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Swiss Parliament weakens environment protection by facilitating construction of photovoltaic plants

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Introduction

In light of the imminent power and electricity shortage, Parliament has discussed the introduction of simplifications in the approval process for large photovoltaic plants, in particular in alpine regions. The proposed amendments and measures have been criticised from a legal and environmental perspective.

On 30 September 2022, Parliament adopted a revision of the Swiss Energy Act,⁽¹⁾ titled "urgent measures to provide the short term a secure winter power supply". The revision introduces various procedural and material simplifications that are likely to have a substantial impact on nature and biodiversity.

Since Parliament declared the revision of the Energy Act to be urgent, the new measures and simplifications entered into force on 1 October 2022 and will apply until 31 December 2025.

Planning obligation and environmental impact assessment

Generally, the planning, construction and modification of large installations with significant and far-reaching impacts on space and environment is subject to a general planning obligation and an environmental impact assessment.

The planning obligation is assessed on a case-by-case basis considering the expected impacts of a specific installation. As a rule, a planning obligation applies to installations subject to an environmental impact assessment as well as other large installations with a significant impact on space. The Swiss Ordinance on the Environmental Impact Assessment (OEIA) defines the types of installations subject to an environmental impact assessment.⁽²⁾

With the planning obligation and the environmental impact assessment, the Swiss legislature obliges the involved authorities to perform a comprehensive assessment of all expected effects of the projected installations. Such assessments include the balancing of all relevant interests – namely, interests of:

- environmental protection;
- protection of landscape and nature;
- protection of biotopes and species; and
- protection of water and forest.

The instrument of environmental impact assessments also has a procedural side. If an installation is subject to an environmental impact assessment, non-profit organisations have a legal right of appeal against such projects.⁽³⁾ The right of appeal is frequently used in practice to have the courts review the compliance of a project with the law.

Construction of photovoltaic plants

Before the new regulations enacted, the planning, construction and amendment of photovoltaic plants with an installed performance of more than five megawatts – which are not attached to a building – was subject to an environmental impact assessment.⁽⁴⁾ The cantons had to define the applicable proceeding, but the environmental impact assessment had to take place in the context of a permit, approval or concession process.

In addition, the construction of large photovoltaic plants was generally subject to a planning obligation. This required a local land use plan or a special land use plan and potentially a basis in the cantonal structure plan.

As well as the planning obligation, if the site in question was located outside the building zone, an exceptional approval was required as well.

Until 30 September 2022, the public interest in such photovoltaic plants did not prevail over interests of environmental protection. Rather, the interest in securing sufficient energy supply had the same if not less weight than other interests, particularly regarding the protection of landscape and nature.

New regulations for use of solar energy

Special regime for construction of large photovoltaic plants

In order to enable the fast construction of large photovoltaic plants on vacant land, Parliament implemented a new article 71a in the Energy Act. The new provision lowers both the material and the procedural requirements for the construction of large photovoltaic plants. Both cantonal and communal authorities are bound by the new provision.

Large photovoltaic plants must fulfil the following requirements:

- an annual minimum production of energy of 10 gigawatt hours; and
- energy production between 1 October and 31 March of a minimum of 500 kilowatt hours per one kilowatt installed performance.

For a transitory period until 31 December 2025, or until large-scale photovoltaic installations with a total annual production of up to two terawatt hours have been realised, the following facilitations apply for the construction of large photovoltaic plants that meet the above requirements:

- their need is deemed given;
- the public interest of a national importance in their realisation is deemed given and by law prevails over other national, regional or local interests (in particular landscape and nature protection interests);
- the requirement of a certain location (location bound factor) is deemed given; and
- no planning obligations apply on the cantonal and communal level.

Explicitly excluded is the realisation of such new, large photovoltaic plants in:

- moors and wetlands that are of special beauty and national importance;
- biotopes of national importance; and
- water and migratory bird reserves.

Under this new regime, the respective canton grants the required construction permit after having obtained the approval from the concerned community and the landowner.

Obligation to use solar energy for new buildings

Article 45a of the Energy Act stipulates that all new buildings with a relevant building area of more than 300 square metres must mandatorily be equipped with a solar installation on the roof or façade (eg, a photovoltaic or a solar thermal system).

The cantons are able to regulate exemptions, particularly if the creation of a solar installation:

- contradicts other public regulations;
- is technically not possible; or
- is economically disproportional.

Also, the cantons are allowed to extend this obligation to buildings with a lower relevant building area than 300 square metres.

Comment

While the new regulations for the use of solar energy are understandable from an energy supply perspective, it may be questioned whether this justifies such restricting mechanisms for the protection of the environment and spatial planning.

With the repeal of a planning obligation, the construction of large photovoltaic plants only requires a simple building permit. A proper alignment of such installations with the planning process and a comprehensive balancing of interests is not required anymore.

The effects of the general subordination of other national, regional or local interests such as landscape and nature protection are even more far-reaching. This not only limits, but completely prevents any assessment of conflicting interests by authorities and the courts. Also, in view of high interests in energy supply, it is important to somehow consider environment protection interests when assessing a projected large photovoltaic plant. Otherwise, there is a risk of damages to nature and biodiversity.

After a facultative referendum against this revision of the Energy Act failed because of an insufficient number of signatures, the new regulations will continue to apply until 31 December 2025, unless repealed or modified earlier by Parliament.

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Endnotes

(1) Energy Act, SR 730.

(2) Ordinance on the Environmental Impact Assessment, Annex, SR 814 011.

(3) Article 55(1) of the Environmental Protection Act, SR 814 01.

(4) Ordinance on the Environmental Impact Assessment, Annex, section 21, No. 21.9, SR 814 011.