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Lessons Learned from the UK and Denmark: Regulatory Challenges Related to Environmental Impact Assessments

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Overarching Research Question

- Keeping in mind the need to decarbonize the energy sector and to mitigate the climate crisis
 - How to optimize decision-making procedures with the aim of attracting investments and increasing the deployment of OWF
 - Geographical and jurisdictional scope: 12-200 nm in Denmark, UK and Norway
 - Subject matter scope: large-scale offshore windfarms
 - Issues of special interest; how the obligation to conduct an EIA interacts with the procedural rules governing the licensing procedure seen in light of progressive technological developments in the OWF industry



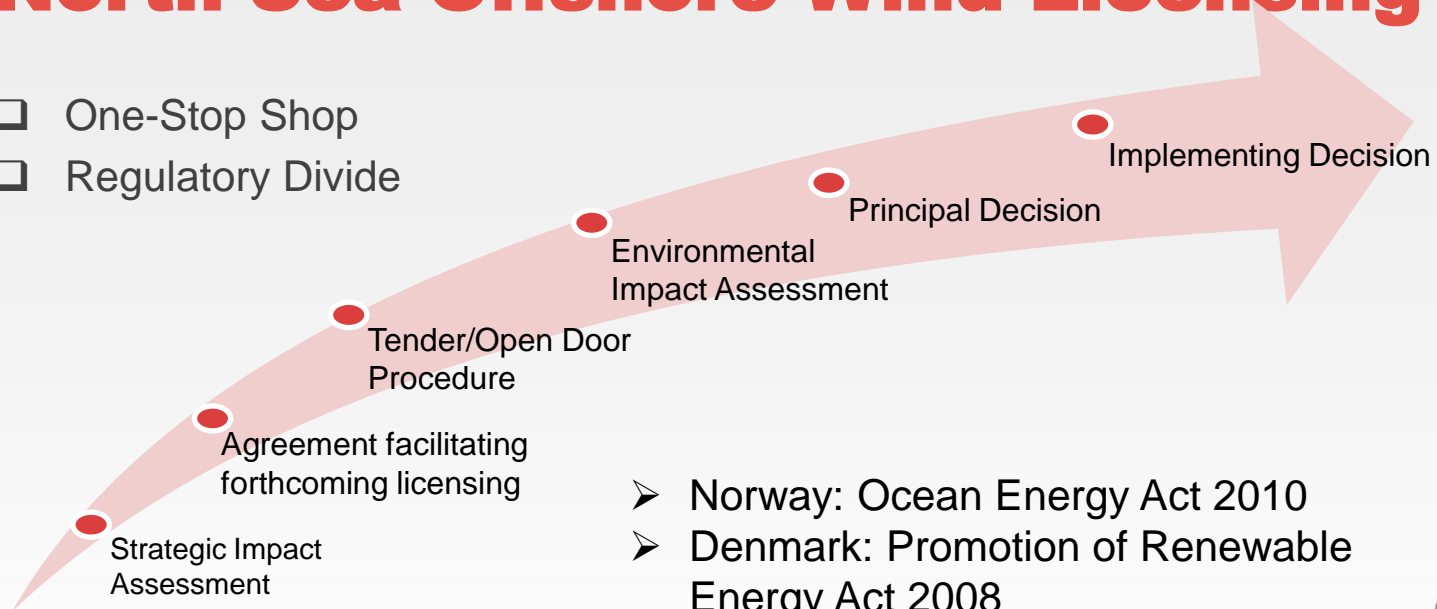
Licensing – A barrier to OWF deployment?

- Empirical studies and/or legal studies often cite licensing procedures as a barrier to increased deployment of OWF
- Renewable Energy Directive 2018/2001 Preamble
 - Recital 50, authorization bodies/institutions
“The lack of transparent rules and coordination between the different authorization bodies has been shown to hinder the deployment of energy from renewable sources”
 - Recital 51, license granting process
“Lengthy administrative procedures constitute a major administrative barrier and are costly”



Common/comparative Features in North Sea Offshore Wind Licensing

- ❑ One-Stop Shop
- ❑ Regulatory Divide



- Norway: Ocean Energy Act 2010
- Denmark: Promotion of Renewable Energy Act 2008
- UK: Planning Act 2008



Environmental Impact Assessment Directive 2011/92/EU

- An EIA (1) provides information about the likely impacts of proposed project on the environment and (2) facilitates participation in decision-making procedures
- Art 2(1) → `Member States shall adopt measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment`
- Art 4(2) → `For projects listed in Annex II (onshore & offshore windfarms), Member States shall determine whether the project shall be made subject to an assessment ... through (a) a case-by-case examination or (b) thresholds or criteria set by the Member State`
 - ❖ The EIA Directive is not necessarily binding on all North Sea States (UK and Norway in particular) but the substantive obligation is to a large extent incorporated into the national jurisdictions.



Rochdale Envelope Approach in OWF EIA`s

- The so-called Rochdale Approach to impact assessments is popularly used in OWF planning procedures. It stems from UK practice [2001] *Env LR 22* and it allows developers to assess potential impacts from wider parameters which does not constrain them in `legal straightjackets` early on in lengthy planning procedures. This implements flexibility into EIA procedures.
 - Example → Turbine size between 185 and 215 meters tall.
 - Example → Effects flowing from two or three different layout scenarios
- Assessing the likely effects of proposed windparks based on a `worst case` approach is a well settled practice in the UK and Denmark
 - It was used in all EIA`s pertaining to the Round 3 projects (Hornsea, East Anglia, Dogger Bank, Navitus Bay and Rampion)
- The practice is also explicitly acknowledged by The Planning Inspectorate (appropriate authority for handling applications for nationally significant infrastructure projects)
 - The guidance is largely void on interpretative guidance on how appropriate parameters should be used. It does however affirm the *Rochdale* case.

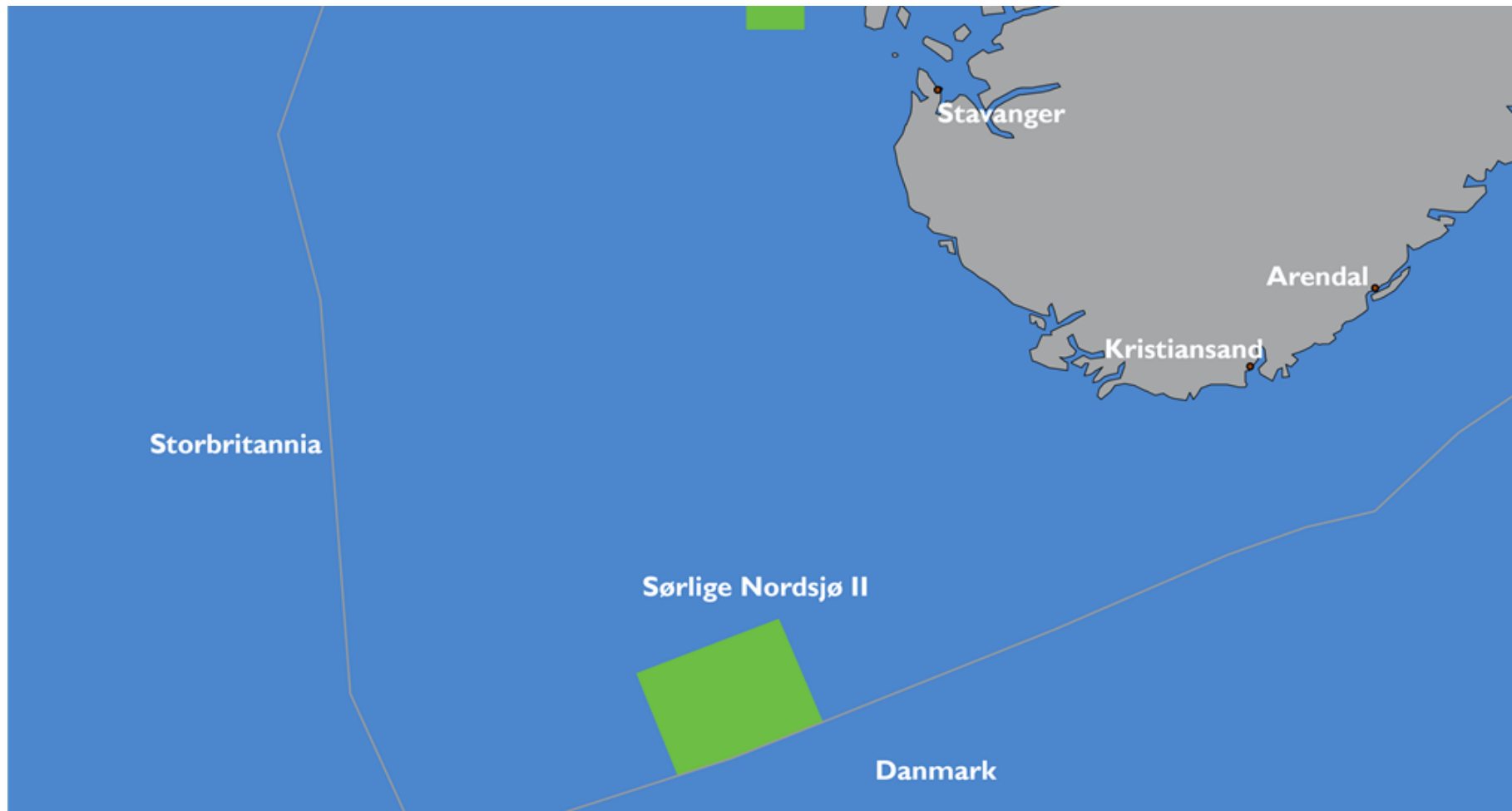


Rochdale Envelope Approach and Associated Issues

While the Rochdale approach may be seen as a necessary mechanism (welcomed by developers, authorities and legal scholars alike) in order to incorporate more flexibility into the EIA regime, the `not environmentally worse than` approach is not without potential fault:

1. Parameters are not constrained by defined thresholds and developers are left to their own devices/discretion in setting the appropriate scale due to lacking guidance or regulation
1. Where several developers apply excessive predictions (worst-case scenarios) within the same body of water, the predictions stack, creating an unrealistic outlook on potential environmental impacts in a cumulative sense within the same, larger area. Subsequent applications for marine renewables could therefore be denied a license to operate and construct as, for example, certain stressors on marine mammals or bird species have reached their toleration limit. This could lead to a race-to-the-water phenomenon
 - This is particularly troublesome in larger areas which have been reserved multiple developments, and also in areas bordering each other which are reserved for individual projects.
2. Stakeholder participation in the decision-making process becomes more complex, time-consuming and costly considering the EIA addresses a certain number of combinations of impacts which must be taken into account during consultations. There is an additional worry that such ambiguous project proposals, as evident from the wide parameters, are less likely to facilitate social acceptance. This could not only delay development due to resistance from national stakeholders, but also from bilateral consultations with adjacent Coastal States in circumstances where the proposed development is likely to have transboundary effects.







A Rochdale Remedy?

- The EIA Directive yields potential in filling the regulatory gap.
- Art 5(1) requires the developer to prepare and submit an environmental impact assessment report.
 - Art 5(1)(d) requires the developer to provide certain information in the report, including `... a description of **reasonable alternatives** studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment`
 - Can the reasonableness criteria be used to limit the discretion on part of the developer in setting unreasonably wide parameters in the EIA?





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