



Longlife

Legal Requirements

Report on legal sustainability requirements and building permission procedures. A comparison of the legal framework in Germany, Denmark, Poland and Lithuania.



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Sustainable, energy efficient and resource saving, residential buildings in consideration of unified procedures and new and adapted technologies

Project in the Baltic Sea Region Programme 2007-2013



Legal sustainability requirements and building permission procedures

A comparison of the legal framework
in Germany, Denmark, Poland and Lithuania



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Edited by Prof. Dr.-Ing. Klaus Rückert, Longlife lead partner and Longlife project partners

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Introduction

Environmental considerations in terms of sustainability requirements are gaining increasing awareness in relation to residential construction projects. Although this issue would appear to be more of a technical and economic topic, one should not underestimate the importance of the legal framework set out by the European Union (EU), its Member States and regional and local entities. This is why we have been asked to analyze this legal framework in detail in the context of the Longlife Project.

Scope of examination

The scope of this legal expertise is broad: It covers both material sustainability requirements and procedural questions relating to the building permission procedure. Since the effectiveness of sustainability requirements for buildings is decisively dependent upon how they are enforced and implemented, these two issues are very closely linked. A look at the national legal systems of Germany, Denmark, Poland and Lithuania reveals a multitude of national particularities, but also many commonalities, due to the steadily increasing influence of the law of the European Union. In particular the European Commission has realized that harmonizing the different legal systems, and thus preparing the Member States to undertake new steps in the field of sustainability in residential construction projects can create a great impact, as can be seen by the fact that the Commission now estimates the energy efficiency savings potential to be 20 % by the year 2020, which would result in savings of 60 billion euro.

Against this background, this legal expertise will first analyze and describe the European legal framework (Part B), then turn to a brief analysis of the different national legal systems of the Member States (Part C), after which, based on this foundation, it will analyze and describe the building permission procedures (Part D) and the material sustainability requirements (Part E) that apply in Germany, Denmark, Poland and Lithuania. The concept of sustainability in terms of the Longlife Project and this legal expertise is also very broad: even though energy efficiency is an increasingly important issue, the concept of sustainability is not limited to that aspect. Hence, this legal expertise also covers other aspects of sustainability such as water consumption and recycling, construction materials and building quality, as well as social aspects such as traffic, mobility and recreation.

Procedural method

This legal expertise is partly the result of external input to the Longlife Project, but is also to a great extent the result of the close cooperation between the partners in the Longlife Project. As German lawyers, we are competent to analyze and describe the European and German legal systems and requirements. With respect to the other jurisdictions, i.e. Denmark, Poland and Lithuania, this legal expertise is based on the contributions of the project partners and associated partners from those countries. Based on the initial discussions in the Vilnius workshop in January 2010, we developed a questionnaire which was then filled in by the partners, i.e. the Municipality of Roskilde for Denmark, Gdansk University of Technology in collaboration with the City of Gdynia for Poland, and the

Housing and Urban Development Agency (HUDA) of the Lithuanian Ministry of Environment.¹ This questionnaire is the principal source and base of this legal expertise.

As a consequence of this procedural method, there is some inconsistency in the level of information on the various countries.² Nonetheless, as a result of several follow-up conversations on the questionnaire, the discussions in the Saint Petersburg workshop in June 2010, as well as in bilateral talks with the project partners, we have been able to arrive at a certain minimum level of information for all of the countries. On some points we have supplemented the contributions of the project partners from Denmark, Poland and Lithuania with information obtained from other sources. Where this occurred, it is so designated in the legal expertise. The other information on the legal situation in these countries is based on the statements provided by the project partners. This approach made it possible to achieve a level of information that enables us to provide an overview and comparison of the legal requirements in Germany, Denmark, Poland and Lithuania.

The discussions during the mid-term conference in Saint Petersburg indicated that it might be an interesting and promising task to analyze the structure and requirements of Russian building law as well and to compare it to the other jurisdictions in a future stage of the Longlife Project.

¹ Our thanks go to Peter Karup and Ove Mørck (Municipality of Roskilde), Dr. Marek Krzaczek, Krzysztof Arendt and Romana Antczak (Gdansk University of Technology), Roman Witowski (City of Gdynia) and Simona Irzikeviciute (Lithuanian Housing and Urban Development Agency) for their valuable contributions to this legal expertise. Many thanks also to Julia Küppers for her support, input and coordination of the communication process, and to Prof. Dr.-Ing. Klaus Rückert and Maria-Ilona Kiefel for their leadership in and coordination of the Longlife Project and for their constant motivation throughout the working process.

² This is the case with Denmark and Poland, but above all with Lithuania. Due to changes within the Lithuanian Project Partner, the information base for this country is unfortunately particularly thin.

E. Summary, Conclusion and Recommendations

Already from the point of view of European legislation it becomes evident how multifaceted the concept of sustainability is. The abundance of regulations illustrates how confusing, fragmented and inconsistent the legal situation is. The European Commission is increasingly taking on the role of an engine for the promotion of sustainability in various areas of life, including the construction of residences. The law of the European Union exerts especially great influence over the promotion of energy efficiency. The European harmonization has made huge advances with respect to the requirements placed on building products. However, to date it has shown itself to be more hesitant with regard to other aspects of sustainability. It is to be assumed that European law will formulate sustainability requirements in other regulatory areas in the future. One of the key challenges in this will be to systematize the currently fragmentary regulations in a unified manner in order to create a coherent system to promote sustainability into which other innovative approaches can be integrated.

Since most of the acts of secondary legislation are issued in the form of Directives, as a rule, Member States have a certain scope of implementation in integrating the provisions of the European Union into their national legislation. This creates a significant potential, in particular in the areas of energy performance of buildings and the use of energy from renewable sources in the building sector. In this way, individual Member States will be able to realize their own regulatory approaches and instruments in order to achieve goals defined under EU law. In the process, on the one hand they can exceed the minimum values required under EU law and decide on their own way forward, while on the other hand the complexity of the regulatory approaches of the Member States of the European Commission will also make it possible to follow their application and practical effectiveness and to accumulate best practice experience in order to possibly prepare regulatory approaches on the European Union level in the future. Thus, the efforts of the Member States will also determine the extent to which the European Union will be able to push forward the ecological and economic (and possibly also social) aspects of sustainability in construction.

A comparison of the building law systems reveals essentially similar structures in Germany, Denmark, Poland and Lithuania. The building law in all of these countries breaks down into administrative building law and planning law. This means that all of the countries under examination are in a position to promote sustainability in the building sector, be it through administrative law, i.e. mandatory requirements that apply to every construction project, or through planning law and local plans. The competence to enact local plans shows that there are important additional players in all of the countries under examination that can promote sustainability in the construction of residences: the cities and municipalities in all of the countries are responsible, albeit to differing degrees, for formulating sustainability requirements for their territory or parts thereof in certain areas.

However, the situation is somewhat different with regard to the building permission proceedings. Although a building permission is mandatory in all of the countries (at least for larger residential houses), there are various divergences from country to country (in Germany even from Federal State to Federal State) with regard to the content of the building application documents, the persons who are entitled to draw up the documents and the duration of the building permission. Since the proceedings themselves are very complex, it comes as no surprise that no uniform permission proceeding can be filtered out of the various national jurisdictions. These differences in the proceedings create a serious obstacle to the crossborder rendering of services in the area of sustainable construction. Even where material sustainability requirements have meanwhile been harmonized, the differences in the features of the building permission proceedings means that these requirements are verified in different manners or in many countries not at all in practice. In this

respect, the European Directive on services has made an initial contribution to harmonization. However, further harmonization measures will be needed in the future in order to remove the existing obstacles and promote crossborder competition in the provision of products and services for the sustainable construction of residences. .

With regard to material sustainability requirements, our examination has shown that building codes can provide an important instrument for promoting sustainability in the construction sector. Although harmonization in the energy sector with respect to sustainability prerequisites has made the most progress in comparison to other sustainability criteria, at present there is a serious need for improvement. The EU is attempting to address the various points of criticism with its Directive 2010/31/EU, which contains important and positive changes, most significantly a unified definition of terms, a unified method of calculation, minimum requirements, financial incentive systems, the legally binding effect of the Energy Performance Certificates, a control system for Energy Performance Certificates and inspection reports, penalties and sanctions, etc. These provisions are extremely welcome, but will have to be exhaustively implemented in the Member States as well in order to achieve any positive effects.

- First and most important is the goal to achieve **common standards** and **categories** in terms of energy matters which either binding regulations or incentive systems can refer to.
- A best practice example of incentive systems is the assistance provided in Germany through the granting of **low-interest loans by KfW Bank**. By 2008, KfW Bank had already assisted 280,000 projects, thus saving 760,000 t of CO₂ and preserving ca. 220,000 jobs (*European Commission, 2009, Low Energy Buildings in Europe: Current State of Play, Definitions and Best Practice*). Denmark has adopted regulations beyond that, making it possible for municipalities to make designations in the local plans with regard to categories of low-energy houses. Energy efficiency can additionally be promoted by, for example, imposing certain sustainability prerequisites in the tendering process in public works contracting law. Such measures can help to set the tone and enforce sustainability prerequisites.
- Another best practice example is the **Act on the Promotion of Renewable Energies in the Heat Sector** (*Erneuerbare-Energien-Wärmegesetz - EEWärmeG*) in Germany, a national climate policy instrument to promote the use of renewable energies. There are two essential aspects to this:
 - **Duty of use:** Owners of buildings that are to be newly constructed must use renewable energies for part of their heat supply. All forms of renewable energy can be used, such as solar radiation energy, geothermal energy, ambient heating and biomass. Instead of using renewable energies, owners can insulate their buildings better, recover waste heat or use heat from district heating or combined heat and power systems.
 - **Expansion of heat grids:** Municipalities can also require connection to and use of such a grid in the interest of climate protection. The latter is also the case in Denmark to a limited extent by way of 15(2) no. 11 Planning Act.
- The state can play a pioneering role and set a positive example. It should itself realize certain models in order to better acquaint citizens with the subject matter involved.

Apart from energy requirements there are also **other sustainability criteria** which have to be addressed:

- Water also plays a role as a sustainability criterion. This primarily involves the **recycling of wastewater** and **rainwater**. There is a serious need for harmonization and catching up in this area. For example, while in Germany, the framework is determined on a national level and the Federal States fill in the specifics up to the municipal level, in Poland, there are no regulations on recycling of wastewater. In Denmark, on the other hand, municipalities can make designations by way of 15 (2) no. 25 Planning Act. This shows the wide variance in the regulatory systems.
- In Germany, another criterion is the **sealing of the land** which also puts sustainability at the forefront. Builders have to comply with the **designations in the development plan**, for instance in accordance with sec. 9 (1) no. 15 BauGB, which provides that certain areas have to be kept free for public and private green spaces, parks, sports grounds etc. They must further adhere to the site occupancy ratio, which means that they are only allowed to overbuild a certain part of their property. When imposing these designations, the municipalities have to keep in mind sec. 1a (1) sent. 1 BauGB which states that land is to be used **sparingly**. No such regulations can be found in the Polish or Danish building codes, although such provisions could combat the increasing sealing of the land, thus promoting sustainability in this regard as well.
- It must additionally be noted that there is far **too little awareness** of the fact that the criteria that are directly or indirectly linked to sustainability go much further than the sustainability requirements in the area of energy, which in most cases play a central role. True, their aims understandably have a high priority, but awareness should also be sharpened in **other areas**, from a legal point of view as well, in order to achieve a comprehensive improvement of sustainability on other levels. For example, traffic, mobility and recreation are seldom examined, even though this can also make an essential contribution to sustainability, e.g. by providing good public transportation to the residential areas, thus causing automobiles to be used less and in turn ultimately reducing CO₂ emissions. One consideration in the long term could be introducing an **evaluation scheme** with a more **comprehensive approach**, that provides for additional criteria along with energy requirements.

The subject of “legal sustainability requirements and building permission procedures” is very complex. However, it can be established that the motivation for shaping a legal framework for sustainability in the housing sector is growing. For instance, the implementation of the European Performance of Buildings Directive is a great milestone in terms of promoting energy efficiency. But the Member States are also endeavouring to enhance their performance, one example being Denmark’s introduction of a new stricter low energy class for housing by 2011 while making the former low energy class the standard for new buildings. Our examination has shown that municipalities may take an important role in going beyond national and European standards by setting stricter requirements on a local level. Facilitating and encouraging these local initiatives may contribute to the promotion of sustainability in the housing sector and trigger creative and innovative solutions. All of the countries examined are on a promising track, although the goals set by the EU are fairly demanding, so there is no reason to slow down in their efforts. It will be of particular interest to see how future challenges, such as climate change, will affect Member States’ policies and how the future European legislative framework will be transposed in the different jurisdictions.

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