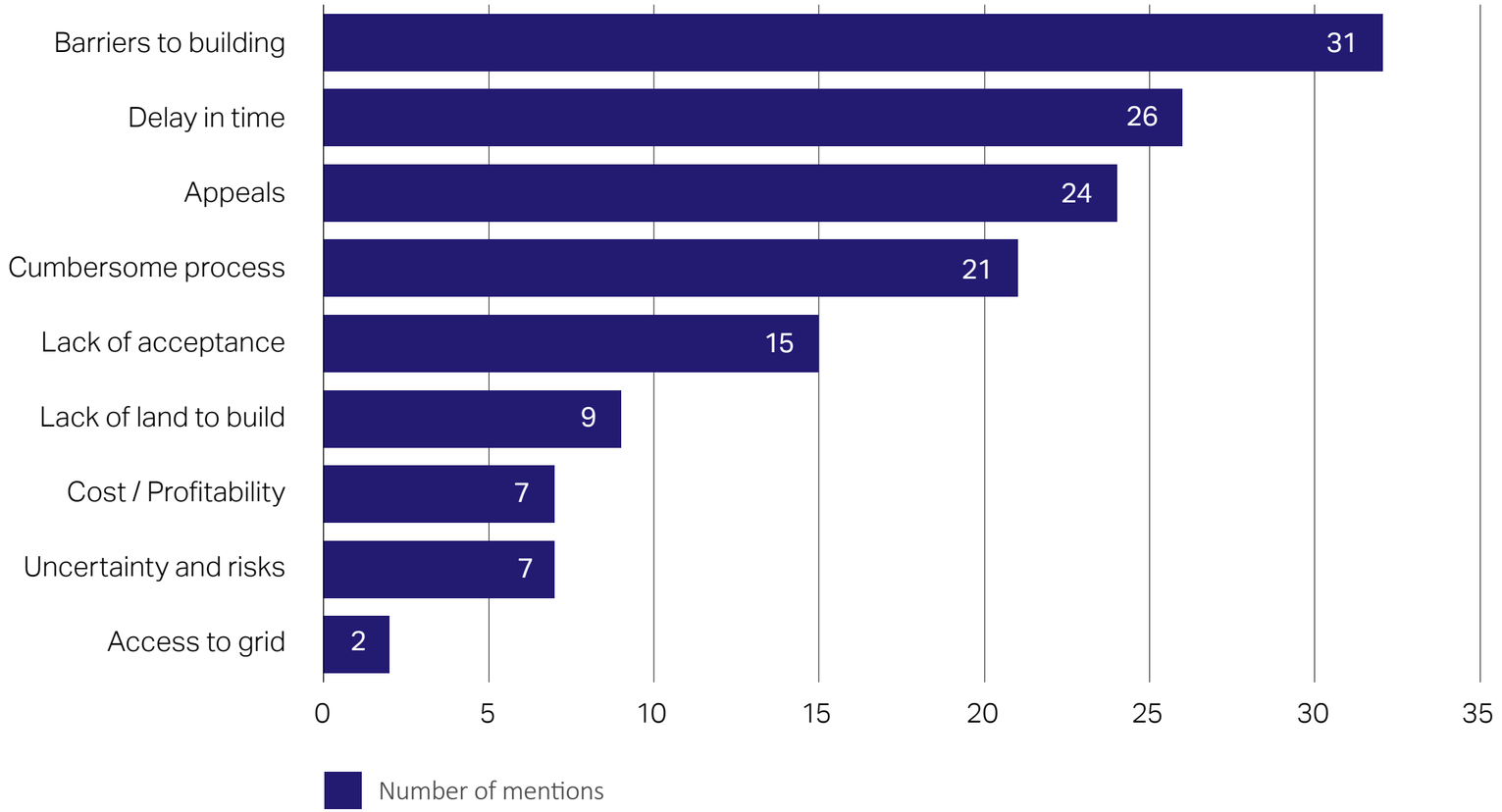
No measure can eliminate the risks attached to recourses, since the right to appeal is a fundamental principle of the rule of law.

Even if the risks of projects being suspended or even abandoned because of permit challenge have been mitigated, these risks still need to be anticipated and managed.

Survey section

Experience with permit challenges

Figure 14: Main challenges in the development of wind farm projects



The approval process of wind farms is according to our interviewees – mostly developers, investors and law firms – a major challenge.

First, as part of the process to receive approval, a multitude of requirements and regulations have to be met that are highly complex. Interviewees mainly mentioned the need to minimise the impact on environment, landscapes, wildlife and communities as well as military and radar. The process of approval is perceived as non-transparent and lengthy. Multiple responsibilities overlap and shift frequently while regulations may change too.

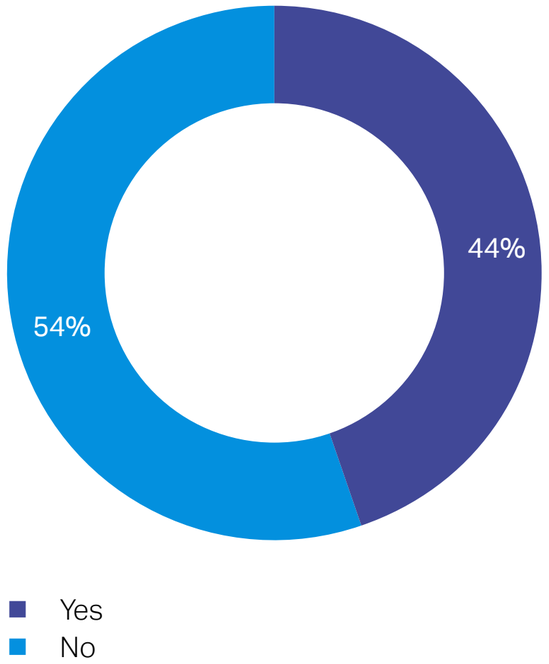
> "The lack of public acceptance and political support is a major disappointment and stands in stark contrast to the high expectations placed on the industry.

Experience with permit challenges

The duration of the entire process is a major concern as well. While the planning phase until a permit is awarded can already take several years, a permit challenge or the appeal against a permit prolongs the process. The lack of public acceptance and political support or will is thus a major frustration and stands in stark contrast to the high expectations vested in the industry.

Finally, in combination with the multiple environmental requirements, the lack of available land or sites further limits the ability to advance the wind energy sector.

Figure 15: The use of insurance as protection against permit challenges



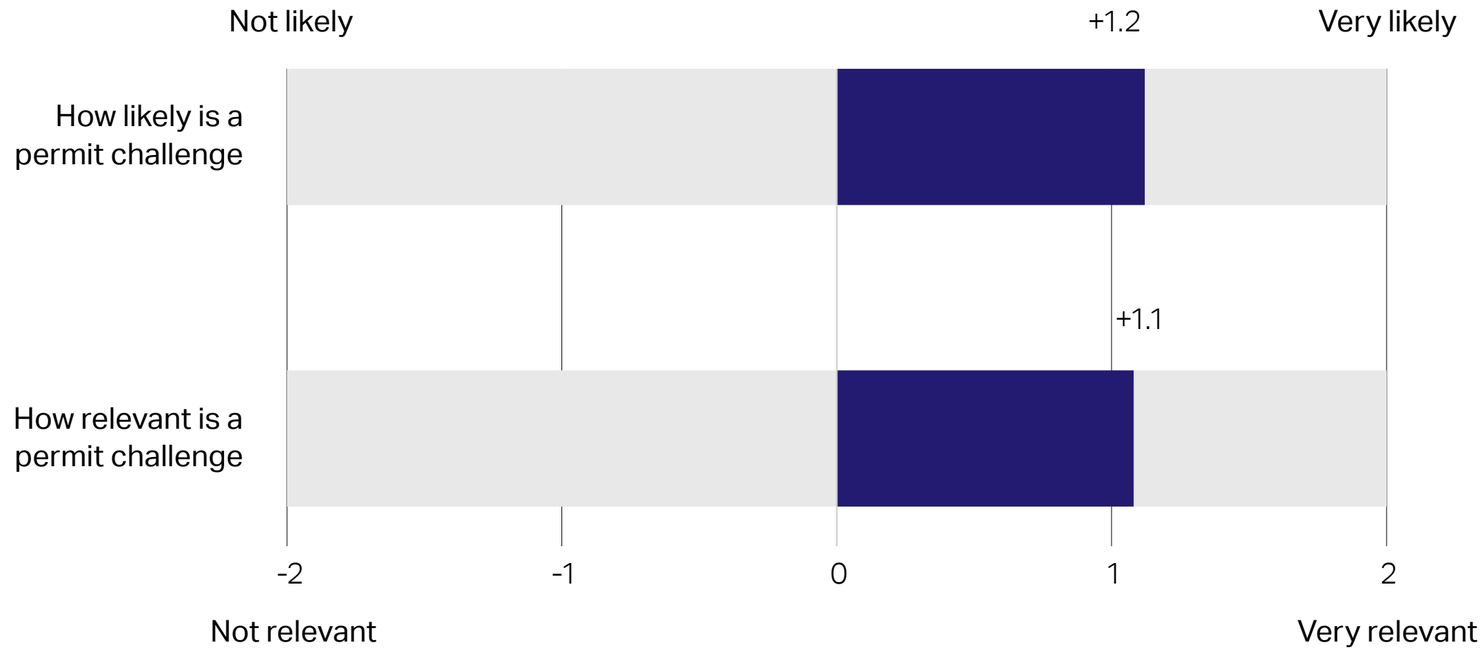
Given the implications associated with permit challenges 44% of interviewees said that they have insured themselves against such risks. However, only few interviewees do so on a regular basis. Of those interviewees who confirmed that they buy insurance, most of them only do so, if they are confronted with a permit challenge or if insurance is a precondition of the lender or investor.

Substantial differences also exist between the countries where our interviewees are based. While in Germany only one company (a lender) stated that they use insurance – or rather always request their debtor that they insure themselves – no other company confirmed that they yet insured themselves. The situation is quite different in France where awareness regarding permit challenge insurance is already more advanced, and developers are more familiar with the cover. Here 60% of interviewees stated that they insured against permit challenges or regularly do so.

Experience with permit challenges

"Insurance is usually only taken out when a permit challenge arises or when insurance is a precondition of the lender or investor.

Figure 16: Probability and relevance of permit challenges



Experience with permit challenges

> "More and more often, the impression arises that projects are systematically challenged and sued – regardless of their quality and the merits of a claim.

To most of the executives interviewed it is seen as very likely that a permit will be challenged, and the impact will be severe. In fact, most interviewees emphasised that they focus on good quality projects and make substantial efforts to assure their projects tie in concerns of local communities and are in full compliance with regulations and environmental requirements. However, more and more frequently, interviewees state that they are under the impression that projects are systematically challenged and sued – irrespective of their quality and the merits of a claim.

To some interviewees, permit challenges have just become part of the cost of the development of wind farms. Although it is important on which basis permits are challenged, those interviewees who state that basically all permits are appealed, see the main objective of claimants in preventing the construction of a wind farm under all circumstances.

They assume that in fact these types of claimants will exhaust all legal options and will try to prolong the process until the wind farm can no longer be built under the conditions agreed in the permit and that the project is eventually annulled. As this process can last for more than three years – if all legal options are fully exhausted – it is also these interviewees who stated that they insure every project because they want to outsource the risk and focus on the continuing construction of the project.

The differences between the three countries examined are minor. Interviewees take a very similar view on the severity of a permit challenge – as it prolongs the process, will create substantial cost and absorb resources. The likelihood that a project is challenged is regarded as very high both in France and Germany and just slightly less likely in Spain.

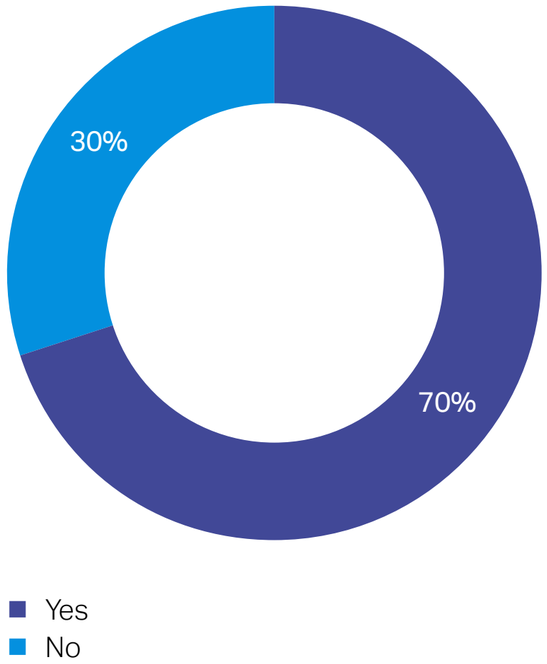
Interviewees uniformly agreed that a permit challenge causes a delay in the development of a project. Some interviewees explained that they pause the project until the appeal has been settled. They try to resolve the case either in or out of court, provided a solution can be found with the claimant and the project can be amended to satisfy claimants' demands.

The direct cost associated with an appeal are not regarded as significant, seen in the range from €20,000 to €100,000. However, the indirect cost associated with the delay in building, its impact on tariffication and the potential costs that may arise as a project is adjusted to encompass the demands of claimants or incorporate changes required as a consequence of the outcome of the judicial review are seen as significant, but vary substantially from case to case.

Experience with permit challenges

Despite the uncertainty that a permit challenge causes in a project, almost all our interviewees stated that they would continue to invest into a wind farm faced with a permit challenge. However, most of the developers we interviewed pursue a project from the initial planning to completion. These companies finance the project themselves and do not rely on debt financing for individual projects. However, those investors we interviewed stated that they make their investment is contingent on the following conditions: either the project is insured or they wait with their commitment until the challenge is resolved.

Figure 17: Proportion of respondents seeking advice on quantifying, assessing and mitigating risk



"

70% of interviewees seek consultancy if the permit of their project is challenged.

70% of interviewees confirmed that they seek consultancy if the permit of their project is challenged. Predominately they turn to law firms to assess the ramification of the appeal, develop their legal defence and implement measures to mitigate the risks that the suit presents. Interviewees explained that they try and seek the participation of local communities in the planning of the projects to buffer opposition and incorporate well-founded concerns.

In considering the risk management of wind farms and the threat that judicial reviews present banks stated that they also consult with insurers to assess the risk and develop strategies to reduce it, which can be a combination of different measures consisting of addressing the valid concerns of claimants, defining the legal response and insuring against residual risks.

Permit challenge insurance

Typically, insurers will help to develop these strategies as they may contribute to improve the insurability of the project and reduce the price for the cover.

Some 30% of interviewees stated that they do not employ a consultancy to assess the risk that a permit challenge presents. First, the development and construction of wind farms is their core competence, they see themselves as well versed to assess the risk of a permit challenge internally, have dedicated legal department who are familiar with these cases, but will obviously team up with external law firms for their defence.

The significance of a permit challenge is also underlined by the fact that all interviewees – investors, funders and developers alike – confirmed that they report a permit challenge to their board. The majority of companies we interviewed were not publicly listed companies, therefore the reporting complied with internal requirements. However, companies also uniformly emphasised that constantly assessing and evaluating the development of pending permit challenges is part of their internal risk management routine.

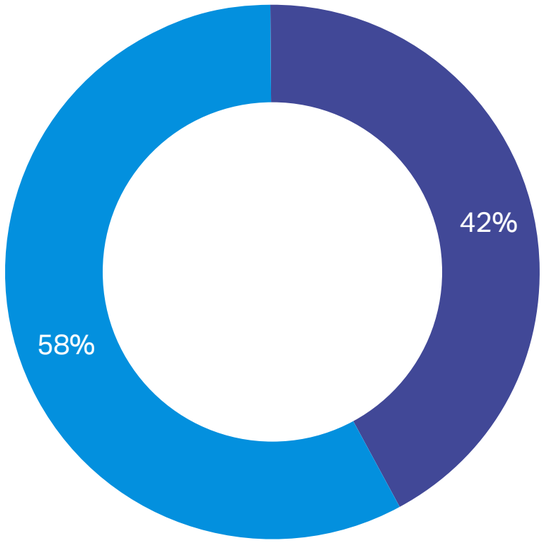
> "The likelihood of a project being challenged is considered very high in both France and Germany, and only slightly lower in Spain.

Awareness regarding permit challenge insurance is reasonably advanced within the wind farm community in France, Germany and Spain. About 70% of interviewees stated that they are aware of permit challenge insurance with almost 100% of interviewees in France, about 50% in Germany and less than 40% in Spain.

Interviewees are conscious of the increasing probability that permits are challenged and that they need to protect against that risk. However, thus far only about 40% of our interviewees had purchased permit challenge insurance with again a higher share of buyers in France, where two thirds of interviewees had already used insurance, while in Germany only one out of six interviewees and in Spain only one third of the interviewees had taken out insurance.

Permit challenge insurance

Figure 18: Proportion of respondents who have already taken out insurance



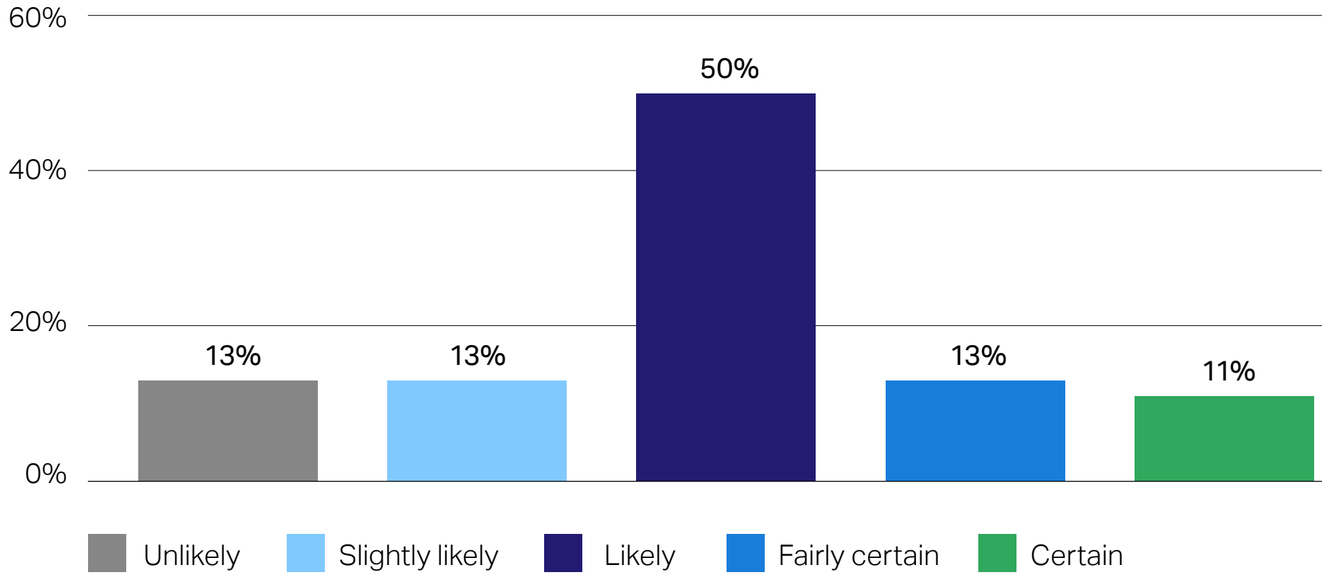
The reasons for the relatively low utilisation of insurance are manifold. Starting with those who are very likely to buy insurance are developers who rely on external funding of banks and lenders. They stated that insurance is mandatory, if a developer wants access to lending.

One source also pointed out that to submit an order, some turbine manufacturers require that developers take out insurance in case a permit is challenged. Apart from assuring financing the main reason to purchase insurance is the time factor, as transferring the risk to the insurer mitigates the threat of a delay in construction.

> "In all three countries observed, awareness regarding permit challenge insurance is reasonably advanced in the wind farm community.

Permit challenge insurance

Figure 19: Likeliness of buying insurance if the permit of an existing project were challenged



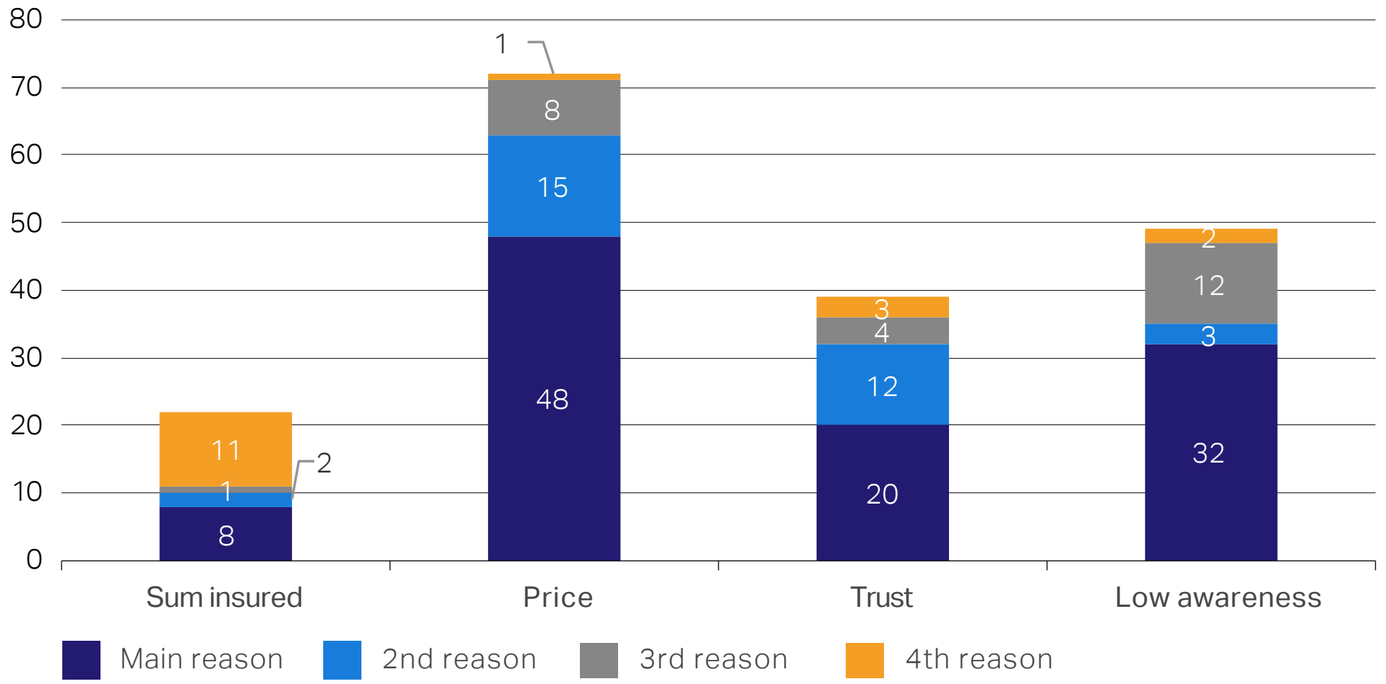
Those who are fairly likely or likely to use insurance, recognise the increasing propensity of permit challenges being launched and that insurance provides an efficient means to transfer that risk. However, they stated that only when a project is faced with the prospect of a permit challenge would they insure. In fact, they evaluate on a case-by-case basis and are more likely to insure the more serious they perceive the likelihood and potential success of a challenge to be.

Finally, there were those who said that they are unlikely to use insurance. Some interviewees were unaware of the possibility that they could cover the risks arising from a permit challenge. Others were sceptical of the cover's benefits as to which risks are included in the cover and the underwriting process was deemed time-consuming.

Permit challenge insurance

"Respondents who would be quite likely or likely to use insurance are aware that permit challenges are increasingly likely and that insurance is an effective means of transferring this risk.

Figure 20: Main hurdles to insure against permit challenges (number of mentions)



Permit challenge insurance

The price of permit challenge insurance is often perceived as high by wind farm developers. As a result, some developers prefer to only buy insurance, once they are served with a permit challenge. However, since margins can be tight in wind farm development, insurance is bought if the threat of a claim is high. Furthermore, developers pointed out that the underwriting process can be laborious and time consuming.

The second most frequently mentioned reason why developers abstained from buying insurance is awareness. Permit challenge insurance is still a fairly young product in Europe.

As a variant of contingency insurance, this type of insurance has been commonplace in the UK since 1980s and has become a familiar tool for real estate developments. In Continental Europe, however, permit challenge insurance is best known in France, but far less in Germany or Spain. While for investors and funders, permit challenge insurance is becoming a precondition to financing, permit challenge insurance is still a relatively new means of risk management for developers.

Furthermore, interviewees also remarked that the permit challenge insurance market is still very small or 'illiquid', with few insurers actually offering the cover.

Lack of credibility or trust is thus another reason why developers do not yet insure more. This is closely related to the question of awareness, as only a few insurers offer the product, which are not necessarily the large 'household' insurance brands active in the wind energy sector.

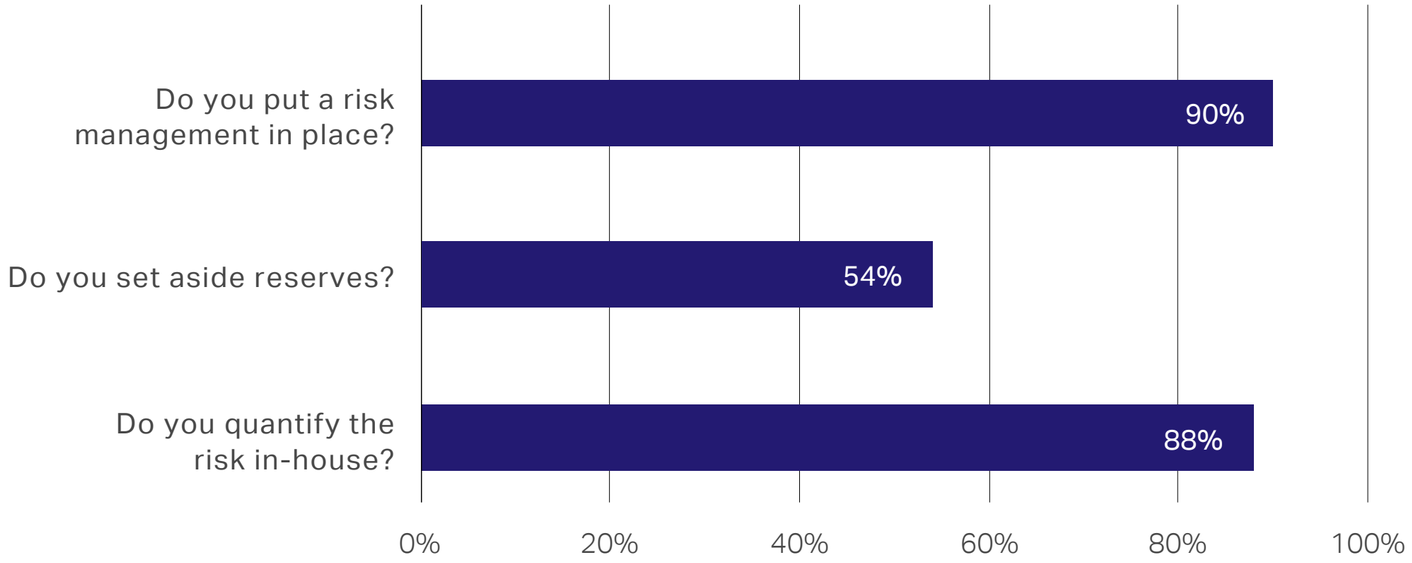
Furthermore, claims for payment are not yet commonly known and there is some uncertainty as to the amount of indemnity paid in the event of interruption to a project.

Finally, there is the concern that cover is perceived as expensive, given that the sum required to be insured is often large because insureds want to be sure that as much of their exposure is covered as possible.

> "The price of insurance against permit challenges is often perceived as high by wind farm developers, so insurance is often only taken out when developers are faced with a permit challenge.

Permit challenge insurance

Figure 21: Forms of risk management when no insurance has been taken out

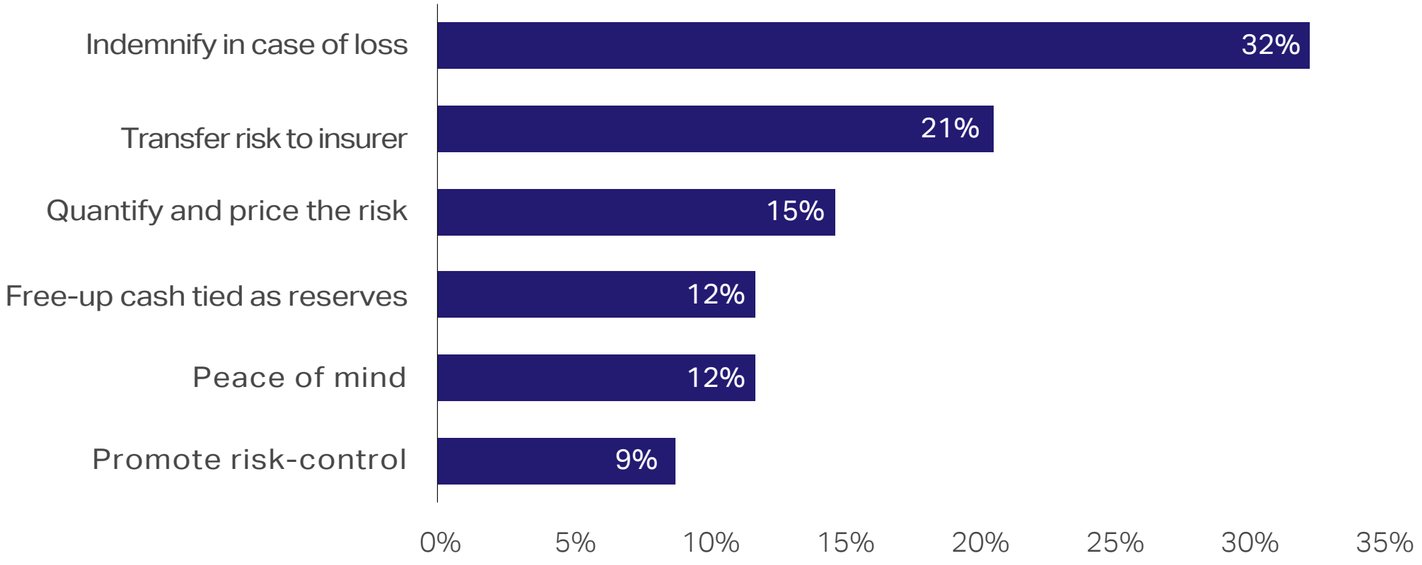


Lack of credibility or trust is another reason why developers do not yet insure more.

Most developers who decide to carry the risk of a permit challenge themselves take precautionary measures to assess the risk and manage it over time. Developers are well aware of the threat that a permit challenge poses and manage their risk mainly in-house, making assessments based on their own experience.

Permit challenge insurance

Figure 22: Main benefits of permit challenge insurance



"The transfer of risk to the insurer frees-up the time that a developer would otherwise need to wait until the permit challenge is solved, allowing them to continue construction. Furthermore, with the risk transfer, both developer and investor regain their peace of mind as they know that their downside is protected.

Permit challenge insurance

Often, parties respond to permit challenges by determining their legal defence strategy and by seeking to find a way with pressure groups or the neighbouring communities to reconcile their concerns. According to our interviewees, only about 50% of those who carry the risk themselves also decide to take precautionary measures and set aside reserves in case of a loss.

The main motivation for developers to sign a permit challenge insurance is to benefit from the transfer of risk to the insurer and to cover the financial ramifications of an interruption of the construction caused by a judicial review. These key reasons also take care of the concerns of partners such as lenders or funders who want their investment to be protected as well as manufacturers who want to ascertain that they will not incur any cost from a delay in construction.

The transfer of risk to the insurer frees-up the time that a developer would otherwise need to wait until the permit challenge is solved, allowing them to continue construction. Furthermore, with the risk transfer, both developer and investor regain their peace of mind as they know that their downside is protected.

The quantification and pricing of the risk is seen as an important benefit of the insurance. Even if the developer were to decide not to sign the insurance, he still would have an independent assessment of the risk and a quantification of the cost he would incur due to a delay in construction. As a result the developer is able to set aside reserves in case of a loss, complying with the need to protect its shareholders as for instance in a liability suit.

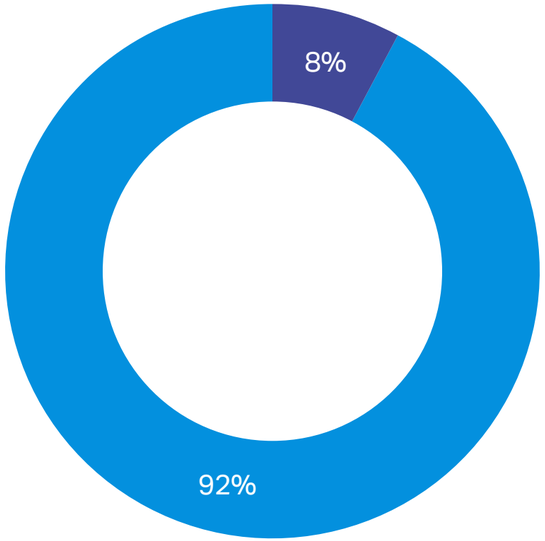
If the developer chooses to insure though, these reserves can be freed-up and reinvested for further projects, improving a developers' return on investment.

Given these benefits it comes as no surprise that our interviewees uniformly said they would finance or develop a project with a permit being challenged, if it is insured. However, 20% of the developers – many of whom develop a project from idea to completion – or investors that we interviewed, stated that would not pursue a project where the permit is challenged, until the dispute is resolved.

> "If insurance for permit challenges were taken out more frequently, insurers could spread the risk profile of the product over a larger group of projects, which would have a positive impact on prices.

Permit challenge insurance

Figure 23: When to take out insurance



- Earliest: With the planning of the project
- Latest: Once the permit challenge is known

Despite the advantages of insurance, our interviewees nevertheless stated that they prefer to take out insurance as late as possible, due to the cost associated and the resources required to complete the necessary due diligence. Given the limited maturity of the market, this also addresses the immediate concerns of insurers since in most cases the risk assessment and underwriting is also easier if the type of permit challenge is known rather than the insurer having to speculate what kind of a permit challenge could be launched and what kind of risks might be associated.

However, developers also said they could imagine insuring as early as possible because if they need to assume that all permits are challenged (which fits current observations in exposed regions), then there is no point in waiting until the permit is challenged.

This reasoning matches insurers' longer-term considerations - if permit challenge insurance were taken out more frequently, insurers would be able to diversify the risk profile of the product across a larger group of projects and therefore the price would come down.

Legal challenges to wind farms

There is no legal obligation to insure against the delay potentially caused by a permit challenge in France, Germany or Spain. However, there are a multitude of obligations that require a timely completion and connection of a wind farm to a grid.

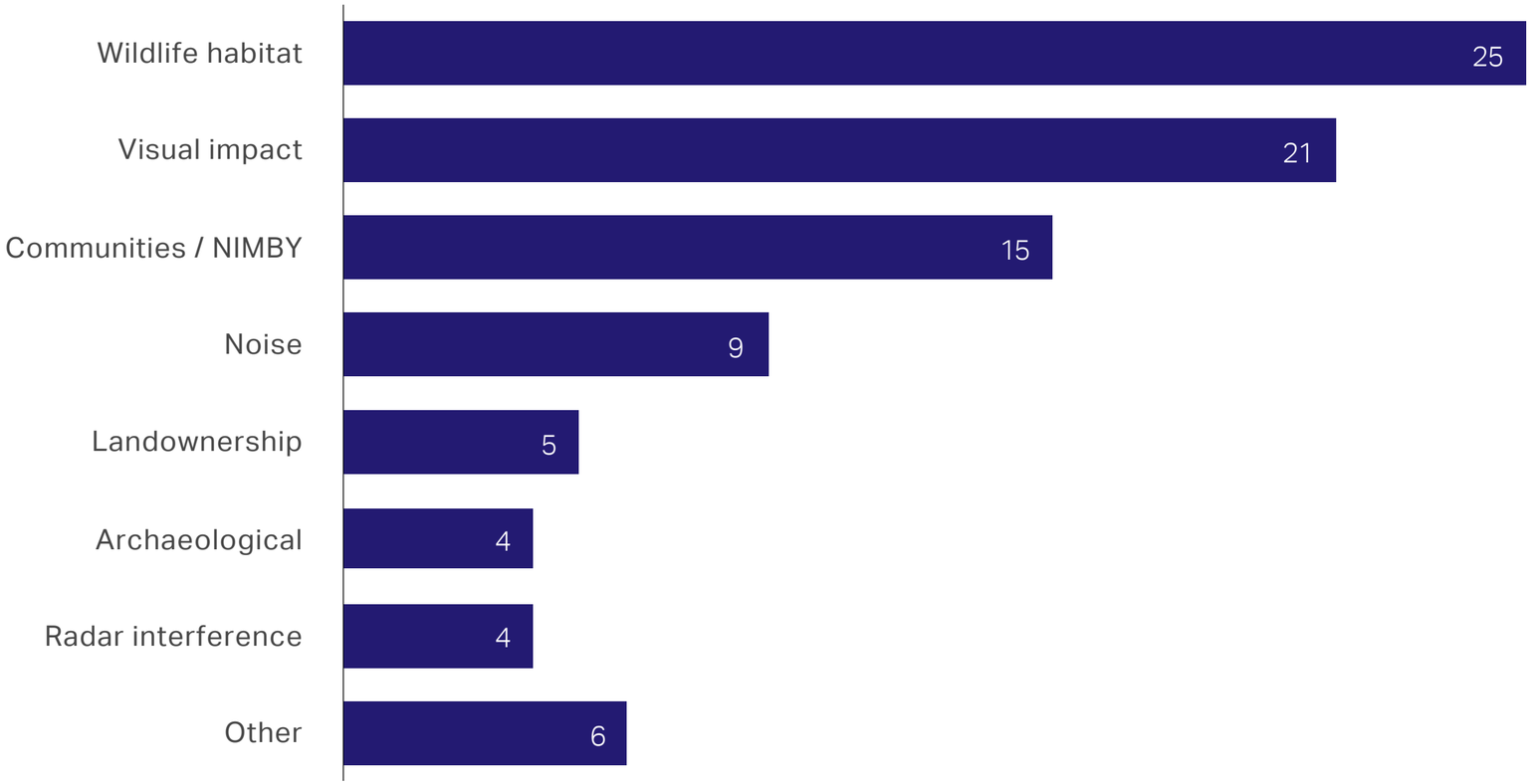
First, if a wind farm is built as part of a power purchase agreement (PPA), production facilities might depend on the timely supply of electricity for the wind farm. Similarly, if the electricity supply of a utility provider depends upon the connection of the wind farm to the grid because it substitutes another source of energy, the developer might incur a conventional penalty. Furthermore, as part of the auction process of a wind farm certain feed-in tariffs will be agreed that not necessarily will remain in place if the completion of the wind farm is delayed. In fact, conditions might have tightened and the commercial rational initially targeted might no longer be viable.

Similarly, lenders do also not uniformly require that developers insure against a delay of the construction. However, in France 80% of interviewees stated that lenders nevertheless demand that insurance is in place to protect against such downside risk. In Germany that demand is far less vocal, with only 30% of interviewees saying their lenders require protection against a late completion. The rate in Spain is quite similar.

In France, Germany and Spain there are generally no damages awarded if a wind farm fails to meet its commercial operational date (COD). Again, there might be a fixed date when a wind farm is expected to connect to the grid, but a failure to meet such a deadline does not automatically trigger damage payments. However, interviewees do not rule out the risk they could incur such punitive payments. In fact, 75% of interviewees said they would consider insurance if it were to cover such risks.

Legal challenges to wind farms

Figure 24: Main reasons for which permits are challenged (by number of mentions)



"Most often, permits for wind farms are challenged because they are perceived to interfere with protected species or habitats, or have a visual impact on the region.

Wind farm permits are most frequently challenged because they are perceived to interfere with protected species or habitats. This concern is closely followed by the visual impact that a wind farm might have on the region where it is to be installed.

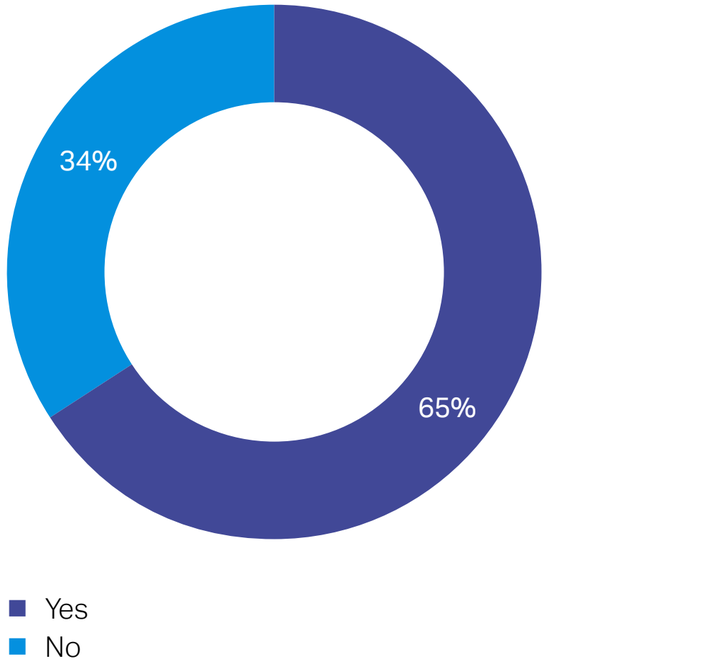
Legal challenges to wind farms

That is particularly the case in France where large parts of the historic landscape are protected. Third, although the overall support for wind energy is high, people fight wind farms if they are installed in their neighbourhood using different arguments that are appropriate to serve this interest. Noise is frequently cited as a reason why a permit should be rejected, followed by unclear landownership conditions as well as interference with archaeological sites or radar. The latter is a key limitation for the building of wind farms. However, the interference with radar is a condition which is typically addressed well before a permit is granted, as such a conflict predetermines where a wind farm can be built at all.

Wind farm developers assess the legal risk associated with the permitting of wind farm usually both with an in-house legal team as well as with a dedicated external law firm. Given the highly regulated environment in which the permitting of a wind park is prepared companies follow a tightly predefined route to ensure all requirements are addressed and complied with. This process is overseen by both legal and compliance departments as the risk and possibility of a permit challenge is regarded as high and can only be minimised if procedural mistakes are avoided.

"Given the highly regulated environment in which the approval of a wind farm is prepared companies follow a well-defined route to ensure that all requirements are addressed and complied with.

Figure 25: Do companies have a process in place for resolving challenges to wind farm permits?



Legal challenges to wind farms

Given the frequency of permit challenges two thirds of interviewees stated that they have a process in place to address permit challenges. Of the remaining one-third of interviewees, some indicated that they are in the process of developing a standardised approach or that they predominately undertake a case-by-case evaluation as every challenge is different.

The defence against a permit challenge is typically a combination of different measures. First, developers try to minimise the risk or prevent a permit challenge by addressing all plausible objections to a wind farm at a given location.

Furthermore, developers engage with the local population and stakeholders to anticipate objections but also increase the participation in wind energy projects. Third, once a suit or appeal has been filed most developers stated that they negotiate with claimants to come to an agreement and settle out of court. Finally, if there is no other avenue available, developers will fight their case in court.

The duration to receive a building permit in France, Germany or Spain varies widely as does the length of time it takes until all legal options are exhausted either in favour of or against the developer. According to our interviewees it can take up to six years until a wind farm is awarded a permit in France. However, one needs to distinguish between the lengths of the administrative decision, which according to most of our interviewees will take up to two years.

This process is slightly faster in Germany. Nevertheless, until a project receives approval it may take up to five years, while the actual decision making typically takes one to two years. Finally, in Spain interviewees expect a decision concerning their permit within four years. Again, the administrative decision will take approximately one to two years.

With regard to the length of the judicial review our French interviewees expect a final decision after up to seven years. However, most interviewees expect a final resolution after four to five years. The process is clearly faster in Germany, where our interviewees typically expect a decision after 24 months. In Spain our interviewees assumed to receive a final decision after three years.

Taken together, the permitting plus potential judicial review may add up to more than 10 years in France and six to seven years in Germany and Spain.

> "Overall the permitting plus potential judicial review may add up to more than 10 years in France and six to seven years in Germany and Spain.

Concluding remarks

The lengthy permitting and judicial review process threatens Europe's ability to meet its carbon emission goals by 2030 – developers and investors will shy away from territories where the commercial viability of wind farms is at risk from an uncertain legal environment.

Ultimately, policymakers must bring public consensus to the planning process if it is to be accelerated to enable the renewable energy industry to fulfil its role in Europe's energy transition..

Insurance is not an alternative to best-practice and consensus; natural selection will drive insurers to seek out the strongest projects with the clearest social licence. But whilst legislation and jurisprudence respond to the pace of change, permit challenge insurance will play a very prominent role offsetting uncertainties around the interpretation of such legislation and jurisprudence. Permit challenge insurance presents an efficient solution to protect developers and investors against the financial risks caused by protracted legal debate on the interpretation environmental and planning laws.

Practically, there is still a lack of awareness about the purpose and coverage of insurance – developers perceive it more as added cost than added value. In fact, insurance is a tool that allows them to access financing and continue building while their judicial challenges are managed to a conclusion. As developers and insurers begin to work more closely to analyse and control risk in unison, demand and familiarity with the product is expected to grow, volumes of policies issued will increase and premium rates will come down.

Essentially, however, permit challenge insurance is only one component in a multitude of tools developers might use to assess, manage and hedge their risks. Addressing the impact of the energy transition on our social and physical environment by resolving well-founded concerns can bring a stronger public consensus and lessen the need to bring disputes to the Courts.

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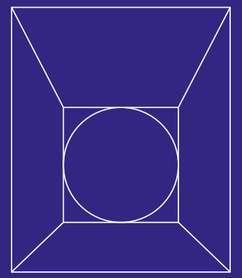

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