

Camille Mialot

L'école de droit de SciencesPo Paris

THE EUROPEAN UNION AND URBAN PLANNING

During the study space, which took place in Warsaw, between the 15th and 20th of June, 2015, an interesting issue arose regarding the Warsaw metropolitan area's urban growth. One participant said that the metropolitan area's urban growth was not managed by a general master plan¹, given that it was, for a long period, managed under Communist principles, as opposed to the more liberal political regime now in place. There is of course a zoning ordinance in Warsaw city that regulates land use. But there is no master plan at the metropolitan level in the sense that there is no rational planning process – no future-oriented plan with goals and objectives for future land use and development.

Firstly, it is necessary to underline Warsaw's impact on me. From a French, and more precisely Parisian, point of view, Warsaw seems a tremendously fast-growing city, with a concentration of skyscrapers in the downtown area; this remains just a small stand of trees, so to speak, but in all likelihood it will soon be a forest. This is a city, and a metropolitan area, that requires planning. (Paris, by contrast, counts only one skyscraper in the city-proper: the ugly and much-regretted Tour Montparnasse.)

Secondly, whether or not it is a liberal interpretation of a more nuanced legal reality, the assertion that there was no master plan for Warsaw's metropolitan area knocked this French urban lawyer, who deals nearly daily the EU's rules, nearly unconscious. (Be assured this had nothing to do with an earlier vodka tasting.)

Before dealing directly with European law we must clarify some concepts. The distinction between the master plan and zoning² is not at all obvious for a French lawyer. The usual “*plan local d'urbanisme*” (PLU), or local urbanism plan, plays both roles: the PLU is a zoning ordinance with zones and building rules, while it also lays out a rational planning process. The core of the PLU is meant to be a document known as the “*plan d'aménagement et de développement durable*” (PADD), which can be translated as “sustainable growth plan”.

¹ H. Izdebski, *City Planning versus Metropolitan Planning Historical experience on the example of Warsaw*, presentation during Study Space Conference in Warsaw, June 17, 2016.

² Definition of the master plan: J. C. Juergensmeyer, T. E. Roberts, *Land use Planning and Development Regulation Law*, 3rd ed., Saint Paul 2013, p. 26.

The French urban code requires a consistency between the PADD and land use regulation. But we have few examples of judicial review of this required consistency. Thus, the PLU gives a unitary vision of land use regulation. The Catalan *Plan de Ordenación Urbanístico Municipal* (POUM) is quite similar, as it contains both a master plan and land use regulation. We must add a bit of nuance to the notion of a French unitary vision, however: sometimes, above the French PLU there exists a “*schéma de cohérence territoriale*” (SCOT) master plan, though this master plan is not binding with regards to building permits. The relationship between the SCOT and the PLU is that the PLU must be adopted in accordance with the SCOT; when a formerly-adopted PLU is contrary to a more recent SCOT, the PLU must be made consistent with the SCOT within an established timeframe.

In any case, in the moment, my intuition was that the lack of a master plan for the Warsaw metro area did not comport with European Union law. But, in the moment, I could not explain why. Twenty years ago, in 1995, Jean-Bernard Auby wrote a paper on the impact of European law on land-use law³. The focus of his paper was in fact broader than European Union law, strictly speaking, as it included the European Convention on Human Rights and the related protection of private property. The paper concluded with an assertion that EU environmental law requires the establishment of land-use regulation (“*servitudes d’urbanisme*”).

In this paper from two decades ago, “land-use regulation” did not mean “planning”, exactly, in the sense that it did not entail a rational, comprehensive planning process. To my mind, however, environmental considerations necessarily entail a future-oriented planning process, as we are going to see.

The issue is still a live one today. In his book *Droit européen de l’aménagement et du territoire*, Francis Haumont asserts that there is no obligation for States or local authorities to adopt master plans, even if they are in fact encouraged to⁴.

The notion advanced below is that the lack of a formal EU law forcing States and local authorities to adopt future-oriented planning processes does not, in fact, mean there is no obligation to do so. Moreover, the way EU law deals with matters such as the environment, waste management and all sectorial and general policies prohibit a specifically city-oriented perspective, and require the consideration of a larger frame of view – that of the metropolitan area.

³ J.-B. Auby, *Droit européen et droit de l’urbanisme*, L’Actualité juridique Droit administratif 1995, p. 662 sqq.

⁴ F. Haumont, *Droit européen de l’aménagement du territoire et de l’urbanisme*, 2nd ed., Bruxelles 2014, p. 73.

1. A SHORT REVIEW OF EU LAW: IS THERE ANY OBLIGATION TO ADOPT A MASTER PLAN?

A short review is naturally not an exhaustive one. The object of this review is to show, among other things, that some EU legal texts do directly concern urban planning. This point is important to underline, as it shows that despite the liberal framework of the European Union, planning is an important subject the Union deals with.

The Treaty on the Functioning of the European Union (TFEU) establishes two main goals that have much to do with planning: preserving the quality of the environment and promoting social and geographic cohesion. Both of these goals are broader than the administrative limits of a single city.

Article 174 of the TFEU specifies that, in order to promote its overall harmonious development, the Union shall develop and pursue actions leading to the strengthening of its economic, social and territorial cohesion. In particular, the Union shall aim to reduce disparities between the levels of development of the various regions and the under-development of the least favored regions. Article 191 of the TFEU stipulates that Union environmental policy shall seek to preserve, protect and improve the quality of the environment. These are EU policies, and therefore do not entail obligations for the States and local authorities.

Logically, it is in secondary Union law that we find obligations for the States and local authorities. In EU derived law, we find sectorial obligations to plan. First is the well-known EU directive called SEVESO. The last EU directive on industrial risk is the 2012/18 EU of July 4 2012 called Seveso III (the third generation of the SEVESO directive). Article 13 of SEVESO III stipulates that Member States must ensure that the objectives of preventing major accidents and limiting the consequences of such accidents for human health and the environment are taken into account in their land-use or other relevant policies, and that Member States must ensure that their land-use or other relevant policies, and the procedures for implementing these policies, take into account the long-term need to maintain appropriate safety distances, in order to protect areas of particular natural sensitivity or interest in the vicinity. The directive refers directly to the authorities tasked with urban planning.

The SEVESO directive imposes zoning, at minimum, with non-construction zones defined as a function of industrial risk. It also requires that those in the vicinity take measures to protect zones of particular natural sensitivity or interest. This signifies an extension of zoning beyond considerations of simple risk to human life, and it supposes, in particular, a far broader geographic coverage. From simple hazard zones around dangerous installations, the new directive requires a consideration of the natural surroundings and markedly expands the field of application of planning.

Next, there is Directive 2000/60/EC of the European Parliament and of the Council, of October 23 2000, establishing a framework for community action in the field of water policy. Article 11 of this directive specifies that each Member State must ensure the establishment for each river basin district, or for the section of an international river basin district within its territory, of a program of measures, taking into account the results of the water analyses. The water directive implies a plan that covers the entire district of a given water basin, and thus a broader zone of consideration. According to this logic, water management plans must account for and deal with major sealed-soil zones created by urbanization.

On a similar subject, directive 2007/60/ EU of October 23 2007, on the assessment and management of flood risks⁵, requires that Member States prepare flood hazard maps and flood risk maps either at the level of the river basin district or the unit of management. This directive is of particular relevance for cities, such as Paris or Warsaw, which are built along rivers. Flood risk is a central determinant of urbanization.

Directive 92/43/CEE, on the conservation of natural habitats and wild flora and fauna, is known as Natura 2000. Article 6 of this directive specifies that, for special areas of conservation, Member States must establish conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat. Article 10 adds that Member States must endeavor, where they deem necessary in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the management of features of the landscape which are of major importance for wild flora and fauna. Directive 92/43 refers directly to land-use planning and requires the creation of continuous ecological corridors.

Article 1 of directive 2002/49/EC on the assessment and management of environmental noise requires that Member States adopt action plans based upon noise-mapping results, with a view to preventing and reducing environmental noise where necessary and particularly where exposure levels can cause harmful effects on human health, and with a view to preserving environmental noise quality where it is good. For obvious reasons, this directive is of particular importance in zones around airports.

Article 28 of directive 2008/98/EC on waste specifies that waste management plans shall propose an analysis of the current waste management situation for a given geographical entity, as well as measures to be taken to improve environ-

⁵ J. Ponce, *Disasters and land use law: the Spanish case in the European union legal framework*, ILSA Journal of International and Comparative Law Summer 2012, p. 650 sqq.

mentally-sound preparations for re-use, recycling, recovery and disposal of waste, and also an evaluation of how a given plan will support the implementation of the objectives and provisions of this directive.

On the basis of the directives on ambient air quality and cleaner air, in case 237/07 Dieter Janecek, on July 28 2008, the European Court of Justice ruled that a directly-impacted citizen may legally enjoin the competent national authorities to draw up an action plan, even though under national law such a person may have other courses of action available to her to compel authorities to take measures to combat atmospheric pollution. The establishment of an action plan to fight atmospheric pollution seems to directly impact the transport sector. In reality, such a plan is far broader in its implications; it includes agricultural and industrial pollution, the pollution resultant from different types of heating systems, etc. In the long term, the geographic location of diverse activities will be affected by this directive.

Last but not least, directive 2001/42/EC of June 27 2001, on the assessment of the effects of certain plans and programs on the environment, specifies in Article 10 that Member States shall monitor the significant environmental effects of the implementation of plans and programs in order, *inter alia*, to identify unforeseen adverse effects at an early stage, and thus be able to undertake appropriate remedial action. In a first reading, this directive seems to present a paradox: in the absence of a plan or program, it would seem, there should be no environmental evaluation. The idea is not to restrict evaluation to public planning, however. In reality, any construction project resulting from a public decision is covered by the directive, even if this project is not undertaken by a public entity.

A directive dealing directly with land use failed to be adopted. On November 10 2006, the European Council decided to consult the European Economic and Social Committee on the proposal of a directive establishing a framework for the protection of soil and amending directive 2004/35/EC. But the project was withdrawn in 2014, having been deemed obsolete⁶. This directive would have specifically addressed the use of land and its protection, as well as phenomena of soil sealing. In reality, the proposed directive looked like a synthesis of several sectorial directives already in place.

As we can observe after this short review, there exists no formal obligation to adopt a master plan. Many policies, such as those for noise, air quality, flood-risk management, industrial risk, etc., imply a planning process and a future-oriented plan, but there is no obligation to gather those policies into a single master plan. The legal framework created by EU law looks like a puzzle that is missing some pieces.

⁶ Decision 2014/C 153/03.

2. A MASTER PLAN AT WARSAW'S METROPOLITAN LEVEL TO FULFILL ITS EU REQUIREMENTS?

As defined by Julian Conrad Juergensmeyer and Thomas E. Roberts, the master plan is a *rational planning process*, based on five criteria⁷:

- 1) it establishes future-oriented goals and objectives;
- 2) it is continuous, non-static and periodically reevaluated;
- 3) it is based upon present and projected conditions;
- 4) it is fair; and
- 5) it is comprehensive in the sense that it deals with city growth not in a sectorial manner but comprehensively, bringing together all the issues a city faces.

All the above-mentioned policies are future-oriented with goals and objectives based on evaluation and data gathering, and are fair in the sense that they are meant to lead to social and territorial cohesion, as laid out in Article 174 of the TFUE. But there is no comprehensive approach, as described in criterion no. 5.

Clearly, the aforementioned issues and related policies and plans are not limited to administrative borders of the city of Warsaw; each issue crosses the border of the city and involves the metropolitan area of Warsaw. Flood-risk management, air quality, industrial risk, and noise management are issues that affect the entire metropolitan area of Warsaw, divided by the Vistula River.

If we return to the example of France and the Paris metropolitan area, we find that there are many sectorial plans there, dealing with air quality, noise, flood-risk management of the river Seine, etc., and that each of these is established by a separate administrative authority. The result is a lack of a comprehensive overview, and the complete absence of what would be gained by a comprehensive view: an accounting for the relationship between each of the above issues, which are intimately linked to one another. Each of these plans was established individually, when its corresponding directive entered into force (even if directive 2001/42/EC concerns all planning processes).

In conclusion, the lack of a master plan for Warsaw's metropolitan area is hardly a disadvantage. The obligation to abide by European Union requirements offers the chance to design a master plan at the adequate level. Moreover, the coming dematerialization of plans⁸, and the prospect of using big-data⁹ as a predictive tool for the creation of those plans, means an opportunity to design master

⁷ J. C. Juergensmeyer, T. E. Roberts, *Land use Planning...*, p. 26.

⁸ See the experience of dematerialization in Santiago Chile, at <https://www.youtube.com/watch?v=eZB643ECe3U&feature=youtu.be>. And soon to be published in the weekly *le Moniteur des Travaux Publics*: C. Mialot, *La planification urbaine à l'heure de la Smart City*, *Le Moniteur des Travaux Publics et du Bâtiment* 2015, p. 84 sqq.

⁹ At <http://radar.oreilly.com/2012/06/predictive-data-analytics-big-data-nyc.html>.

plans with an unprecedented appreciation of the real functioning of a metropolitan area. This will be a revolution.

THE EUROPEAN UNION AND URBAN PLANNING

Summary

There is no master plan for the metropolitan area of Warsaw. Although, at first glance, urban planning seems to be largely unregulated by UE law, the addition of sectorial regulation on many important subjects as environment, risks etc. strongly encourage a future oriented regulation of land use a master plan. And precisely because such matters goes beyond the Warsaw city's administrative boundaries, the metropolitan area seems to appear as the proper level to adopt a master plan.

UNIA EUROPEJSKA I PRAWO ZAGOSPODAROWANIA PRZESTRZENNEGO

Streszczenie

Nie istnieje ogólny plan zagospodarowania przestrzennego dla obszaru metropolitalnego Warszawy. Choć na pierwszy rzut oka planowanie urbanistyczne wydaje się nie dość uregulowane przez prawo unijne. Dodanie sektorowych regulacji w prawie UE w wielu ważnych kwestiach jak na przykład środowisko powoduje, że przyszłe regulacje będą dążyły do stworzenia całościowego planu zagospodarowania przestrzennego. Taki plan obejmowałby swym zasięgiem obszary wykraczające poza administracyjne granice Warszawy.

BIBLIOGRAPHY

Auby J.-B., *Droit européen et droit de l'urbanisme*, L'Actualité juridique Droit administratif 1995

Haumont F., *Droit européen de l'aménagement du territoire et de l'urbanisme*, 2nd ed., Bruxelles 2014

Izdebski H., *City Planning versus Metropolitan Planning Historical experience on the example of Warsaw*, presentation during Study Space Conference in Warsaw, June 17, 2016

Juergensmeyer J. C., Roberts T. E., *Land use Planning and Development Regulation Law*, 3rd ed., Saint Paul 2013

Mialot C., *La planification urbaine à l'heure de la smart city*, Le Moniteur des Travaux Publics et du Bâtiment 2015

Ponce J., *Disasters and land use law: the Spanish case in the European Union legal framework*, ILSA Journal of International and Comparative Law Summer 2012

Web sites

<https://www.youtube.com/watch?v=eZB643ECe3U&feature=youtu.be>

<http://radar.oreilly.com/2012/06/predictive-data-analytics-big-data-nyc.html>

KEYWORDS

metropolitan, master plan, EU law, comparative urban planning

SŁOWA KLUCZOWE

obszar metropolitalny, plan główny, prawo UE, zagospodarowanie przestrzenne w ujęciu porównawczym