

UNIVERSITY OF BERGEN

# **The Concept of Change in Offshore Windfarm Licensing**

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# Roadmap

1. Context
  - Offshore wind in the North Sea and policy objectives
  - Spatial footprint and the concept of change
  - General aspects of offshore windfarm (OWF) licensing in certain North Sea States
2. Environmental Impact Assessments (EIA) and Rochdale Approach
  - Substantive EIA obligation as shown from EIA Directive
  - Rochdale Approach as used in the OWF industry and associated legal issues



# **1. Setting The Scene – Spatial Footprint and the Concept of Change**



# The Concept of Change

- The dynamics of an ecosystem may introduce unforeseen environmental impacts and human dynamics may introduce improved technology which can reduce such impacts and also improve the capacity and efficiency of the turbines
- Certain socioeconomic and environmental parameters may change during the lifetime of a windfarm. In other words, the regulation governing the licensing procedure must necessarily reflect values of flexibility alongside predictability



# Offshore Wind in the North Sea

- North Sea houses approximately 79 per cent of the European cumulative capacity (25 GW)
- The average OWF? 788 MW capacity and 44 km (23 nm) from shore
- The world`s biggest OWF → Hornsea One 407 km<sup>2</sup>, 1,2 GW capacity. Hywind Tampen (in planning) 11 km<sup>2</sup>, 88 MW, smaller size and different purpose
- Policy context - EU Strategy on offshore renewable energy COM (2020) 741 → “... the Commission estimates that the objective to have an installed capacity of at least 60 GW of offshore wind ... by 2030, with a view to reach by 2050 300 GW ... is realistic and achievable”
  - OWF output can potentially be 450 GW by 2050. This would meet 30% of the EU`s energy demand in 2050.
  - In other words, as evinced by political will across North Sea States, deployment of offshore wind is likely to exponentially increase.



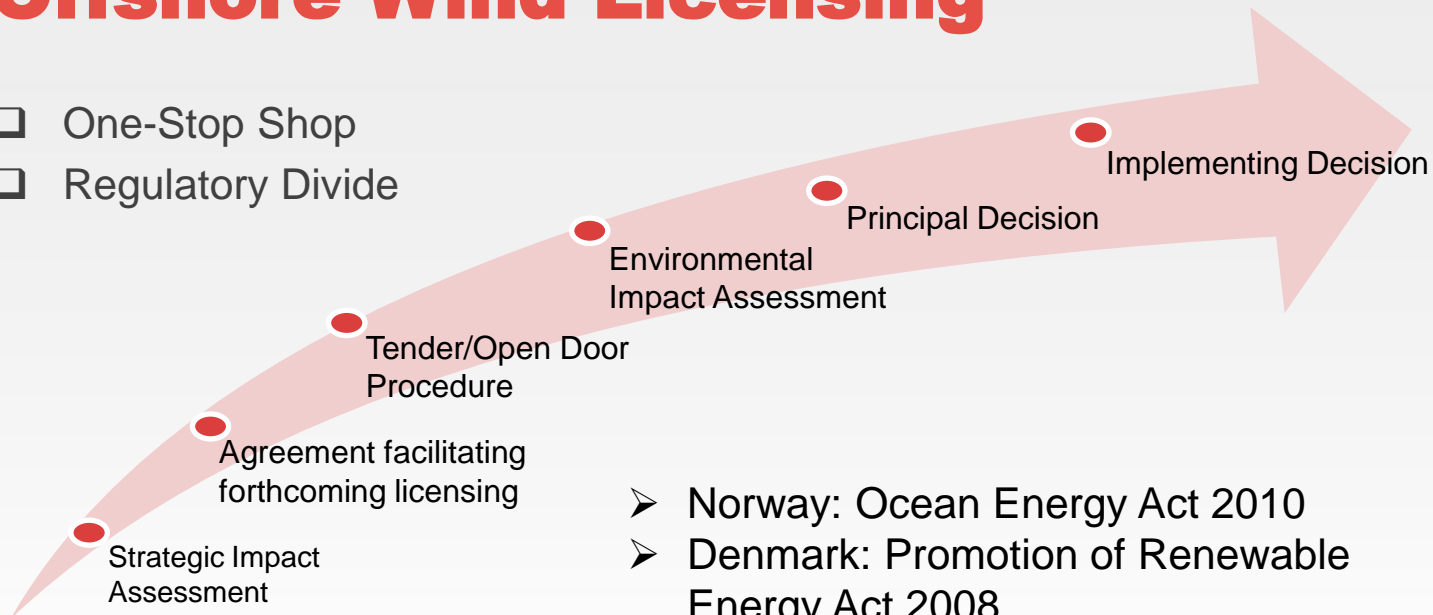
# Spatial Footprint

- OWF leave a significant footprint at sea which not only affects the environment but also other marine users. It may displace *inter alia*:
  - Navigation routes and shipping
  - Fishing
  - Recreational use and tourism
  - Military exercises
  - Low overflight
  - Natural environment – largely limited to the construction phase
  - Migratory animals, particularly birds
  - Other energy activities (i.e. oil & gas)



# Common 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



# **2. Environmental Impact Assessments – The Rochdale Approach**





# 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

The Battles of Kingsway Park: *R v Rochdale MBC ex parte Milne (No 1)* and *R v Rochdale MBC ex parte Tew* [1999] and *R v Rochdale MBC ex parte Milne (No 2)*

- Facts: Outline planning permissions for a business park with inadequate descriptions relating to the design, size or scale of the proposed development. In `round two`, the EIA was challenged for lacking detail of the design of the park.
- Judgment: `If a particular kind of project is expected to evolve over a number of years depending on market demand, there is no reason why a `description of the project` for the purposes of the Directive should not recognise that reality`. Sullivan J held in favour of the respondents.
  - The judgment gave fruition to the so-called Rochdale Envelope where `The assessment may conclude that a particular effect may fall within a fairly wide range. In assessing the `likely` effects, it is entirely consistent with the objectives of the Directive to adopt a cautious `worst case` approach. Such an approach will then feed through the mitigation measures envisaged under paragraph 2(c). It is important that they should be adequate to deal with the worst case, in order to optimise the effects of the development on the environment` (para 122)



# Rochdale Envelope Approach in Practice

- Assessing the likely effects of proposed windparks based on a `not environmentally worse than` 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 in Practice

- The Planning Inspectorate (UK), `Using the Rochdale Envelope` (2012)
  - Turbines
  - Nacelle height
  - Blade tip height/length
  - Minimum separation distances between turbines
  - Minimum clearance above mean sea level
- How is it used? Hornsea Three
  - Minimum and maximum parameters in relation to layout scenarios, use of different infrastructure, grid connections, commissioning timeline etc.
  - For instance → 300 turbines (most numerous, but smaller in capacity per turbine) v 160 turbines (maximum design scenario with largest turbines)

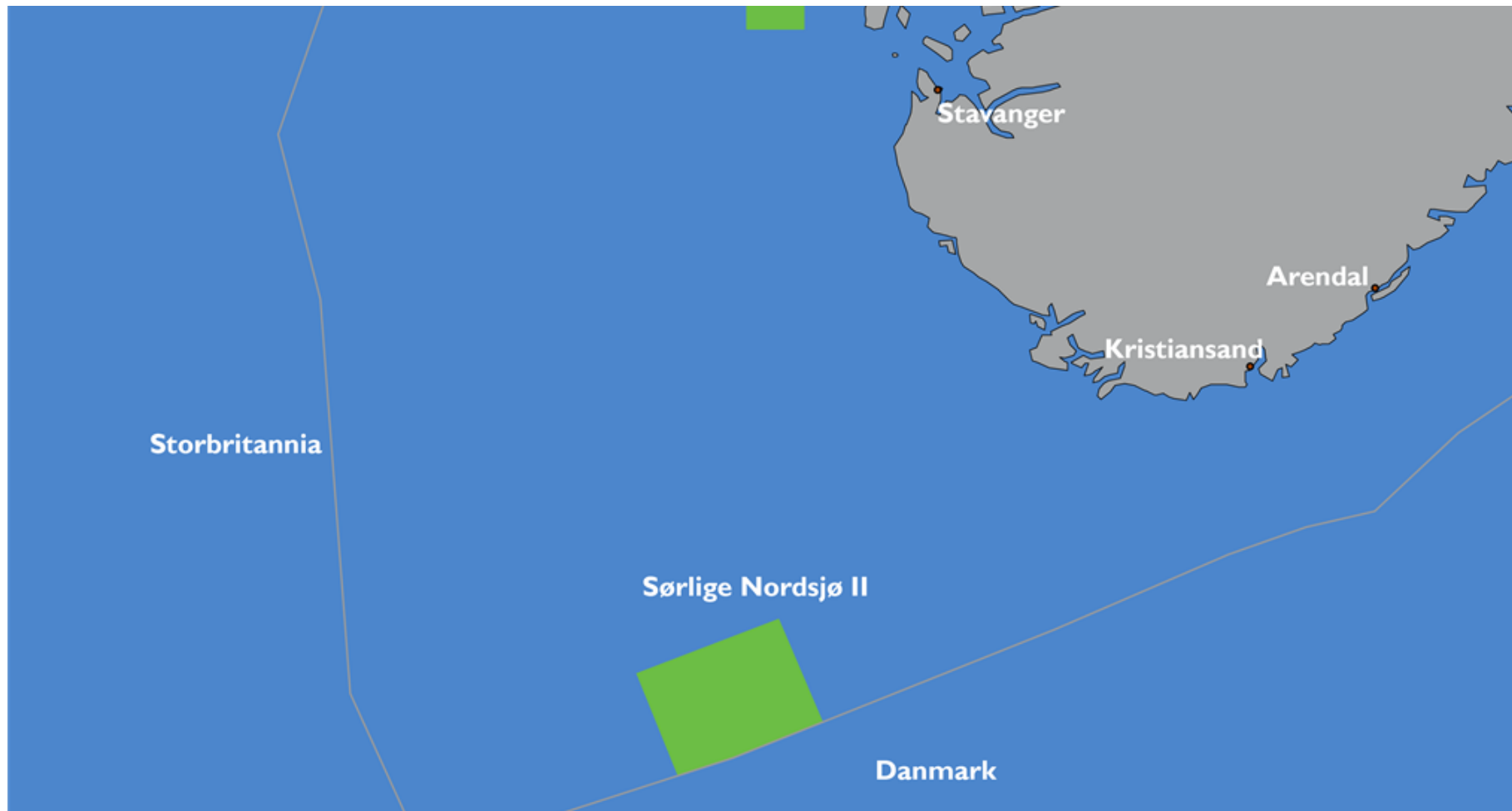


# Rochdale Envelope Approach and Associated Issues

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.





Storbritannia

Stavanger

Arendal

Kristiansand

Sørlige Nordsjø II

Danmark



# So how do we regulate the Rochdale Approach?

- It is likely that developers will set wide parameters in order to reserve space for subsequent change – as previously shown, this is potentially an issue
- So how do we police its abuse? Is there truly a regulatory gap here?
  - In the surprisingly limited literature on this issue, authors have suggested ways in which the consenting authority can implement pre-emptive measures in individual licensing rounds to prevent the approach and flexibility therein from being abused.





## 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?



## A Rochdale Remedy?

- The former wording in the provision was `outline the main alternatives`. The incorporation of `reasonable alternatives` is a recent development following the 2014 amendments to the EIA Directive
  - While the interpretation of alternatives does not require an extensive legal analysis to prove its connection to the Rochdale approach (see Annex IV in the Directive), this is not the case with the reasonableness criteria
  - There is no exhaustive definition to be found on the reasonableness term in the EIA Directive
    - But a guidance note (non-binding, but persuasive) to the EIA Directive prepared by the European Commission treats `reasonableness` as being synonymous with `feasibility`
    - Alternatives envisaged should accomplish the objectives of the project `... in a satisfactory manner, and should also be feasible in terms of technical, economic, political and other relevant criteria`



## Conclusion

- There is clearly a need for flexibility mechanisms in the regulatory EIA regime in individual North Sea States as evinced by the concept of change
- The Rochdale Approach and its wide-spread use in OWF licensing procedures is a welcomed flexibility mechanism but we must ensure that its use is adequately policed to promote legal certainty and prevent delays in decarbonizing the energy mix





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