Council of the European Union

Brussels, 9 March 2023
(OR. en)

7216/23

Interinstitutional File: 2022/0367(NLE)

ENER 109
CLIMA 117
CONSOM 71
TRANS 86
AGRI 109
IND 97
ENV 219
COMPET 183
FORETS 23

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Request from CEE Bankwatch Network and ÖKOBÜRO for an internal review according to Article 10 of Regulation 1367/2006 2 (the 'Aarhus Regulation') and Commission Decision 2008/50/EC of 13 December 2007, in relation to the Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy

Delegations will find in the Annex the note on the above-mentioned subject, as received from CEE Bankwatch Network and ÖKOBÜRO.

20 February, 2023

Request for Internal Review under Title IV of the Aarhus Regulation

CEE Bankwatch Network, registered at Heřmanova 1088/8, Prague 7, 170 00, Czechia, and represented by Mr. Mark Martin, with the e-mail main@bankwatch.org, ('Applicant A')

And

ÖKOBÜRO - Allianz der Umweltbewegung, registered at Neustiftgasse 36/3a, 1070 Vienna, Austria, represented by Mr. Thomas ALGE, with the e-mail office@oekobuero.at, ('Applicant B')

hereby submit a

Request for an Internal Review of Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy[1] (the 'Contested Act')

to the Council of the European Union

according to Article 10 of Regulation 1367/2006[2] (the 'Aarhus Regulation') and Commission Decision 2008/50/EC of 13 December 2007.[3]

CEE Bankwatch Network and ÖKOBÜRO together are hereinafter referred to as 'the Applicants'.

[1] COUNCIL REGULATION (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJ L 335/36, 29.12.2022.
[2] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006) as amended by Regulation (EU) 2021/1767 (OJ L 356, 8.10.2021).
[3] Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts, OJ L 13, 16.1.2008.

Contents

5.1.2.3.3. Conclusion on breaches of the Alpine Convention and its protocols

5.2. Ground two: The wrong legal basis was chosen for adoption of the Contested Act

5.2.1. Breach of Article 192 of the TFEU

5.2.2. Breach of Article 8 of the Aarhus Convention

5.2.3. Breach of Articles 296 and 191 of the TFEU

5.2.3.1. The Council has included a disproportionately wide range of technologies in the Contested Act compared to those which can realistically contribute to increasing renewable energy supply within the period of the 'urgent situation'.

5.2.3.2. The Council's decision to include Articles 3, 5 and 6 was not proportionate or evidence-based.

5.2.3.2.1. The Council's decision to include Article 6, exempting renewable projects from EIAs in certain circumstances, goes far beyond what is needed to alleviate the barriers to renewable energy projects in the EU.

5.2.3.2.2. The Council's decision to include Article 3 on 'overriding public interest' is not proportionate in relation to the impact that the Habitats, Birds and Water Framework Directives have on realisation rates for renewable energy projects.

5.2.3.2.3. The Council's decision to include Article 5, restricting the EIA scope and permitting timeline for repowering projects, did not take account of the results of changes already introduced in the Renewable Energy Directive and was not based on real needs stemming from current evidence.

5.2.3.3. The Council's inclusion of Article 3 is particularly unlikely to be effective in speeding up renewable energy project permitting and is thus disproportionate to the stated aim of the Contested Act.

6. Conclusion

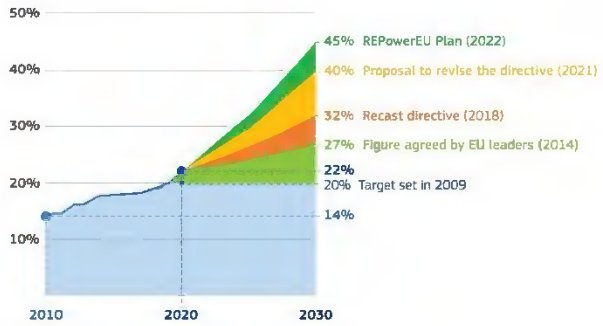
1. Introduction

The EU has for many decades sought to decrease the environmental impact of its activities by means of wide-ranging yet flexible legislation, designed to balance the need for economic activities with the need to preserve and improve the quality of the environment. Its legislation initially concentrated on nature conservation, decreasing pollution and protecting health, but during the last two decades, the need for the EU to decrease its greenhouse gas emissions and increase its share of renewable energy by means of binding targets has become an increasingly high priority.

Under the Paris Agreement, the EU adopted additional commitments to take action against climate change.[4] These commitments are reflected in the EU climate-neutrality objective for 2050 and the target to reduce greenhouse gas emissions by 55 per cent compared to 1990 levels by 2030. In 2018 the EU agreed to a binding target of at least 32 per cent renewable energy in total final energy consumption under the recast Renewable Energy Directive (2018/2001/EU),[5] but the European Commission's European Green Deal,[6] published in December 2019, made it clear that higher targets were needed.

On 14 July 2021, the European Commission proposed a revision of the Directive, including the target, until its 'Fit for 55' package.[7] However, before the revision of the Directive was completed, wholesale gas prices rocketed[8] and Russia launched its full-scale invasion of Ukraine on 24 February 2022, giving even greater urgency to the EU's efforts to boost renewable energy deployment. This led the European Commission to propose another round of amendments to the Renewable Energy Directive on 18 May 2022[9] as part of its so-called REPowerEU package, aimed at tackling the invasion's impacts on the EU energy sector.

Evolution of renewable energy targets



[4] United Nations, Paris Agreement, 2015.
[5] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast)
[6] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. The European Green Deal. COM/2019/640 final, 11.12.2019.
[7] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652. COM/2021/557 final, 14.07.2021.
[8] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling rising energy prices: a toolbox for action and support. COM/2021/660 final, 13.10.2021.
[9] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency. COM/2022/222 final, 18.05.2022.

Source: European Commission, Renewable energy targets, accessed 28 January 2023.

However, before the amendments to the Renewable Energy Directive had been agreed on (as of 18 February 2023, the final text has still not been adopted), the European Council, at its meeting of 20-21 October 2022, concluded the following:

'The European Council calls on the Council and the Commission to urgently submit concrete decisions on the following additional measures, as well as on the Commission proposals, having assessed their impact notably on existing contracts, including the non-affectation of long-term contracts, and taking into account the different energy mixes and national circumstances: (...)

f) fast-tracking of the simplification of permitting procedures in order to accelerate the rollout of renewables and grids including with emergency measures on the basis of Article 122 TFEU;'[10]

On 9 November 2022, the European Commission published a proposal for a Council Regulation laying down a framework to accelerate the deployment of renewable energy.[11] It contained several provisions which, in an attempt to speed up permitting for renewable energy projects, contradicted existing provisions of EU environmental legislation.

On 24 November 2022, it was announced that the text had been agreed on by the Council and the text was published **(Annex 1)**.

However, further changes took place at the Energy Council meeting on 19 December 2022, with the addition of a new article, which exacerbated the text's contradictions with existing EU environmental legislation. The text agreed on 24 November was replaced with the new one on the European Council's website.[12]

The Contested Act was formally adopted on 22 December 2022, and published in the Official Journal on 29 December 2022 **(Annex 2)**. It entered into force on the following day.

According to Article 10 of the Contested Act, it shall apply for a period of 18 months. Under Article 9, by 31 December 2023 at the latest, the Commission shall carry out a review of the Regulation *'in view of the development of the security of supply and energy prices and the need to further accelerate the deployment of renewable energy. It shall present a report on the main findings of that review to the Council. The Commission may, based on that report, propose to prolong the validity of this Regulation.'*

This Request for Internal Review concerns the Contested Act which in the Applicants' view, contains provisions which contravene existing EU environmental law.

The Applicants request the Council to review the Contested Act, and amend the Contested Act in order to ensure it complies with environmental law.

---

[10] European Council, European Council meeting (20 and 21 October 2022) – Conclusions, Brussels, 21 October 2022, EUCO 31/22, CO EUR 27, CONCL 6.
[11] European Commission. Proposal for a Council Regulation laying down a framework to accelerate the deployment of renewable energy, 9.11.2022, COM/2022/591 final.
[12] European Council, EU to speed up permitting process for renewable energy projects, Council of the EU Press release 24 November 2022, updated on 20 December 2022.

2. Legal framework

2.1 The Treaty on the Functioning of the European Union (TFEU)

The TFEU contains several provisions requiring not only the protection and preservation of the environment, but also its improvement. **Article 191 of the TFEU** states that that:

'1. Union policy on the environment shall contribute to pursuit of the following objectives:
*- **preserving, protecting and improving the quality of the environment**,*
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

***Union policy on the environment shall aim at a high level of protection** taking into account the diversity of situations in the various regions of the Union. It shall be based on the **precautionary principle and on the principles that preventive action should be taken**, **that environmental damage should as a priority be rectified at source** and that the polluter should pay. […]*

*In preparing its policy on the environment, **the Union shall take account of:***

- ***available scientific and technical data,***
- *environmental conditions in the various regions of the Union,*
- ***the potential benefits and costs of action or lack of action,***
- *the economic and social development of the Union as a whole and the balanced development of its regions. […]*' (Our emphasis)

Article 192 of the TFEU makes it clear that in most cases, action to be taken to achieve the environmental objectives in Article 191 should be taken via the **ordinary legislative procedure**:

'1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;
(b) measures affecting:
- *town and country planning,*
- *quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,*
- *land use, with the exception of waste management;*
- *measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.*

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph. (...)'

Article 194 of the TFEU also underlines the need to 'preserve and improve' the environment with

regard to the energy sector:

'1. In the context of the establishment and functioning of the internal market and ***with regard for the need to preserve and improve the environment****, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:*
(a) ensure the functioning of the energy market;
(b) ensure security of energy supply in the Union;
(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
(d) promote the interconnection of energy networks.'

Article 122 of the TFEU was used as the legal basis for the adoption of the Contested Act. Article 122 is part of the TFEU's chapter on economic policy and allows the Council to take emergency decisions in two cases:

'Article 122

1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.'

In this case, the Council was relying on the first paragraph to justify using Article 122, as confirmed by the first paragraph of the Regulation: *'Having regard to the Treaty on the Functioning of the European Union, and in particular Article 122(1) thereof, [...]'.*

Rapidly increasing the deployment of environmentally sustainable forms of renewable energy may be considered a legitimate part of an emergency response to the situation that the EU has faced since mid-2021, even if it cannot produce immediate results. However, the Contested Act goes considerably wider than economic measures.

It contains several articles which are in contradiction with existing EU environmental law, as well as several provisions which are unclear and may undermine the uniform and fair application of environmental law across the EU. These are presented below in the section on the Scope of the Request.

Article 296 of the TFEU stipulates that *'Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality.*

Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.'

The Contested Act has been adopted in the form of a Regulation in line with this Article, and does include text that attempts to state the reasons on which it is based. However, as explained below, the Applicants find this insufficient to demonstrate compliance with the principle of proportionality.

2.2 Article 8 of the Aarhus Convention[13]

Article 8 of the Aarhus Convention regulates '*public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments*', as follows:

'Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

To this end, the following steps should be taken:

(a) Time-frames sufficient for effective participation should be fixed;

(b) Draft rules should be published or otherwise made publicly available; and

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.'

2.3 The Strategic Environmental Assessment (SEA) Directive (2001/42/EC)[14]

The SEA Directive aims to integrate environmental considerations into the preparation, adoption and implementation of plans and programmes, in order to promote sustainable development. Applying the Directive should lead to more sustainable and resource-efficient development through systematic appraisal of different options during planning. To achieve this, an environmental assessment must be carried out according to the Directive's provisions for plans and programmes identified as likely to have significant effects on the environment.

The SEA Directive applies to a wide range of public plans and programmes, including land use, transport, energy, waste and agriculture. The SEA must be undertaken at the same time as a plan or programme is being prepared, so that it can influence the decision-making process as it goes along. First, a scoping process is carried out to establish what should be assessed, then a report is prepared, which also needs to include reasonable alternative courses of action. A public consultation has to be held, and the results need to be taken into account while finalisation of the plan or programme. It also needs to be demonstrated how they have been taken into account. Once a decision is taken to accept the plan or programme, monitoring of the environmental impacts of the implementation of the Directive is mandatory.

In the Contested Act, application of the SEA Directive is treated as a substitute for applying the EIA Directive for renewable energy projects in designated renewable areas.

2.4 The Environmental Impact Assessment (EIA) Directive (2011/92/EU, amended by 2014/52/EU)[15]

Under the EIA Directive, major building or development projects in the EU must first be assessed for their impact on the environment. This is done before the project can start.

An EIA is always required for projects such as thermal power stations and other combustion

[13] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), done at Aarhus, Denmark, on 25 June 1998.
[14] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.
[15] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

installations with a heat output of 300 megawatts or more; dams where the amount of water stored exceeds 10 million cubic metres; or overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km. An EIA is also required for changes or extensions of projects where the change or extension itself meets the Directive's thresholds requiring a mandatory assessment, and under Article 4(2) and point 13 of Annex II of the EIA Directive, Member States need to carry out a determination whether *'(a) Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I)'* shall be made subject to an assessment.

For other projects listed in Annex II, including wind farms and hydropower projects below the thresholds cited above, it is up to individual EU Member States to decide whether an EIA is needed on a case-by-case basis or by setting specific criteria, such as the location, size or type of project. Solar photovoltaic plants are not mentioned in the Directive, but need to be screened to see whether their environmental impact is such that an EIA should be carried out. This is likely if the site is particularly sensitive.

The Directive also stipulates how the public is informed about the project and the fact that it is subject to an EIA procedure and how those affected can participate in the decision-making process. The public is also informed of the decision afterwards and can then challenge it before the courts. The EIA procedure therefore guarantees a certain level of transparency with regard to the decision-making process for the most environmentally harmful types of public and private projects.

The EIA process significantly differs from the SEA process in terms of the level of detail it can attain, due to its focus on specific projects, rather than wider plans or programmes. The EIA Directive also provides more precise instructions on the content of the report and the requirements for public consultations and access to justice than the SEA Directive.

As explained below in Section 5.1.2.1., the Contested Act conflicts with most of the provisions in the EIA Directive with regard to renewable energy projects planned in a 'dedicated renewable or grid area', by setting up a parallel system, based on different criteria for deciding whether a project needs an EIA or not. Its provisions on repowering projects also conflict with the provisions of the EIA Directive due to setting impossibly short deadlines for permitting and limiting the scope of the EIA, where required.

2.5 The Habitats Directive (92/43/EEC)[16] and Birds Directive (2009/147/EC)[17]

The Habitats Directive aims to promote the maintenance of biodiversity and forms the cornerstone of the EU's nature conservation policy, together with the Birds Directive. It establishes the EU-wide Natura 2000 ecological network of protected areas, and aims to safeguard them against potentially damaging developments.

Article 6 is of particular relevance concerning the development of renewable energy projects, and the Contested Act partly conflicts with it, as explained below in section 5.1.2.2.

'(...) 2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely

[16] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.
[17] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

Thus, the Habitats Directive includes clear provisions for deciding whether a project impacting the Natura 2000 network can go ahead or not. The Habitats Directive also stipulates, in its **Article 7**, that:

'Obligations arising under Article 6 (2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4 (4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4 (1) or similarly recognized under Article 4 (2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

Thus, the obligation to carry out an appropriate assessment also applies to sites protected under the Birds Directive, as does the condition that the Member State authority '*shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned'.*

The Birds Directive also stipulates different potential grounds for derogations than the Habitats Directive, in its **Article 9**.

'1. Member States may derogate from the provisions of Articles 5 to 8, where there is no other satisfactory solution, for the following reasons:

(a) — in the interests of public health and safety,
— in the interests of air safety,
— to prevent serious damage to crops, livestock, forests, fisheries and water,
— for the protection of flora and fauna;

(b) for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.'

The Commission is also responsible for ensuring that the consequences of the derogations referred to do not harm the aims of the Directive:

'4. On the basis of the information available to it, and in particular the information communicated to it pursuant to paragraph 3, the Commission shall at all times ensure that the consequences of the

derogations referred to in paragraph 1 are not incompatible with this Directive. It shall take appropriate steps to this end.'

In 2016 the European Commission undertook a fitness check evaluation of both the Habitats and Birds Directives, finding that they are fit for purpose.[18] The evaluation found that the clarity of these Directives was also appreciated by project developers.[19]

2.6 The Water Framework Directive (2000/60/EC)[20]

The Water Framework Directive requires Member States to use River Basin Management Plans and Programmes of Measures to protect, prevent deterioration and – where necessary – restore water bodies in order to reach good chemical and ecological status. This was originally supposed to be achieved by 2015, but this was achieved for only around 40 per cent of water bodies.[21] 2027 is now the final deadline.

In terms of renewables permitting, the most relevant part of the Water Framework Directive is Article 4, paragraph 7, which often applies to hydropower:

'7. Member States will not be in breach of this Directive when:

— failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or

— failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities

and all the following conditions are met:

(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;

(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;

(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and

(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.'

The Contested Act is partly in conflict with these provisions, as explained below in section 5.1.2.2.

The European Commission completed a fitness check of the Water Framework Directive in 2019 and again found that the legislation is fit for purpose.[22]

---

[18] Commission Staff Working Document Fitness Check of the EU Nature Legislation (Birds and Habitats Directives) Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, SWD(2016) 472.
[19] Ibid, p 58: "They argue that the Directives provide a clear legal framework and that, in their absence, a loss of legal certainty would be expected to increase administrative burdens."
[20] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.
[21] European Environment Agency, Ecological status of surface waters in Europe, 18 November 2021.
[22] Commission Staff Working Document Fitness Check of the Water Framework Directive, Groundwater Directive, Environmental Quality Standards Directive and Floods Directive, SWD(2019) 439 final

Moreover, it concludes that '*To achieve sustainable protection and use of water resources, which will become even more important due to climate change, it is particularly relevant to ensure a balanced and coherent approach to the sometimes competing uses of water by different sectors. Energy and agriculture are particularly pertinent in this respect. It will also be necessary to consider how further integration of the Directives with other policy areas can best be advanced in a mutually supportive way; this is especially important in view of the emerging challenges for water management caused by climate change and pollutants of emerging concern. Work in this field includes the allocation of funds under other policies in a way that promotes, and in no way hinders, the achievement of the Directives' objectives.*'

2.7. The Alpine Convention

The Alpine Convention is a treaty between eight Alpine countries and the European Union that aims to protect the natural environment and promote sustainable development in the Alpine region. The countries that are party to the Convention are Austria, France, Germany, Italy, Liechtenstein, Monaco, Slovenia, and Switzerland. Additionally, the European Economic Community (now: EU) is a party to the Convention.

The Alpine Convention was signed in 1991 and entered into force in 1995. It is a comprehensive framework agreement that covers a wide range of issues related to the Alpine region, including protection of natural resources, biodiversity, tourism, transport, and energy. The Convention also promotes cooperation between the signatory parties in the areas of spatial planning, project permission procedures, the use of resources, research, education, and cultural exchange.

The EU's commitment to implementing the Alpine Convention is reflected in the EU Strategy for the Alpine Region (EUSALP), which was launched in 2015. The EUSALP seeks to address common challenges in the Alpine area and promote sustainable development, and it is closely aligned with the objectives of the Alpine Convention.

The EU is a member of the Alpine Convention since its signature on 11 November 1991, followed by its ratification on 4 March 1996 and entry into force on 14 April 14 1998.[23] It also signed and/or ratified the following protocols to the Alpine Convention:

a) Spatial planning and sustainable development (just signed on 20 December 1994, not ratified)

b) Mountain farming (signed on 20 December 1994, ratified on 6 July 2006, entry into force 6 October 2006)[24]

c) Nature protection and landscape conservation (just signed on 20 December 1994, not ratified)

d) Tourism (signed on 9 January 2006, ratified on 6 July 2006, entry into force 6 October 2006)[25]

e) Energy (signed on 9 January 2006, ratified on 6 July 2006, entry into force 6 October 2006)[26]

f) Soil conservation (signed on 9 January 2006, ratified on 6 July 2006, entry into force 6 October

[23] Council Decision of 26 February 1996 concerning the conclusion of the Convention on the protection of the Alps (Alpine Convention) 96/191/EC.
[24] Council Decision 2006/655/EC of 19 June 2006 on the approval, on behalf of the European Community, of the Protocol on the implementation of the 1991 Alpine Convention in the field of mountain farming (OJ L 271, 30.9.2006, pp. 61-62)
[25] Council Decision 2005/923/EC of 2 December 2005 on the signing on behalf of the European Community of the Protocol on Soil Protection, the Protocol on Energy and the Protocol on Tourism to the Alpine Convention (OJ L 337, 22.12.2005, pp. 27-28) and Council Decision 2006/516/EC of 27 June 2006 on the conclusion, on behalf of the European Community, of the Protocol on Soil Protection, the Protocol on Energy and the Protocol on Tourism to the Alpine Convention (OJ L 201, 25.7.2006, pp. 31-33).
[26] Council Decision 2005/923/EC of 2 December 2005 on the signing on behalf of the European Community of the Protocol on Soil Protection, the Protocol on Energy and the Protocol on Tourism to the Alpine Convention (OJ L 337, 22.12.2005, pp. 27-28) and Council Decision 2006/516/EC of 27 June 2006 on the conclusion, on behalf of the European Community, of the Protocol on Soil Protection, the Protocol on Energy and the Protocol on Tourism to the Alpine Convention (OJ L 201, 25.7.2006, pp. 31-33).

2006)[27]

g) Transport (signed on 12 October 2006, ratified on 25 June 2013, entry into force 25 September 2013)[28]

h) Additional Protocol for Monaco (signed on 20 December 1994, ratified on 14 January 1998, entry into force 22 March 1999)[29]

The Contested Act is in violation of the protocol on Energy, as well as parts of the protocol on soil conservation, most notably Article 9, as explained below in point 5.1.2.3.

[27] Council Decision 2005/923/EC of 2 December 2005 on the signing on behalf of the European Community of the Protocol on Soil Protection, the Protocol on Energy and the Protocol on Tourism to the Alpine Convention (OJ L 337, 22.12.2005, pp. 27-28) and Council Decision 2006/516/EC of 27 June 2006 on the conclusion, on behalf of the European Community, of the Protocol on Soil Protection, the Protocol on Energy and the Protocol on Tourism to the Alpine Convention (OJ L 201, 25.7.2006, pp. 31-33).
[28] Council Decision 2007/799/EC of 12 October 2006 on the signature, on behalf of the Community, of the Protocol on the Implementation of the Alpine Convention in the field of transport (OJ L 323, 8.12.2007, pp. 13-14) and Council Decision 2013/332/EU of 10 June 2013 on the conclusion on behalf of the European Union of the Protocol on the implementation of the 1991 Alpine Convention in the field of transport (OJ L177, 28.6.2013, p. 13)
[29] Council Decision 98/118/EC of 16 December 1997 concerning the conclusion of the Protocol of Accession of the Principality of Monaco to the Convention on the Protection of the Alps (OJ L 33, 7.2.1998, p. 21)

3. Scope of the request

The Applicants request an internal review of the following Articles of the Contested Act:

'*Article 1*

Subject matter and scope

This Regulation establishes temporary rules of an emergency nature to accelerate the permit-granting process applicable to the production of energy from renewable energy sources, with a particular focus on specific renewable energy technologies or types of projects which are capable of achieving a short term acceleration of the pace of deployment of renewables in the Union.

This Regulation applies to all permit-granting processes that have a starting date within the period of its application and is without prejudice to national provisions establishing shorter deadlines than those laid down in Articles 4, 5 and 7.

Member States may also apply this Regulation to ongoing permit granting processes which have not resulted in a final decision before 30 December 2022, provided that this shortens the permit granting process and that pre-existing third party legal rights are preserved.'

'Article 3

Overriding public interest

1. *The planning, construction and operation of plants and installations for the production of energy from renewable sources, and their connection to the grid, the related grid itself and storage assets shall be presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in the individual case, for the purposes of Article 6(4) and Article 16(1)(c) of Council Directive 92/43/EEC ([30]), Article 4(7) of Directive 2000/60/EC of the European Parliament and of the Council ([31]) and Article 9(1)(a) of Directive 2009/147/EC of the European Parliament and of the Council ([32]). Member States may restrict the application of those provisions to certain parts of their territory as well as to certain types of technologies or to projects with certain technical characteristics in accordance with the priorities set in their integrated national energy and climate plans.*

2. *Member States shall ensure, at least for projects which are recognised as being of overriding public interest, that in the planning and permit-granting process, the construction and operation of plants and installations for the production of energy from renewable sources and the related grid infrastructure development are given priority when balancing legal interests in the individual case. Concerning species protection, the preceding sentence shall only apply if and to the extent that appropriate species conservation measures contributing to the maintenance or restoration of the populations of the species at a favourable conservation status are undertaken and sufficient financial resources as well as areas are made available for that purpose.'*

'Article 5

Repowering of renewable energy power plants

3. *The permit-granting process for the repowering of projects, including the permits related to the upgrade of the assets necessary for their connection to the grid where the repowering results in*

[30] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7).
[31] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1).
[32] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010, p. 7).

an increase in capacity, shall not exceed 6 months including environmental impact assessments where required by relevant legislation.

4. *Where the repowering does not result in an increase in the capacity of the renewable energy power plant beyond 15%, and without affecting the need to assess any potential environmental impacts pursuant to paragraph 3 of this Article, grid connections to the transmission or distribution grid shall be permitted within 3 months following application to the relevant entity unless there are justified safety concerns, or there is technical incompatibility with the system components.*

5. *Where the repowering of a renewable energy power plant, or the upgrade of a related grid infrastructure which is necessary to integrate renewables into the electricity system, is subject to a determination whether the project requires an environmental impact assessment procedure or an environmental impact assessment pursuant to Article 4 of Directive 2011/92/EU, such prior determination and/or environmental impact assessment shall be limited to the potential significant impacts stemming from the change or extension compared to the original project. (...)'*

'Article 6

Acceleration of the permit-granting process of renewable energy projects and for related grid infrastructure which is necessary to integrate renewables into the system

Member States may exempt renewable energy projects, as well as energy storage projects and electricity grid projects which are necessary to integrate renewable energy into the electricity system, from the environmental impact assessment under Article 2(1) of Directive 2011/92/EU and from the species protection assessments under Article 12(1) of Directive 92/43/EEC and under Article 5 of Directive 2009/147/EC, provided that the project is located in a dedicated renewable or grid area for a related grid infrastructure which is necessary to integrate renewable energy into the electricity system, if Member States have set any renewable or grid area, and that the area has been subjected to a strategic environmental assessment in accordance with Directive 2001/42/EC of the European Parliament and of the Council (8). The competent authority shall ensure that, on the basis of existing data, appropriate and proportionate mitigation measures are applied in order to ensure compliance with Article 12(1) of Directive 92/43/EEC and Article 5 of Directive 2009/147/EC. Where those measures are not available, the competent authority shall ensure that the operator pays a monetary compensation for species protection programmes in order to secure or improve the conservation status of the species affected.'

The other provisions of the Contested Act may also prove confusing and difficult to apply in reality due to short deadlines and potential clashes with domestic legislation, however the aforementioned Articles are the ones which in the Applicants' view contravene existing environmental legislation.

4. Admissibility

Article 10 of the Aarhus Regulation entitles any non-governmental organisation that meets the criteria set out in Article 11 of the Aarhus Regulation to make a request for internal review to the Union institution or body that adopted an administrative act, as defined in Article 2(1)(g) Aarhus Regulation, on the grounds that such an act or omission contravenes environmental law.

This request fulfils the requirements of this provision because the Applicants meet the criteria set out in Article 11 of the Aarhus Regulation, and the Contested Act constitutes an administrative act in the sense of Article 2(1)(g) of the Aarhus Regulation.

4.1. Applicant A meets the criteria set out in Article 11 of the Aarhus Regulation

CEE Bankwatch Network has previously been a co-applicant for an internal review request under the Aarhus Regulation which was found to be admissible, namely the request submitted by ClientEarth on 3 June 2022 to the European Commission requesting an internal review of the Commission Delegated Regulation (EU) 2022/564 of 19 November 2021 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (the 5th Union list of projects of common interest), registered on 8 June 2022.

In the Commission's reply to ClientEarth, dated 7 November 2022, the Commission confirmed that '*After examining your application, the Commission concludes that the applicants fulfil the entitlement criteria under Article 11 of the Aarhus Regulation and are thus entitled to make a request for internal review.*'

Thus, there is no doubt that CEE Bankwatch Network fulfils the criteria under Article 11(1) of the Aarhus Regulation and is thus admissible to submit the present Request.

Nevertheless, CEE Bankwatch Network submits the documents listed in points 1-3 of the Annex to Decision 2008/50, specifically:

1. The statute of CEE Bankwatch Network in its current form, as published in the Czech Register of Associations, administered by the Municipal Court in Prague – see **Annex 3**, in Czech and in English;

2. Annual activity reports of CEE Bankwatch Network for the years 2020 and 2021.[33]

3. An official extract from the Register of Associations, administered by the Municipal Court in Prague, Section L, File No. 9452., dated 25 March 2021, which proves CEE Bankwatch Network's incorporation as a legal person under Czech law since 2014, i.e. for well over 2 years at the time of submission – see **Annex 4**, in Czech.

These documents demonstrate that CEE Bankwatch Network meets all the criteria under Article 11(1) of the Aarhus Regulation:

Article 11(1)(a): Article 2(1) of its Statute (**Annex 3**, p. 13) proves that CEE Bankwatch Network is incorporated in the form of a legally recognized, non-profit environmental association. This is also confirmed by the extract of the Czech Companies Register (**Annex 4**). Both documents also show that CEE Bankwatch Network is a legal person in accordance with Czech national law.

Article 11(1)(b): Article 3 of CEE Bankwatch Network's Statute demonstrates that its primary stated objective is promoting environmental and social protection and to promote the involvement of the public in decision-making. The organisation's mission is to prevent the environmentally and socially harmful impacts of international development finance, and to promote alternative solutions and public

[33] CEE Bankwatch Network, Annual Report 2020 and Annual Report 2021.

participation.

Article 11(1)(c): The Extract from the Czech Register of Associations demonstrates that CEE Bankwatch Network has existed for more than two years. The activity reports provide evidence that CEE Bankwatch Network is actively pursuing the objectives mentioned above.

Article 11(1)(d): This Request aims to ensure that the EU's much-needed acceleration of renewable energy is carried out in line with existing EU environmental law and strikes a careful balance between increasing the EU's share of renewable energy and ensuring nature protection. This objective is fully in line with CEE Bankwatch Network's statutory purpose described above, as the mitigation of climate change and the prevention of harm to nature fall within the organisation's mission and objectives.[34]

This is also reflected in the organisation's entry in the EU's Transparency Register, which also gives an overview of EU legislation that CEE Bankwatch Network is interested in, as well as an overview of which EU public consultations the organisation has contributed to in recent years.[35]

4.2. Applicant B meets the criteria set out in Article 11 of the Aarhus Regulation

Applicant B, ÖKOBÜRO, undoubtedly fulfils the criteria listed under Article 11(1) of the Aarhus regulation and elaborates on its entitlement to submit the present Request as follows:

Article 11(1)(a) states that non-governmental organisations submitting a request for internal review must be independent, non-profit-making legal persons according to Member States' national law. ÖKOBÜRO is organised as an association according to Section 1(1) of the Austrian Association Act (see **Annex 5**, ÖKOBÜRO Statute; **Annex 6**, Extract from the register of associations; and **Annex 7**, Decision on the continuation of the association's activities). Associations may not be for profit under Austrian law (Section 1(2) of the Association Act "Vereinsgesetz 2002, BGBl 2002/66") and have legal personality by law (Section 1(1) of the Association Act). Additionally, ÖKOBÜRO states in Section 2(2) of its statutes (**Annex 5**, p. 1) that its activities are not aimed at achieving a profit.

Article 11(1)(b) states that organisations entitled to submitting a request must have the primary stated objective of promoting environmental protection in the context of environmental law. According to Section 2(2) of its Statute, ÖKOBÜRO aims to promote the protection of the environment, nature, and animals, primarily at national but also at international level. Furthermore, Section 2(3) of the Statute stipulates that ÖKOBÜRO's purpose is to preserve the environment and nature as the basis of life for humans and animals, to protect the environment and nature from harmful effects, to protect animal welfare and to promote the achievement of the global sustainability goals of the United Nations. Furthermore, ÖKOBÜRO is a legally recognised environmental organisation according to Section 19(7) of the Environmental Impact Assessment Act (Umweltverträglichkeitsprüfungsgesetz 2000, BGBl 1993/697) and is therefore entitled to participate in Austrian environmental procedures according to e.g. the Environmental Impact Assessment Act or the hunting and nature conservation laws of the federal states (see **Annex 8**, Notification of recognition as an environmental organisation pursuant to 19(7) Environmental Impact Assessment Act.

Article 11(1)(c) stipulates that the organisation must have existed for more than two years and is actively pursuing the objectives referred to under Article 11(1)(b). ÖKOBÜRO has existed as an association under the Austrian Association Act since 27 January 1993. Its activity reports prove that ÖKOBÜRO has been actively pursuing environmental protection in the context of environmental law (see **Annexes 9-11**, Activity reports of 2019, 2020, and 2021).

Article 11(1)(d) stipulates that the subject matter in respect of which the request for internal review is made is covered by its objective and activities. The present Request aims to strike a cautious balance

[34] For more information on Applicant A's work in these fields, see for example https://bankwatch.org/biodiversity and https://bankwatch.org/energy-transformation

[35] EU Transparency Register, CEE Bankwatch Network, ID 93834493808-49.

between expanding the EU's share of renewable energy and preserving nature protection while ensuring that the much-needed acceleration of renewable energy in the EU is carried out in accordance with current EU environmental law.

This objective is in accordance with ÖKOBÜRO's statutory purpose to promote the protection of the environment, nature, and animals, primarily at national but also at international level. ÖKOBÜRO's activity report proves that the present Request falls in line with ÖKOBÜRO's past activities regarding breaches of the Birds and Habitats Directives as well as the EIA Directive and the implementation of the Aarhus Convention (**Annexes 9-11**). To name a few examples, ÖKOBÜRO is actively involved in proceedings promoting the protection of protected species such as the wolf and the otter and recently encouraged the submission of questions for a preliminary ruling concerning the conservation status of the wolf to the CJEU.

Moreover, ÖKOBÜRO followed the recent amendment of the Austrian EIA Act and issued an official statement on it[36] as well as issuing an official statement on the Contested Act in November 2022.[37]

ÖKOBÜRO submits the following documents as proof of its entitlement to submit the present Request:

1. The Statute of ÖKOBÜRO, as published in the Austrian Register of Associations, administered by Vienna Provincial Police Headquarters – see **Annex 5**, in German.

2. An official extract from the register of associations, administered by Vienna Provincial Police Headquarters, dated 14 February 2023 – see **Annex 6**, in German.

3. The decision XV-2970 on the continuation of the association's activities of the Vienna Provincial Police Headquarters, dated 22 May 2014. – see **Annex 7**, in German.

4. The notification of recognition as an environmental organisation 22-0.855.436 pursuant to 19(7) Environmental Impact Assessment Act of the Federal Ministry for Climate, Environment, Mobility, Innovation and Technology, dated 2 December 2022 – see **Annex 8**, in German.

5. ÖKOBÜRO's activity reports from 2019, 2020 and 2021 – see **Annexes 9-11**, in German.

4.3. The Contested Act is an administrative act in accordance with Article 2(1)(g) of the Aarhus Regulation

Article 2(1)(g) of the Aarhus Regulation defines 'administrative act' as '*any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1).*' The Contested Act fulfils these requirements for the following reasons:

4.4. The Contested Act is a non-legislative act adopted by a Union institution

Article 289 TFEU stipulates what constitutes a legislative act:

'1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.

2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.

3. Legal acts adopted by legislative procedure shall constitute legislative acts.

[36] See https://oekobuero.at/files/833/stellungnahme_okoburo_uvp_g.pdf
[37] OKOBÜRO, EU-Notfallmaßnahmenverordnung ist umweltschädlich und undemokratisch, Positionspapier ÖKOBURO, November 2022.

4. In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.'

None of the circumstances described above apply to the Contested Act, which was adopted neither via the ordinary legislative procedure, nor via a special legislative procedure (the European Parliament did not participate in the adoption of the regulation). Rather, it was a 'measure' in the form of a Regulation, adopted under Article 122 of the TFEU by the Council on 22 December 2022, without the involvement of the European Parliament, i.e. the EU's legislative body. Therefore, the Applicants conclude that the Contested Act is indeed a non-legislative act.

4.5. The Contested Act has legally binding and external effects

As explained above, the Contested Act is a Regulation adopted as a 'measure' under Article 122 of the TFEU. In accordance with Article 288 of the TFEU, regulations adopted by the EU institutions have general application, are binding in their entirety and are directly applicable in all Member States. Indeed the Contested Act states itself that it '*shall be binding in its entirety and directly applicable in all Member States'.*

4.6. The Contested Act contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1) of the Aarhus Regulation

According to Article 2(1)(f) of the Aarhus Regulation, 'environmental law' means

'Union legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Union policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems.'

In section 5.1. below, the Applicants submit that Articles 1, 3, 5 and 6 of the Contested Act contravene the following provisions of environmental law:

- Articles 191, 192, 194 and 296 of the TFEU
- Article 8 of the Aarhus Convention
- Articles 1, 2, 3, 4, 6, 8, 8a, 10a, and 11 of the EIA Directive, and as a consequence also Articles 5 and 9.
- Articles 6 and 7 of the Habitats Directive
- Article 9 of the Birds Directive
- Article 4.7 of the Water Framework Directive

The relevant articles are to a large extent explained in Section 2 above, with the exception of the **EIA Directive**, where the Contested Act in the Applicants' opinion contravenes most of the Directive. This is explained in more detail in section 5.1., below.

Article 296 of the TFEU may not at first sight appear to be a provision of 'environmental law', however the obligation to state the reasons on which an act is based is a fundamental precondition for exercising access to justice regarding acts that contravene environmental law, as is the provision that the act must be '*in compliance with the applicable procedures and with the principle of proportionality*'.

The Court of Justice has also confirmed that the obligation to state the reasons for adopting an act '*enable[s] the persons concerned to ascertain the reasons for the measure and enable[s] the court*

having jurisdiction to exercise its power of review.'[38]

In order to understand whether decisions affecting the environment have been taken in compliance with the applicable procedures and with respect to the proportionality principle, it is essential that the thinking behind them is explained in the act itself. The obligation to state reasons must therefore be considered to be legislation that pursues objectives of the Union policy on the environment.

[38] Case C-479/07, France v Council, not published, EU:C:2009:131, paragraph 49.

5. Grounds for the Request for an Internal Review

The Applicants assert that the provisions of the Contested Act contravene existing EU environmental law (explained in Section 5.1) and that the Contested Act was adopted using the wrong legal basis (explained below in Section 5.2).

5.1. Ground one: The content of the Contested Act contravenes environmental law

5.1.1. Breach of Articles 191 and 194 of the TFEU

The TFEU contains several provisions requiring not only the protection and preservation of the environment, but also its **improvement**. Furthermore, in accordance with the need to *preserve **and** improve* the environment, EU law cannot reduce the protection of nature already established by previous EU acts, nor can environmental protection provisions be repealed by subsequent acts.

Article 191 of the TFEU states that that:
'1. Union policy on the environment shall contribute to pursuit of the following objectives:
*- **preserving, protecting and improving the quality of the environment**,*
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

***Union policy on the environment shall aim at a high level of protection** taking into account the diversity of situations in the various regions of the Union. It shall be based on the **precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source** and that the polluter should pay. […]'* (Our emphasis)

Article 194 of the TFEU also underlines the need to 'preserve and improve' the environment with regard to the energy sector:

*'1. In the context of the establishment and functioning of the internal market and **with regard for the need to preserve and improve the environment**, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:*
(a) ensure the functioning of the energy market;
(b) ensure security of energy supply in the Union;
(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
(d) promote the interconnection of energy networks.'

However, **Article 5 of the Contested Act,** which removes the obligation to conduct an assessment of environmental impacts of renewable technologies under certain circumstances, **runs contrary to the goal of 'improving the quality of the environment'**.

The environmental impact assessment process is central to EU environmental law safeguarding the environment from projects with potentially negative environmental impacts. Without it, other principles of Article 194, including the precautionary principle, the principles that preventive action should be taken and that environmental damage should as a priority be rectified at source, become difficult or impossible to apply, because no detailed assessment will have been undertaken on how to actually apply them at the project level.

Article 3 of the Contested Act is also almost certain to deteriorate the quality of the environment, not preserve or improve it. This is because it is aimed at easing permitting for renewable energy projects which *require derogations* from the Habitats, Birds and Water Framework Directives and could not obtain them under normal circumstances. Yet under normal circumstances, **some renewable energy projects do receive approval for derogations** from these directives, despite the fact that this means that it has already been established during the permitting process that the plants will have significant impacts on Natura 2000 areas or will deteriorate rivers' water status. The Schwarze Sulm[39] and Gratkorn[40] hydropower plants in Austria are among the many plants which have, rightly or wrongly, received derogations under these Directives.[41]

What Article 3 of the Contested Act does is to *presume* that **all** renewable energy plants requiring derogations under these Directives are of overriding public interest, no matter how great their damage to protected habitats and species or water status. It **only** helps the **most damaging renewable energy plants** during the appropriate assessment process, because other plants do not need such derogations at all and even very damaging plants are often already able to obtain them after the assessment has been carried out and the various criteria analysed.

If we look at renewable energy development as a continuum, such as in the graphic below, the most environmentally acceptable projects are those in already built-up areas, and some areas of the countryside are suitable for solar and wind development as well, particularly agri-solar, which can be combined with some types of farming. In more sensitive areas, fewer types of renewable energy can be implemented without causing significant impacts, but still some can. Existing EU environmental law does not require non-damaging projects in Natura 2000 areas or on water bodies to undergo appropriate assessment processes or to obtain derogations. The graphic shows the optimal gradation of renewable energy zoning, with most projects in built-up areas and fewest in the very sensitive areas towards the right.

[39] C-346/14 - Commission v Austria
[40] Umweltsenat, Betrifft: Berufungen gegen den Genehmigungsbescheid der Steiermärkischen Landesregierung bezüglich des Vorhabens „Errichtung und Betrieb der Wasserkraftanlage Kraftwerk Gratkorn" Bescheid US 1B/2012/2031, 26.11.2013.
[41] For more information on derogations for hydropower plants in Austria see WWF Austria and *ÖKOBÜRO*, Umsetzung des Verschlechterungsverbots gemäß EU-Wasserrahmenrichtlinie in Österreich im Bereich Wasserkraft, 2018.

Source: European Environment Bureau, 2022

The situation in reality is different, however, as the Habitats, Birds and Water Framework Directives already provide for exceptions in which projects with significant impacts on protected species and habitats or which deteriorate water status can obtain derogations. Only an exceptional few renewable energy projects are so damaging that they do not even manage to obtain derogations.

Some articles of the Contested Act do act to promote small-scale solar and heat pumps, which have massive potential and low environmental impacts. **Yet Article 3 of the Contested Act prioritises boosting the *most damaging* renewable energy projects in *the most sensitive* natural areas.**

The Applicants therefore submit that the Council has adopted the Contested Act in breach of Articles 191 and 194 of the TFEU, due to a failure to ensure the preservation and improvement of the environment.

5.1.2. Breaches of EU legislative acts and international law

As mentioned above, the Contested Act is a non-legislative act. This is not only relevant in relation to the admissibility of the present request (as established above) but also because a non-legislative act may not deviate from a legislative act. This is the consequence of the hierarchy of norms as established by the Lisbon Treaty.

As Craig and de Burca state: '*The important point to note is that the definition of a legislative act is purely formal. This follows from the wording of Article 289(3) TFEU: any legal act, whether in the form of a regulation, directive, or decision, which is enacted in accordance with the ordinary or special legislative procedure is a legislative act for the purposes of the Lisbon Treaty. This formalism is symmetrical: any legal act enacted by the ordinary or special legislative procedure is by definition a legislative act; and if a legal act is not enacted in this manner then it does not constitute a legislative*

act."[42]

The consequence of this distinction is that legislative acts are hierarchically superior to non-legislative acts. This is because the former are adopted with the participation of the European Parliament, while the latter are not. To permit non-legislative acts to deviate from legislative acts essentially permits the Council to circumvent the European Parliament, thus undermining the democratic values on which the Union is founded (Article 2 of the Treaty on European Union).

In fact, this is what happened in the present case: As explained at the outset of the request, the European Parliament and Council were in the process of negotiating an amendment to the Renewable Energy Directive which covered very similar content. However, the Council intervened with the request for an emergency regulation, essentially circumventing this legislative procedure and, thus, the Parliament's involvement.

As further explained below, the Contested Act both explicitly and implicitly derogates from higher-ranking legislative acts, which amount to environmental law for the purpose of the Aarhus Regulation.

Moreover, the Contested Act also contravenes certain provisions of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), as well as the Alpine Convention and its protocols, binding provisions of international law which equally rank higher than non-legislative acts (Art. 216(2) TFEU).

5.1.2.1. Breach of the EIA Directive and Aarhus Convention

Articles 5 and 6 of the Contested Act contravene the existing provisions of the EIA Directive as follows.

5.1.2.1.1. The deadlines in Article 5 are incompatible with carrying out an environmental impact assessment, where needed.

Article 5 sets deadlines for the permit-granting process for the repowering of projects as follows:

1. *The permit-granting process for the repowering of projects, including the permits related to the upgrade of the assets necessary for their connection to the grid where the repowering results in an increase in capacity, shall not exceed 6 months including environmental impact assessments where required by relevant legislation.*

2. *Where the repowering does not result in an increase in the capacity of the renewable energy power plant beyond 15%, and without affecting the need to assess any potential environmental impacts pursuant to paragraph 3 of this Article, grid connections to the transmission or distribution grid shall be permitted within 3 months following application to the relevant entity unless there are justified safety concerns, or there is technical incompatibility with the system components.*

Repowering projects have the potential to generate additional electricity compared to the original design of the plants due to advances in technology since the original plant was built. In some cases, this will have no additional environmental impact, but in some cases it may – for example if larger, higher wind turbines are used, if the plant covers a greater area, or if the operating regime of a hydropower plant is to be changed. Moreover, some projects cause serious environmental impacts even before their repowering – the wind farms in Kaliakra in Bulgaria are one example.[43] In such cases,

[42] P. Craig and G. De Burca, EU Law – Text, Cases and Materials (Oxford University Press, 7th edition, 2020), p. 151.
[43] Bulgarian Society for the Protection of Birds / BirdLife Bulgaria, Convention on the Conservation of European Wildlife and Natural Habitats Standing Committee 40th meeting Strasbourg, 30 November - 4 December 2020, Specific Sites - Files open Wind farms in Balchik and Kaliakra – Via Pontica (Bulgaria) - Report by the Complainant.

it cannot be taken for granted that repowering should take place at all - this needs to be assessed.

The timeline for carrying out environmental impact assessment varies, but even if the screening, scoping and approval stages are carried out relatively quickly, several months are still needed to write the actual study or studies – which contain several hundred pages or more – and at least one month is needed for the public consultation. If adequate year-round fieldwork has not been carried out at the site before the project developer initiates the EIA process, then this also has to be counted into the timeline. To put this into perspective, Article 16 of the Renewable Energy Directive[44] sets a deadline of two years for permitting processes for renewable energy projects, and this was set because it usually takes longer.

The above deadlines of six and three months are therefore unrealistic for permitting processes which include environmental impact assessment processes, as it is practically impossible to complete even EIA processes within such deadlines, let alone any other steps in the permitting procedures. In the Applicants' opinion, the result of this is likely to be that national permitting authorities exempt such projects from carrying out EIAs, even where these would be required using the criteria in Annex III of the EIA Directive.

Even if EIAs are carried out, they cannot be of sufficient quality if completed so quickly. Nor is it realistic that public participation will be 'effective' as required by Article 6(4) of the EIA Directive, that the time-frames for consulting the public concerned on the environmental impact assessment report will not be shorter than 30 days as required by Article 6(7) EIA Directive or that the results of consultations to be '*duly taken into account in the development consent procedure*' will be properly respected as required by Article 8 of the EIA Directive, due to the pressure to complete the process.

Equally, there will be no possibility to comply with the requirements of Article 6 of the Aarhus Convention, which equally requires early public participation '*when effective public participation can take place*' (Art. 6(4)), '*reasonable time-frames for the different phases [...]allowing sufficient time for informing the public [...] and for the public to prepare and participate effectively during the environmental decision-making*' (Art. 6(3)) and that the outcome of the public participation phase is duly taken into account in the decision (Article 6(8)).

The Court of Justice has consistently confirmed that Article 6 of the Aarhus Convention applies as a matter of EU law (see for instance, Case C-826/18 *Stichting Varkens*, Case C-664/15 *Protect*, Case C-234/15 *Slovak Bears* II etc). Thus, contrary to the statement in recital 20 of the Contested Act, Article 5 of the Contested Act will in practice prevent compliance with Article 6 of the Aarhus Convention.

In light of the foregoing, the Contested Act infringes articles 6(4), 6(7) and 8 of the EIA Directive and Articles 6(3), 6(4) and 6(8) of the Aarhus Convention.

5.1.2.1.2. The requirement to examine only the 'change or extension' of a repowering project during the EIA process contravenes the requirement to examine the whole project and cumulative impacts with other existing projects.

The EIA Directive stipulates a mandatory environmental impact assessment for changes or extensions to projects only for Annex I projects: '*Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex*'. Article 4(2) also requires Member States to determine whether projects fulfilling point 13 in Annex II shall be made subject to an assessment: *'(a) Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse*

[44] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources

effects on the environment (change or extension not included in Annex I)'.

For the purposes of Article 4(2), Article 4(3) states that the criteria from Annex III need to be taken into account. One of these stipulates that when determining whether a project needs an EIA, various criteria need to be taken into account, including *'(a) the size and design of the whole project;' and '(b) the cumulation with other existing and/or approved projects;'*. This reference to the 'whole' project is designed to stop the practice of salami-slicing, in which project developers artificially break their projects into smaller pieces for assessment, with the goal of avoiding an EIA altogether or at least making the impacts look less than they really are.

The Court of Justice has repeatedly ruled against the practice of salami-slicing in EIA procedures, for example in the following cases:

C-392/96 (CJEC 1999)	Afforestation, peat extraction. Ireland	It is unacceptable to set thresholds without ensuring that the purpose of the legislation is not circumvented by the splitting of the projects
C-227/01 (CJEC 2004)	Railway. Spain	EIA Directive could be compromised if it is only necessary to split up a project into shorter sections to exclude it from the requirements
C-142/07 (CJEC 2008)	Motorway. Spain	Project divided into 15 subprojects under EIA thresholds. The judgement forced a further EIA
C-205/08 (CJEC 2009)	Power line. Austria and Italy	EIA Directive cannot be circumvented by the splitting of projects. Failure to take into account cumulative effects of projects must not mean that they all cease to be covered by the obligation to carry out an assessment
C-560/08 (CJEC 2011)	Road. Spain	There is a splitting of a road widening project into sections, without EIA in some of them, and without a global impact assessment

Source: Álvaro Enríquez-de-Salamanca, Project splitting in environmental impact assessment, 19 April 2016

Article 5 of the Contested Act, however, not only allows salami-slicing, but *requires* it during both the screening process and the assessment process itself, if it is required:

3. *Where the repowering of a renewable energy power plant, or the upgrade of a related grid infrastructure which is necessary to integrate renewables into the electricity system, is subject to a determination whether the project requires an environmental impact assessment procedure or an environmental impact assessment pursuant to Article 4 of Directive 2011/92/EU, such prior determination and/or environmental impact assessment shall be limited to the potential significant impacts stemming from the change or extension compared to the original project. (...)'*

Even if it is contested what the scope of the 'whole project' is, both at the screening stage and during the assessment itself, cumulative impacts have to be examined. Where an EIA is required, Annex V of the EIA Directive requires it to describe *'the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources'*.

Thus the requirement by the Contested Act to examine only the change or extension of the project during screening and during the EIA process – where required – is an explicit derogation from – and therefore contravenes – Article 4(2) together with Annex II and 4(3) together with Annex III of the EIA Directive, and contradicts the case law on salami-slicing.

5.1.2.1.3. Exempting renewable energy projects and related grid infrastructure in dedicated renewable or grid areas from environmental impact assessments is a breach of the EIA Directive and the Aarhus Convention

Article 6 of the Contested Act allows Member States to exempt renewable energy projects, energy storage projects and electricity grid projects which are necessary to integrate renewable energy into the electricity system, from environmental impact assessment under Article 2(1) of Directive 2011/92/EU and from the species protection assessments under Article 12(1) of Directive 92/43/EEC and under Article 5 of Directive 2009/147/EC, *'provided that the project is located in a dedicated renewable or grid area for a related grid infrastructure which is necessary to integrate renewable energy into the electricity system, if Member States have set any renewable or grid area, and that the area has been subjected to a strategic environmental assessment in accordance with Directive 2001/42/EC of the European Parliament and of the Council ([45]).'*

In this case, '*The competent authority shall ensure that, on the basis of existing data, appropriate and proportionate mitigation measures are applied in order to ensure compliance with Article 12(1) of Directive 92/43/EEC and Article 5 of Directive 2009/147/EC. Where those measures are not available, the competent authority shall ensure that the operator pays a monetary compensation for species protection programmes in order to secure or improve the conservation status of the species affected.'*

These provisions contravene Articles 1, 2, 3, 4, 6, 8, 8a, 10a, and 11 of the EIA Directive, and as a consequence also Articles 5 and 9.

The EIA Directive sets out what kind of projects must be subject to EIA assessments and the criteria which must be used to determine whether such an assessment is needed; what the assessment report needs to contain; how the public is to be consulted; how the results of the consultation are to be taken into account, and, importantly, it stipulates the conditions for access to justice and the right to challenge the decision taken by the authorities. **Article 6 of the Contested Act circumvents these provisions by creating a parallel decision-making framework in which there is no obligation to use the criteria stipulated by the Directive, no need for any study or public consultation, and no guarantee of the right to legally challenge EIA approval decisions.**

Carrying out a Strategic Environmental Assessment on the plan or programme which designates a dedicated renewable or grid area can in no way be considered a substitute for carrying out a project-level EIA procedure. This is because Strategic Environmental Assessments have a much wider scope, covering whole plans or programmes. It cannot be expected that they will contain a thorough analysis of project-level impacts, nor that they will be able to prescribe appropriate project-level mitigation measures. The SEA Directive stipulates only much more generally what is to be included in the SEA study, while the EIA Directive contains more precise instructions for the project level. This is why there are two different directives at the EU level - one aimed at ensuring early public participation but at a more general level (corresponding to Article 7 of the Aarhus Convention) and one aimed at ensuring public participation in the preparation of specific projects (corresponding to Article 6 of the Aarhus Convention).

The above deficiencies are further exacerbated by the fact that the concept of a 'dedicated renewable or grid area' is not defined in the Contested Act. From the legislative process ongoing at EU level on updating the Renewable Energy Directive, we can infer that these are supposed to be the equivalent of 'go-to areas' for renewables and grids, as proposed by the Commission on 18 May 2022.[46] However, while the proposed amendments to the Renewable Energy Directive include clear definitions and criteria on what kinds of areas can be considered as 'go-to' areas, the Contested Act contains nothing of the kind.

---

[45] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ L 197, 21.7.2001, p. 30).

[46] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, Brussels, 18.5.2022, COM(2022) 222 final, 2022/0160(COD)

Thus there is a danger that Member States could interpret this Article very broadly indeed. For example, if a spatial plan includes plans for renewable energy installations, and has been subject to a Strategic Environmental Assessment – no matter its quality – this could be argued to fall under the concept of 'a dedicated renewable or grid area'. **If this is so, the Contested Act practically abolishes the obligation to carry out environmental impact assessments for any renewable energy projects already marked in spatial plans, as long as the spatial plans have undergone EIA processes.**

As explained above, renewable energy projects which are not expected to have significant negative impacts are anyway not required to undergo environmental impact assessment procedures, so the existing EU law is proportional to the likely impacts. In principle, carrying out an EIA is not overly burdensome compared to the costs of failing to protect the environment – even if application of the procedure in some Member States could be more effective.

Moreover, Article 1(3) of the EIA Directive already lays out additional grounds for exceptions from the obligation to carry out EIA processes. '*Member States may decide, **on a case-by-case basis and if so provided under national law**, not to apply this Directive to projects, or parts of projects, **having defence as their sole purpose, or to projects having the response to civil emergencies as their sole purpose**, if they deem that such application would have an adverse effect on those purposes.*'

The Contested Act **breaches this provision by greatly widening the category of exempted projects** to include renewable energy projects which do not have defence or response to civil emergencies as their sole purpose.

Given the above, the Applicants submit that Article 6 of the Contested Act contravenes Articles 1, 2, 3, 4, 6, 8, 8a, 10a, and 11 of the EIA Directive, and as a consequence also Articles 5 and 9. As a result, Article 6 of the Aarhus Convention is also breached, as the public is denied the right to participate in project-level decision-making processes on projects that significantly impact the environment.

This broad derogation from the need to carry out an EIA may also result in increased legal challenges that would undermine the goal of the Contested Act of speeding up renewable energy development.

5.1.2.2. Breach of the Birds, Habitats and Water Framework Directives

Article 3 of the Contested Act creates a presumption that the development of renewable energy projects is of 'overriding public interest' for the purpose of certain provisions of the Habitats Directive, the Water Framework Directive, and the Birds Directive. **But each of these directives already sets out an 'overriding public interest' test,** which permits certain activities or projects for public interest reasons in circumstances where they have been identified as harmful.

If such an exemption is applied it must be done by means of a case-by-case assessment. In addition, other tests also have to be applied to ensure that such projects do not have major negative effects on the environment which cannot be avoided, mitigated or compensated.

Article 6(4) of the Habitats Directive requires not only that an 'overriding public interest' test be met but also requires the Member State to prove that there are no 'alternative solutions' to the proposed development. The Member State must also take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. The remaining tests still need to be satisfied regardless of the presumption that is created by Article 3 of the Contested Act.

Similarly, in the case of the Birds Directive, there are three conditions that need to be met in order for any derogation from Article 9 of Birds Directive to be applied, namely: i) no alternative satisfactory

Solutions exist, ii) occurrence of one of the reasons listed in Article 9(1), and iii) compliance with the formal conditions of Article 9(2).[47] Article 3 of the Contested Act only makes reference to a presumption of renewable projects constituting imperative reasons of overriding public interest (falling under Art 9(1)(a)), and fails to make reference to the minimum legal requirements that all intended derogations under Art 9(1) of the Birds Directive need to comply with.

Article 4(7) of the Water Framework again sets slightly different conditions for assessing derogations, including that the reasons for the modifications or alterations are set out and explained in the river basin management plan covering the water body in question; that the project is of overriding public interest and/or that the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and that the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option. Again, adequate mitigation measures need to be applied.

The Council's rationale for allowing renewable projects to be presumed as being of overriding public interest and serving public health and safety is that this would allow such projects to benefit from a simplified assessment, as per Recital 8 of the Contested Act:

'One of the temporary measures consists of the introduction of a rebuttable presumption that renewable energy projects are of overriding public interest and serving public health and safety for the purposes of the relevant Union environmental legislation, except where there is clear evidence that those projects have major adverse effects on the environment which cannot be mitigated or compensated for. (...) Presuming renewable energy plants, including heat pumps, are of overriding public interest and serve public health and safety would allow such projects to benefit, where necessary, from a simplified assessment for specific derogations foreseen in the relevant Union environmental legislation with immediate effect. Taking into consideration their national specificities, Member States should be allowed to restrict the application of this presumption to certain parts of their territories or certain technologies or projects. It is possible for Member States to consider applying this presumption in their relevant national legislation on landscaping.'

But it is highly unlikely that Article 3 will create a simplified assessment. It is more likely to create confusion, as there is already ample case law and Commission guidance on what constitutes 'overriding public interest' in the context of these Directives,[48] but Member States are now allowed by Article 3 to use a different criterion. The Contested Act lacks clarity about how this new presumption should be applied and fails to clarify that the slightly differing tests above laid out under each Directive still apply.

What Article 3 does, is to tip derogation assessments in favour of the developer by making sure that renewable energy projects are *'given priority when balancing legal interests in the individual case.'*

Considering that derogations are anyway only needed for projects with adverse impacts, this is likely to create more – not fewer – public grievances against projects with significant adverse impacts on Natura 2000 sites and water bodies and result in more legal challenges to decisions allowing derogations.

It is unclear how Member States will be able to ensure that public participation in Appropriate Assessments and Water Framework Directive assessments under Article 4(7) fulfils the Aarhus Convention's requirement that it must take place '*when all options are open and effective public participation can take place*' (Article 6.4). Even if the Recital of the Contested Act states that the

[47] C-118/94, Associazione Italiana per il WWF and others, paragraph 21
[48] See e.g. European Commission, Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC, C(2021) 6913

presumption of overriding public interest is 'rebuttable', Article 3 does not explain how this is likely to work in practice if renewable energy projects are legally given priority. It seems unlikely that effective public participation can take place, and that all options are truly open, if there is a presumption from the outset that the project can go ahead.

The Council has attempted to counter this objection by including the clause that: '*Concerning species protection, the preceding sentence shall only apply if and to the extent that appropriate species conservation measures contributing to the maintenance or restoration of the populations of the species at a favourable conservation status are undertaken and sufficient financial resources as well as areas are made available for that purpose.*' But this cannot replace the derogation criteria in the Habitats, Birds and Water Framework Directives explained above. In addition, there is a disconnect in the timing. '[A]*ppropriate species conservation measures contributing to the maintenance or restoration of the populations of the species at a favourable conservation status'* take time to implement and may or may not be successful. By the time it is clear whether they have truly been undertaken and have been effective, the renewable energy project will have long since obtained its derogation and been built. Thus any developer can state that they will undertake such measures in order to obtain a derogation, and by the time it becomes clear whether the measures have been undertaken and whether they work, it is too late to revoke the derogation.

Lastly, Article 9(1)(a) of the Birds Directive, Article 6(4) of the Habitats Directive and Article 4(7) of the Water Framework Directive are **exceptions** to the Member States' obligations to adopt conservation measures in line with each Directive and, as such, must be interpreted strictly and narrowly.[49] Therefore, **establishing a derogation which is potentially EU-wide** (subject to Member States' discretion to exclude certain areas) **is in contravention of the very concept of overriding public interest, which by its nature is to be used only under very specific and exceptional circumstances**.[50]

5.1.2.3. Breach of the Alpine Convention and its protocols

According to Article 6 of the Contested Act, Member States may exempt renewable energy projects, energy storage projects and electricity grid projects which are necessary to integrate renewable energy into the electricity system, from environmental impact assessments under Article 2(1) of Directive 2011/92/EU and from the species protection assessments under Article 12(1) of Directive 92/43/EEC and under Article 5 of Directive 2009/147/EC, '*provided that the project is located in a dedicated renewable or grid area for a related grid infrastructure which is necessary to integrate renewable energy into the electricity system, if Member States have set any renewable or grid area, and that the area has been subjected to a strategic environmental assessment in accordance with Directive 2001/42/EC of the European Parliament and of the Council.*'

In such a case, '*The competent authority shall ensure that, on the basis of existing data, appropriate and proportionate mitigation measures are applied in order to ensure compliance with Article 12(1) of Directive 92/43/EEC and Article 5 of Directive 2009/147/EC. Where those measures are not available, the competent authority shall ensure that the operator pays a monetary compensation for species protection programmes in order to secure or improve the conservation status of the species affected.*'

These provisions contravene Articles 2, 3, 6, 7, 10, 12, and 17 of the Energy Protocol to the Alpine Convention, as well as Articles 3, 7, and 9 of the Soil Conservation Protocol to the Alpine Convention.

5.1.2.3.1. Violation of the Energy Protocol

[49] European Commission, Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC, C(2021) 6913
[50] C-182/10, Solvay and Others, paragraph 76

Article 2(2) of the Energy Protocol requires the parties to have projects undergo an EIA, if they are new projects or upgrades to existing projects in the Alpine area. Article 6 of the Contested Act cancels the need for an EIA, if certain criteria are met and thus is in direct contradiction to the Alpine Convention.

Article 3(2) of the Energy Protocol requires parties to respect the rules of the Alpine Convention and its protocols in their policies. Neither of these are named in the preamble to the Contested Act, nor in the Act itself, yet it does undercut core principles of the Alpine Convention and its protocols. The EU therefore shows its lack of inclusion of the Alpine Convention and its protocols in the Contested Act.

Article 6(1) of the Energy Protocol compels parties to strengthen the use of renewable energy, while both respecting environmental protection and doing no harm to the countryside. The Contested Act may allow projects which did not provide proof on how these requirements are met, thus undercutting the protection provided by the Energy Protocol.

Article 7 of the Energy Protocol requires parties to secure the ecological functions of water courses and the integrity of the landscape in existing and planned hydropower plants. Article 6 of the Contested Act allows for projects to be realised within the Alpine region which may not fulfil these criteria and thus violates Article 7.

Article 10 of the Energy Protocol rules that parties must ensure environmental and landscape protection when implementing energy transmission projects. This may be undercut by Article 6 of the Contested Act.

Article 12(1) of the Energy Protocol requires parties to carry out EIAs for new and repowered energy related projects. This is in direct contradiction to Article 6 of the Contested Act.

5.1.2.3.2. Violation of the Soil Conservation Protocol

Article 3 of the Soil Conservation Protocol requires parties to ensure that the Convention and the Soil Protection Protocol provisions are respected in its other policies. Neither of them are named in the preamble to the Contested Act, nor in the Act itself, yet it does undercut core principles of the Alpine Convention and its protocols. The EU therefore shows its lack of inclusion of the Alpine Convention and its protocols in the Contested Act.

Article 7(3) of the Soil Conservation Protocol requires parties to lay special attention to ensure the protection of the limited soil available in the Alpine region, when new projects of inter alia energy infrastructure are being realised. This is not sufficiently possible in an SEA and therefore Article 6 of the Contested Act may allow the circumvention of the protection provided by the Alpine Convention and its protocols.

Article 9(3) of the Soil Conservation Protocol rules out the use of bog soil for non-agricultural use. With certain projects not needing their own permitting procedure under the Contested Act, this limitation cannot be fully enforced, therefore, Article 6 of the Contested Act is in violation of Article 9(3) of the Soil Conservation Protocol. There are projects like the proposed expansion of the Kauntertal hydropower plant in Austria, which are set to have a great impact on high alpine mires, but could be exempt from having to undergo an EIA under the Contested Act. In the said case, the proposed project would irreversibly destroy mire landscapes at the pristine Platzertal 2300 metres above sea level. Under Articles 3, 5 and 6 of the Contested Act, the aforementioned example could be either exempted from an appropriate assessment or receive a permit even with great and irreversible environmental damages, due to the strengthening of the overriding public interest. This in turn may violate Article 9 of the Soil Conservation Protocol, which prohibits the use of bog soil for the expansion of a hydropower plant.

5.1.2.3.3. Conclusion on breaches of the Alpine Convention and its protocols

The Alpine Convention and its protocol set out requirements for the use of Alpine land, including the need for appropriate assessments before a project can be realised. Additionally, certain projects, such as energy projects do require an EIA (see also above on the implications of omitted EIAs). Article 6 of the Contested Act is in direct contradiction with the said requirements, by creating an alternative framework for project permitting, where there is no obligation to fulfil the criteria of the Alpine Convention.

While there is a need to carry out a Strategic Environmental Assessment (SEA), this can in no way be seen as sufficient for a project level permitting process. Thorough analysis of a project is in fact needed when it comes to environmental impacts on an area as vulnerable as the Alps. The Alpine Convention sets out to provide that very protection by requiring project permission procedures, as well as setting out general limitations on soil use. Meanwhile, SEAs provide a larger scope analysis and the SEA Directive contains very limited rules on their requirements and overall scope.

Given the above, the Applicants submit that Article 6 of the Contested Act contravenes Articles 2, 3, 6, 7, 10, 12, and 17 of the Energy Protocol to the Alpine Convention, as well as Articles 3, 7, and 9 of the Soil Conservation Protocol to the Alpine Convention.

5.2. Ground two: The wrong legal basis was chosen for adoption of the Contested Act

The Applicants allege that since the Contested Act both contains elements of environmental law and contravenes other existing environmental laws, the wrong legal basis was used for its adoption. Thus, Articles 1, 3, 5 and 6 of the Contested Act are unlawful.

5.2.1. Breach of Article 192 of the TFEU

Article 192 of the TFEU makes clear that in most cases, action to be taken to achieve the environmental objectives in Article 191 of the TFEU shall be taken by the European Parliament and the Council via the **ordinary legislative procedure** and after consulting the Economic and Social Committee and the Committee of the Regions.

Paragraph 2 of Article 192 lays out the circumstances when derogations are allowed, but these are not relevant to the present case of the adoption of the Contested Act as they refer to *'the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions'.* The Contested Act was neither adopted via a special legislative procedure, nor were the aforementioned bodies consulted.

Thus, Article 192 of the TFEU stipulates that the ordinary legislative procedure is the appropriate one for the adoption of acts – such as Articles 1, 3, 5 and 6 of the Contested Act – that stipulate the actions to be taken for the achievement of the environmental objectives in Article 191 of the TFEU.

The text of Article 122 of the TFEU also contains nothing to suggest that it – rather than Article 192 – can form the basis for decisions related to achieving the environmental objectives from Article 191. Considering it is part of **Title VIII, Economic and Monetary Policy**, it is not clear why the Council considered it a lawful basis for making decisions on environmental law.

The Council's own legal service also underlined these points in 2020, in an examination of the Next Generation EU instrument:

'Having regard to its wide wording, the Council has a wide margin of discretion when acting on the

basis of Article 122(1) TFEU. That degree of discretion must, however, be exercised bearing in mind the following parameters:

– First, recourse to Article 122(1) TFEU presupposes the existence of a situation of urgency or of exceptionality[51] *leading to severe difficulties*[52] *in the economic situation of the Member States which* ***cannot be addressed by means of the ordinary Union measures****. The "appropriate" measures to which Article 122(1) TFEU refers must be commensurate to the gravity of the situation. Moreover, as confirmed by the case law, measures adopted under Article 122(1) TFEU* ***must be temporary***[53]*. It* ***cannot be used for the purpose of regulating a matter on a permanent basis*** *or to replace the ordinary financing of EU policies, since this would encroach on the relevant substantive legal bases provided for in the Treaties.* ***The introductory words "without prejudice to any other procedures provided for in the Treaties" underscore the exceptional and temporary nature of measures under Article 122(1)*** *TFEU, as recourse to that provision may not undermine or circumvent the use of other legal basis laid down in the Treaties for use in "normal times".*

– Second, Article 122(1) TFEU belongs to Chapter 1 of Title VIII TFEU, which deals with economic policy. ***Measures under Article 122(1) TFEU must therefore be economic in nature.***[54] (Our emphasis).

The Council's own explanation in the recitals of the Contested Act explains why it considered that the situation was urgent, and why it considered that speeding up renewable energy deployment would represent a 'spirit of solidarity between Member States', but it does not justify how or to what extent the specific measures laid out in the Contested Act would contribute to the goal of speeding up renewable energy deployment, compared to other measures that could be taken.

As explained in more detail in section 5.2.3. on proportionality, a wide range of issues need to be addressed in order to speed up renewable energy deployment and most of them have nothing to do with existing EU environmental law - for example, the need to increase administrative capacity, digitalise permitting procedures, and improve spatial planning. Yet the Contested Act selected several measures without explaining why these are the key ones to address the current 'severe difficulties' regarding energy supply, and why this would, in turn, require the use of Article 122.

In other words, **the Contested Act does not explain why the Council considered it legally justified to use Article 122** – rather than the ordinary legislative procedure stipulated in Article 192 – to make decisions on environmental law. It provides only a very general explanation about speeding up renewable energy deployment:

'(21) The principle of energy solidarity is a general principle under Union law as stated by the European Court of Justice in its judgment of 15 July 2021, in Case C-848/19 P (3), Germany v Poland and it applies to all Member States. In implementing the principle of energy solidarity, this Regulation allows for cross-border distribution of the effects of faster deployment of renewable energy projects. The measures set out in this Regulation are directed at renewable energy installations in all Member States

---

[51] *'The wording of Article 122(1) does not mention expressly the condition of urgency as is the case for Article 122(2). However, the two paragraphs need to be read jointly and on the basis of the specific purpose of Article 122 in the system of the Treaties: both contextual and systemic methods of interpretation point therefore at an "emergency rationale" that applies to the whole Article.'*

[52] *'Art. 122(1) TFEU refers to "severe difficulties in the supply of certain products". While the reference is merely illustrative and not meant to limit the types of difficulties that can be addressed by the Article, the provision does set a threshold of relevance ("severe difficulties") that needs to be reached to justify the adoption of measures under this legal basis and leaves thus a margin of discretion to the Council when adopting the measures. It is noted that the notion of "severe difficulties" is also used to define the condition for the recourse to financial assistance under paragraph 2 of Article 122.'*

[53] *'These conditions have been identified by the Court for the use of Article 103 of the EEC Treaty which is the predecessor of Article 122 TFEU. See judgment in Balkan Import, cited above, paragraphs 13 to 17.'*

[54] Council of the European Union, Opinion of the Legal Service. Subject: Proposals on Next Generation EU
- Compatibility of the package with the Union's principles of budgetary balance and discipline under Article 310 TFEU
- Compatibility of the package with the integrity of the system of own resources (Article 311 TFEU)
- Suitability of Article 122 TFEU as legal basis for the Recovery Instrument proposal
- Compatibility of the package with Article 125(1) TFEU (no bail-out clause), 9062/20, 24 June 2020.

and capture a wide scope of projects, including on existing structures, new installations of solar energy equipment and repowering of existing installations. Given the degree of integration of Union energy markets, any increase in renewable energy deployment in a Member State should be beneficial also to other Member States in terms of security of supply and lower prices. It should help renewable electricity flow across the borders to where it is most needed and ensure that renewable electricity produced at low cost is exported to Member States where electricity production is more expensive. In addition, the newly installed renewable energy capacities in the Member States will have an impact on the overall gas demand reduction across the Union.'

(22) Article 122(1) of the Treaty on the Functioning of the European Union allows the Council to decide, on a proposal from the Commission and in a spirit of solidarity between the Member States, upon the measures appropriate for the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy. In the light of recent events and Russia's recent actions, the high risk of a complete halt of Russian gas supplies, combined with the uncertain outlook for alternatives, poses a significant threat of disruption of the energy supplies, increasing energy prices further and consequently adding pressure on the Union's economy. Therefore, urgent action is necessary.'

The explanations are insufficient to justify why, in line with the requirements of Article 122 TFEU, the contested provisions of the Contested Act amount to a '*measure appropriate to*' the economic situation, in particular in case of '*severe difficulties [that] arise in the supply of […] energy*'. The Applicants submit that the Council has not adequately justified that derogating from the EIA, Habitats and Water Framework Directives would address these supply difficulties, so it is not established that they are appropriate to the situation.

Nor is the temporary nature of the act convincing, given that it essentially permanently permits certain activities. A permit issued during the period while the Regulation is in force will result in facilities being built which last 20-30 years or even much longer in the case of hydropower plants.

The Applicants therefore conclude that, by including provisions making changes to existing environmental law in the 'measure' adopted under Article 122 of the TFEU, the Council contravened Article 192 of the TFEU by failing to use the ordinary legislative procedure for the adoption of decisions on action to be taken to achieve the environmental objectives in Article 191 of the TFEU.

5.2.2. Breach of Article 8 of the Aarhus Convention

The type of decision-making procedure used to adopt the Contested Act is also important because the EU's compliance with Article 8 of the Aarhus Convention depends on it.

As explained above, Article 8 of the Aarhus Convention provides that each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

Article 122 of the TFEU includes no provisions enabling public participation during decision-making. This is understandable, as it is meant for urgent situations, and it is part of the Economic and Monetary Policy section of the TFEU, so it would not usually raise concerns about Aarhus Convention compliance.

However, in this case, Article 122 was used to adopt '*executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment*'. The Contested Act contains several provisions stipulating how EU environmental law should be applied – or not – in certain cases, and these are likely to have a significant effect on the environment.

This is explained in more detail below, on the sections on the EIA, Habitats, Birds and Water Framework Directives. But in general, some forms of renewable energy entail significant impacts on the environment. The harvesting and combustion of biomass and the construction and operation of hydropower plants are the most notable, but all types of energy installation can have impacts depending on their location and scale.

The range of effects a hydropower facility can have on species and habitats as well as on rivers and freshwaters varies from one site to another and may relate to: changes in river morphology and riverine habitats; barriers to migration and dispersal of protected species; disruption of sediment dynamics; changes to the ecological flow regime; changes in seasonal flood cycles; water chemical and temperature changes; injuries and killing of individual animals; displacement and disturbance to species; and loss, degradation or fragmentation of terrestrial species and habitats. The barrier effect is especially severe when there is more than one obstacle on a river stretch. Even with very small structures or physical barriers, rivers can rapidly become impassable.[55]

As another example, the potential impact of wind farms on birds and bats can include collision fatalities, disturbance and displacement, barrier effects, habitat loss and degradation. Moreover, wind farms that are placed on or near certain rare and fragile habitat types such as blanket bogs or raised mires, wetlands, sand dunes and shallow sand banks can potentially cause the loss or deterioration of these habitats.[56]

Decades of careful development of EU environmental legislation has sought to find a balance between encouraging the development of renewable energy and safeguarding the environment from such impacts. But the Contested Act makes serious changes to the rules on assessing the environmental impacts of such projects. Thus, it falls into the category of '*executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment'.*

Had the Council confined itself to Articles 4, 7, and 8, this would not have been the case, as these provisions are not likely to have a significant effect on the environment.

In the Applicants' view, therefore, the Council breached Article 8 of the Aarhus Convention by adopting the Contested Act in its current form (notably Articles 1, 3, 5 and 6) without ensuring public participation.

5.2.3. Breach of Articles 296 and 191 of the TFEU

Article 296 stipulates that where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures ***'and with the principle of proportionality.'*** The Court of Justice has also clarified that '*when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.*'[57]

In addition, legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties. A related provision is in Article 191 of the TFEU, which states that '*In preparing its policy on the environment,* ***the Union shall take account of:***

- ***available scientific and technical data,***

[55] European Commission, Guidance document on the requirements for hydropower in relation to EU Nature legislation, 2018.
[56] See more: Wind energy developments and Natura 2000. Guidance document, December 2013; Science for Environment Policy, Wind & Solar Energy and nature conservation, Future Brief 9 produced for the European Commission DG Environment. Bristol: Science Communication Unit, 2015.
[57] Judgment of the Court (Fifth Chamber) of 13 November 1990, The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others, Case C-331/88

- *environmental conditions in the various regions of the Union,*
- ***the potential benefits and costs of action or lack of action,***
- *the economic and social development of the Union as a whole and the balanced development of its regions. […]*' (Our emphasis)

The Contested Act states that '*Since the objectives of this Regulation cannot be sufficiently achieved by the Member States, but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve those objectives*'. However, the Applicants submit that the Contested Act was **not** adopted in line with the principle of proportionality. This is because the provisions of the Contested Act go well beyond what was needed to address the urgent situation at hand.

Moreover, the Council has not demonstrated that it has taken account of available scientific and technical data, nor that it has taken accounts of the potential benefits and costs of action or lack of action. No impact assessment – that could help to assess the costs and benefits of the measures – was carried out before the Contested Act was adopted, so it is unclear how it was decided which measures would be proportionate.

5.2.3.1. The Council has included a disproportionately wide range of technologies in the Contested Act compared to those which can realistically contribute to increasing renewable energy supply within the period of the 'urgent situation'.

The Contested Act does not lay out how long it expects the urgent situation to last, however it does state that difficulties are expected to persist in the 'next year', i.e. 2023. Since the Contested Act is to be in force for 18 months, we may consider this to be the approximate time frame during which actions taken under the Contested Act need to show results.

It should be taken into account that **during 2022, even before the Contested Act was adopted and entered into force, solar photovoltaic deployment in the EU increased by 47 per cent compared to the previous year**. The EU installed 41.4 GW of solar in 2022, compared to the 28.1 GW installed in 2021.[58] According to SolarPower Europe, 41.4 GW represents enough capacity to power the equivalent of 12.4 million European homes. It also represents the equivalent of 4.45 billion cubic metres of gas, or 102 Liquid Natural Gas (LNG) tankers.[59]

In addition, despite supply chain difficulties, **EU countries installed 15 GW of wind power in 2022, up no less than a third compared to 2021**.[60]

These developments show that to a large extent, EU Member States are capable of increasing renewables installation when the situation pushes them to do so. If we nevertheless accept that further speeding up of renewable energy deployment in the short term required an additional Act, it needed to be limited to the specific steps necessary to bring rapid results. This is particularly important due to the environmental impacts that renewable energy installations can have (see the examples in section 5.2.2).

Article 1 states that: '*This Regulation establishes temporary rules of an emergency nature to accelerate the permit-granting process applicable to the production of energy from renewable energy sources, with a particular focus on specific renewable energy technologies or types of projects which are capable of*

[58] Solar Power Europe, New report reveals EU solar power soars by almost 50% in 2022, 19 December 2022.
[59] Solar Power Europe, New report reveals EU solar power soars by almost 50% in 2022, 19 December 2022.
[60] Wind Europe, EU wind installations up by a third despite challenging year for supply chain, 11 January 2023.

achieving a short term acceleration of the pace of deployment of renewables in the Union.'

But even if the *focus* is on technologies which are capable of achieving short-term acceleration, the Contested Act in fact **loosens environmental permitting requirements for all kinds of renewable energy**, including those which cannot possibly be built soon enough to have an impact within the next 3-5 years, let alone 18 months, such as wind farms or large hydropower plants. There is little publicly available data for the construction of large hydropower plants within the EU but globally they tend to take at least a decade.[61] Onshore wind farms can take between 4 and 8 years, including project preparation,[62] and offshore wind farms are estimated to take between 7 and 11 years. Three to five years are dedicated to the development phase, one to three to the pre-construction phase and two to four years to construction.[63] Little information is available on the construction time for biomass plants in the EU, especially larger ones, but it is also unlikely that these can be built in less than five years including project preparation. Even if permitting times are speeded up, project preparation still takes time, and these types of projects cannot contribute to increasing the EU's renewable energy output within 18 months, or even 2-3 years.

Presumably for this reason, after a public statement by wind and solar industry bodies that underlined the need to deal with the projects currently undergoing permitting,[64] the Council also included in Article 1 of the Contested Act the following:

'*Member States may also apply this Regulation to ongoing permit granting processes which have not resulted in a final decision before 30 December 2022, provided that this shortens the permit granting process and that pre-existing third party legal rights are preserved.*'

If successfully applied, this *does* make it more likely that some projects to which the Contested Act is applied – mainly large solar projects, due to the construction period – would in fact start operating during the next year or two. But the consequences of changing the permitting procedure for a certain plant or technology while that permitting procedure is ongoing should not be underestimated.

First, delays are to be expected while national authorities decide and communicate to relevant actors which rules now apply to the project or technology in question. Since the Contested Act is a Regulation, it is directly applicable, but the existing provisions in national law are still applicable as well and those are the ones that administrative staff, project promoters and civil society are used to.

Second, 'pre-existing third party legal rights' need to be preserved. These include the rights enshrined in the Aarhus Convention, including the right to public participation in decision-making on projects, as well as the right to access to justice. As explained in section 5.1.2, in the case of Articles 3, 5 and 6 of the Contested Act, it is hard to see how these rights will be maintained during the application of the Act even for permitting processes beginning during its period of validity, but especially for ongoing permit granting procedures whose rules are subject to change during the process. We therefore expect that rather than speeding up permitting processes, this provision will cause increased legal uncertainty and potentially court challenges.

On the basis of the above, the **Applicants submit that by failing to exclude technologies which cannot contribute to an increase in renewable energy output in the short term, the Council went beyond what is proportional to achieve the aims of the Contested Act.**

It might be objected that action is in any case needed to ensure that the EU continues to increase its share of renewable energy beyond the current urgent situation. The Applicants agree – however, Article 122 is not the right decision-making procedure for this.

[61] International Water Power and Dam Construction, Hydropower over the next decade, 15 April 2020.
[62] Iberdrola, Everything you'd like to know about offshore wind farm construction, accessed 30 January 2023.
[63] Iberdrola, Everything you'd like to know about offshore wind farm construction, accessed 30 January 2023.
[64] Frederic Simon, Solar, wind industry worried about 'daft' EU permitting rules, Euractiv, 18 November 2022.

5.2.3.2. The Council's decision to include Articles 3, 5 and 6 was not proportionate or evidence-based.

The Contested Act does not provide evidence on why the specific measures selected for inclusion were chosen, what the likely scale or speed of their impact is in terms of speeding up renewable energy deployment, or why other possible measures were not included. In this sense, the Council barely fulfilled its obligation to 'state the reasons on which the [act is] based' as the explanatory text is very general.

However, some publicly available sources allow us to examine barriers to renewable energy acceleration in the EU, and contain recommendations for speeding it up. In recent years, several studies have examined the barriers to faster renewable energy deployment in EU countries. The following box gives an overview of two studies covering the whole EU. The first concentrates on permitting processes, while the second is wider and looks at all barriers. These studies provide a wide range of actions which can be taken to speed up renewables development in the EU.

Technical support for RES policy development and implementation – Simplification of permission and administrative procedures for RES installations (RES simplify): interim report, dated July 2021, but published 17.05.2022.[65]

This report was commissioned by the European Commission and written by the consultancies *eclareon* and Öko-Institute, together with the industry bodies Wind Europe and SolarPower Europe. Thus it represents the interests only of a very limited group of stakeholders and does not necessarily encapsulate the views of government permitting authorities, environmental experts or other relevant stakeholders. Still, it identifies a wide range of steps that in the authors' view, need to be taken in order to speed up renewable energy deployment.

[65] *eclareon*, Öko-Institute, Wind Europe and SolarPower Europe, Technical support for RES policy development and implementation – Simplification of permission and administrative procedures for RES installations (RES simplify): interim report, European Commission, dated July 2021, published 17.05.2022.

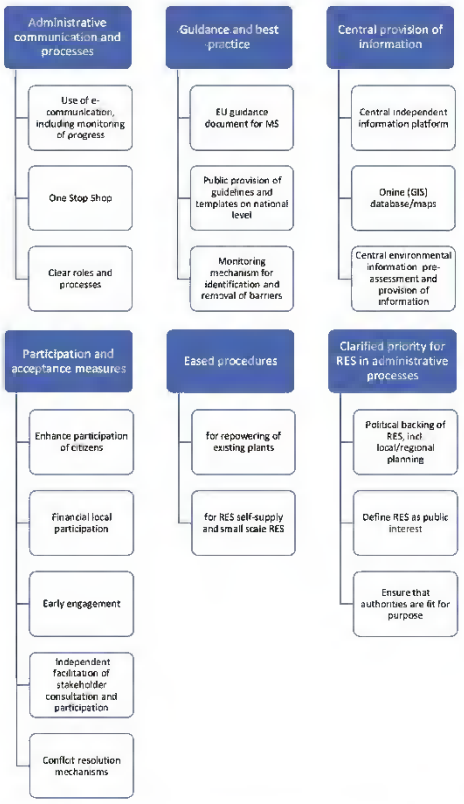


Figure 0-1. Overview of best practice and further recommendations to enhance permission procedures

Source: RES Simplify Interim Report, May 2022.

To the best of the Applicants' knowledge, as of 18 February 2023, the final report has not been published.

Three of the actions identified in this study have been partly included in the Contested Act - Eased procedures for repowering of existing plants, eased procedures for renewable self-supply and small-scale plants, and what is presented on the diagram as 'defining renewables as a public interest.' However, it should be noted that this latter problem was actually only identified in the study as relevant to hydropower, while the recommendation was extrapolated to all renewables, without presenting evidence as to why this would be needed.

Similarly, for repowering projects, the examples provided in the study as problematic were those where national-level application was stricter than what existing EU law requires, so they would in the Applicants' opinion not require a change in legislation at the EU level. Moreover, it was pointed out in the study that the simplification of repowering procedures is already included in Article 16 of the 2018 Renewable Energy Directive, which limits the permitting process to one year, with a potential extension of up to one year. The Directive also introduces a requirement for a simplified notification process for repowering projects. The 2018 Directive had to be implemented in national law by the Member States by the end of June 2021. Thus, although the Study did not say it, it is too early to introducing new changes without having a chance to see how the existing ones are working.

Barriers and Best Practices for Wind and Solar Electricity in the EU27 and UK, March 2022

This report was funded by the European Climate Foundation and written by the *eclareon* consultancy. Its main conclusions were that:

'*Barriers related to administrative processes are now the biggest roadblock to developments in Europe. An overwhelming majority of countries face administrative issues blocking deployment, especially the high complexity, long duration and low transparency of administrative procedures. The integration of renewables in*

spatial and environmental planning represents another major challenge. These barriers are also amongst the most severely rated. In Hungary, Ireland and Poland barriers are rated so serious as to make project development nearly impossible – at least for wind energy.

Barriers related to the political and economic framework are found all over Europe. While they are no longer as dominant as in the past, these barriers remain the most serious blocks in Hungary and Romania, and more recently in Lithuania and Italy.

Market structure is still a block to development. While these barriers are generally less serious, they are especially problematic in Italy, Czechia, Germany, Finland, Spain, Poland, Hungary and France.

Wind and solar PV projects also face issues dealing with the cost of grid access or the transparency of the grid connection procedure. Countries such as Hungary, Greece, Bulgaria, Austria or Belgium are strongly affected.'

'Administrative barriers' is a very wide category, but the top five such barriers were considered to be the following:

- In Hungary, spatial and technical restrictions effectively ban wind power plants
- In Ireland, revision of the Wind Development Planning Guidelines has been delayed
- In Poland, spatial restrictions on building wind plants means that 99 per cent of the country's territory is out of bounds
- In Estonia, administrative procedures are extremely long - mainly caused by a lack of administrative staff
- In Portugal, administrative processes are excessively complicated due to the lack of a proper one-stop-shop approach.

The main recommendations in the report were as follows:

'*1. A reliable and long-term strategy for renewables with clear sector and technology targets is key to investors' confidence and steady RES deployment. To this end, national 2030 renewable energy targets should be binding.*

2. Support scheme conditions for RES should be reliable and the remuneration level scheduled over a defined time period for investors to build their business plans. Depending on the support type, the defined support methodology needs to be aligned with market conditions and the pace at which installations are commissioned.

3. Administrative procedures need to be streamlined and transparent. Setting deadlines for each project milestone is a useful tool (e.g. for consultation periods, EIA etc.). The competent administrative authorities should be allocated adequate resources to process permitting procedures, be equipped with an adequate number of skilled personnel and set up with state-of-the-art digital infrastructure.

4. Project size does not automatically translate in more (severe) administrative barriers (as we for instance see in the case of offshore wind). More centralised, one stop shop planning can ease administrative barriers for bigger projects as well as facilitate the involvement of more diverse entities in developing renewable energy projects.

5. Third parties such as local communities, municipalities, nature conservation organisations need to be involved upfront in RES projects to increase acceptance and avoid long appeal procedures. Their role, responsibilities and the advantages to their participation need to be clearly defined, leading project development to respect ecosystems and inhabited areas.

6. Grid planning needs to be a part of a comprehensive strategic approach providing a clear vision on future energy infrastructure. This approach needs to include energy generation, sector coupling, demand management, storage solutions, etc. It also needs to be coordinated between transmission and distribution grid operators, as well as relevant stakeholders, such as local communities or nature conservation organisations. In addition, consistent grid planning needs to translate into fair grid access costs and transparent grid connection procedures.'

The Contested Act only deals with part of recommendation number three, on setting deadlines for administrative processes.

The Contested Act includes only a very small number of the recommendations from these studies - at best three recommendations from the first study – though two of them have been taken well beyond what would be needed to fix the problems cited – and one from the second study. This would be

understandable if they were recommendations that had been proven to be key to short-term acceleration of renewable energy deployment, but as noted above, the Contested Act contains no information explaining why these measures were chosen and not others such as digitalisation of permitting processes or increased administrative resources to process permitting applications.

Moreover, the measures in Articles 3, 5 and 6 of the Contested Act go beyond the evidence provided in these studies.

5.2.3.2.1. The Council's decision to include Article 6, exempting renewable projects from EIAs in certain circumstances, goes far beyond what is needed to alleviate the barriers to renewable energy projects in the EU.

Neither of the above studies propose exempting renewable energy projects in designated renewable areas from EIA processes, nor exempting renewable energy projects from EIA processes in other circumstances. In fact, the *RES simplify* study (p.41-42) finds that: '*Also, there is a broad consensus among project developers that a balance with environmental goods in general is necessary, as is the need for EIAs in particular. In fact, project developers are often rather concerned about specific details linked to EIAs, for example that EIAs diverge from Member State to Member State or that data from these are not available in publicly available repositories.*' **In other words, even project developers agree that EIAs are necessary, even if the rules need to be refined.**

In the case of geothermal energy, the *RES simplify* study (p.70) even calls for increased guidelines for EIA, harmonising national level guidelines and further standardising the permitting process. It is thus clear that not only are they not calling for the elimination of the EIA process, but are rather calling for more regulation on it.

Given the above, it is unclear what the evidence base is for the Council's decision to include Article 6, which allows renewable energy projects to be exempted from carrying out an EIA if they are located in an area designated for renewables, as long as the plan or programme designating the area has been subject to a Strategic Environmental Assessment.

Moreover, this provision did not appear either in the original proposal for the Contested Act from the European Commission published on 9 November 2022, nor in the text which had allegedly been agreed on by the Council on 24 November 2022.

5.2.3.2.2. The Council's decision to include Article 3 on 'overriding public interest' is not proportionate in relation to the impact that the Habitats, Birds and Water Framework Directives have on realisation rates for renewable energy projects.

The *Barriers and Best Practices for Wind and Solar Electricity in the EU27 and UK* study does **not** identify the *'overriding public interest'* provisions in the Habitats, Birds and Water Framework Directives as an important barrier to wind and solar development.

However, the *RES simplify* study identifies Article 4(7) of the Water Framework Directive as a barrier for the development of hydropower, including the provision on 'overriding public interest'. It recommends '*Adaptation of the Water Framework Directive: There should be a better alignment of the renewable energy and environmental goals in RED II and the Water Framework Directive, so that it becomes clear to which extent Member States can consider hydropower projects to be of overriding public interest as defined in the WFD. This would provide an anchor as to whether responsible authorities can grant them licenses.*'

The *RES simplify* study does not identify the 'overriding public interest' provisions of Article 6 of the Habitats Directive as a barrier for other forms of renewable energy development. However, **despite a lack of evidence and analysis of this issue outside of the hydropower sector**, it recommends the

following:

'Define RES as public interest: The permission to develop RES projects depends on how their environmental benefit relates to any potential negative impact stemming from their installation and operation. In order to clarify the high value of renewables in fighting climate change on the global level, renewables should be legally defined as a matter of public interest. Ideally, this status could be regulated by EU legislation rather than only on the level of Member States.'

Although it is phrased as 'public interest' and not 'overriding public interest', the phrasing of the recommendation makes clear that it is aimed at enabling renewable facilities to automatically comply with the 'overriding public interest' provisions of the EU's environmental legislation.

However, the study does not provide any evidence as to why this should be the case. Even its recommendation on the hydropower sector only suggests **clarifying** '*to which extent Member States can consider hydropower projects to be of overriding public interest,* not actually presuming all hydropower plants to be of overriding public interest.

As mentioned above, the European Commission's Fitness Checks for the Birds and Habitats Directives and the Water Framework Directives all found these Directives fit for purpose, so it is not clear why the overriding public interest provisions are now considered to be excessively burdensome. Adopting what amounts to an amendment to those Directives so soon after a comprehensive Fitness Check, in which large numbers of EU citizens and businesses expressed their support for these Directives, does not make sense and undermines the Fitness Check process.

Member States are not obliged to report on the application of Articles 6.3 and 6.4 of the Habitats Directive or Article 4(7) of the Water Framework Directive per se, so it is difficult to locate precise data on the extent to which the overriding public interest clauses in the Habitats and Water Framework Directives inhibit the development of renewable energy in the EU.[66] However, projects which require such derogations are a small minority of renewable energy projects, which have been established as having a significant impact on protected habitats and species or deteriorate water status and therefore need derogations. Moreover, many examples exist, in which renewable energy projects have indeed been established as being of overriding public interest and have been able to go ahead as a result. **So those few which now require a boost to help them pass the appropriate assessment should be the lowest priority projects, because they are the most damaging and there is massive potential for much lower impact projects which has not yet been exploited**.

Moreover, the issue at stake is not only the extent to which the Habitats and Water Framework Directives inhibit renewable energy, but also the extent to which excessive use of derogations inhibits the achievement of the goals of these Directives. The whole point of these derogation clauses is that they should be exceptions, not the norm. But as noted by the European Commission in its 5th Water Framework implementation report in February 2019:

'*The exemptions foreseen in Article 4 of the WFD currently cover around half of Europe's water bodies. This mainly concerns natural water bodies, but increasingly also heavily modified and artificial water bodies, next to new physical modifications. Whilst the justifications for such exemptions have overall improved, their persistent wide use is an indicator of the significant efforts still needed to achieve good status or potential by 2027.*'[67]

[66] Article 6.4 requires Member States to inform the Commission if they adopt compensatory measures in relation to projects which have a significant negative impact on Natura 2000 sites, and these reports also include information on the use of the overriding public interest provision. Regrettably, however, the Commission does not appear to have published a *Summary report on implementation of Article 6.4, subparagraph 1* of the Habitats Directive, since March 2012. See European Commission, Habitats Directive reporting, accessed 30 January 2023.

[67] European Commission, Report from the Commission to the European Parliament and the Council on the implementation of the Water Framework Directive (2000/60/EC) and the Floods Directive (2007/60/EC) Second River Basin Management Plans First Flood Risk Management Plans, (COM/2019/95 final).

Yet there is no explanation in the Contested Act on why the Council considers the inclusion of Article 3 justified, either in terms of the volume of renewable energy projects it will speed up, or in terms of weighing up its impact on achieving environmental targets. More generally, the Council states that *'Those urgent measures have been selected because of their nature and potential to contribute to solutions for the energy emergency in the short term. More particularly,* ***several*** *of the measures in this Regulation can be implemented by Member States rapidly in order to streamline the permit-granting process applicable to renewable energy projects, without requiring burdensome changes to their national procedures and legal systems and ensuring a positive acceleration of the deployment of renewables in the short term.'* (Our emphasis)

First of all, if it is an emergency Regulation, **all** of the measures must be able to be implemented quickly and without burdensome changes to their national procedures. Second, neither Article 3 nor Article 6 of the Contested Act can easily be implemented because they clash with existing environmental law, as outlined in Section 5.1. The more quickly Member States attempt to apply them, the more likely they are to be faced with court cases challenging individual permitting decisions.

5.2.3.2.3. The Council's decision to include Article 5, restricting the EIA scope and permitting timeline for repowering projects, did not take account of the results of changes already introduced in the Renewable Energy Directive and was not based on real needs stemming from current evidence.

Repowering of existing plants has significant potential to ensure that the EU's renewable energy capacity is increased. The EIA Directive already regulates changes and extensions to existing projects, and as explained in section 5.1.2.1., the Contested Act partly clashes with these. Moreover, in 2018 the Renewable Energy Directive[68] was updated to include new provisions on repowering projects as follows:

Article 16(6) states:

'Member States shall facilitate the repowering of existing renewable energy plants by ensuring a simplified and swift permit-granting process. The length of that process shall not exceed one year.

Where duly justified on the grounds of extraordinary circumstances, such as on grounds of overriding safety reasons where the repowering project impacts substantially on the grid or the original capacity, size or performance of the installation, that one-year period may be extended by up to one year.'

In addition, Article 16(8) states:

'Member States may establish a simple-notification procedure for grid connections for repowering projects as referred to in Article 17(1). Where Member States do so, repowering shall be permitted following notification to the relevant authority where no significant negative environmental or social impact is expected. That authority shall decide within six months of receipt of a notification whether this is sufficient.

Where the relevant authority decides that a notification is sufficient, it shall automatically grant the permit. Where that authority decides that the notification is not sufficient, it shall be necessary to apply for a new permit and the time-limits referred to in paragraph 6 shall apply.'

As the transposition deadline was only 30 June 2021, there has been relatively little time to see how these measures function in practice. Thus, the introduction of further changes to permitting procedures for repowering projects in the Delegated Act was not based on a need demonstrated by current data or evidence.

[68] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ L 328 21.12.2018

5.2.3.3. The Council's inclusion of Article 3 is particularly unlikely to be effective in speeding up renewable energy project permitting and is thus disproportionate to the stated aim of the Contested Act

As argued in sections 5.1.2.1.3., 5.1.2.2. and 5.2.3.1, Articles 1, 3, 5 and 6 are all likely to generate legal uncertainty and attract legal challenges, thus it is disputable to what extent any of them will really speed up renewable energy development. However, Article 3 is particularly unlikely to prove effective in significantly speeding up permitting procedures for such projects.

This is because, if we take the example of an appropriate assessment under the Habitats Directive, under the Contested Act, the appropriate assessment process will still have to be carried out. If the project is found to adversely affect the integrity of the site concerned, and it requires a derogation, it currently has to prove both that there are no alternative solutions and that the project must go ahead for imperative reasons of overriding public interest. Compensation measures also have to be taken, and should be in place, fully operational and effective before the damage on the site occurs[69] – a process which may take years.

Under Article 3 of the Contested Act, it will still have to prove that there are no alternatives and define compensation measures, but it is unclear how the 'imperative reasons of overriding public interest' provision will be applied in practice. This is partly because the Contested Act provides a significant degree of flexibility to Member States on the extent to which they must apply this provision, and partly because it is a **presumption**, not an absolute rule.

Moreover, paragraphs (4) and (8) of the Recital of the Contested Act both mention that the presumption is rebuttable and paragraph (20) states that the provisions of the Aarhus Convention remain applicable. So either the project promoter must still make the case why the project is of overriding public interest, in which case the permitting process will not be shortened at all, or they may face lengthy court cases aimed at rebutting the presumption.

In addition, the 'presumption' is intended to stack the process in favour of the project going ahead, which calls into question whether appropriate assessments or assessments under Article 4(7) of the Water Framework Directive will be able to guarantee the public's right to '*early public participation, when all options are open and effective public participation can take place*', as required by Article 6 of the Aarhus Convention. This too may lead to additional legal challenges, further delaying project implementation.

Thus, the disadvantages caused by Articles 1, 3 and 6 of the Contested Act - including the high likelihood that there will be less – not more – legal clarity, are in the Applicants' opinion clearly disproportionate to the aim pursued of encouraging faster renewable energy development.

Overall, the Council failed to select the type of act to be adopted and its contents in line with the principle of proportionality, as required by Article 296 of the TFEU. It also failed to take proper account of available scientific and technical data and to assess the potential benefits and costs of action or lack of action as required by Article 191 of the TFEU.

It failed to restrict the Contested Act to those technologies which could make a short-term contribution to ramping up the EU's renewable energy generation, and the inclusion of Articles 1, 3, 5 and 6 in the Contested Act is far from the 'least onerous' measure that could be taken. Including these Articles was not in line with the available evidence base on measures needed to speed up renewables development. Moreover, the three articles entail a number of serious disadvantages, in terms of environmental impact, lack of clarity on implementation, and potential for lengthy legal challenges. In particular Article

[69] European Commission, Commission notice, Assessment of plans and projects in relation to Natura 2000 sites - Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC, p 84

3 of the Contested Act is likely to bring more, not less confusion, and thus prolong existing procedures. Thus the Applicants submit that the Council did not act proportionately in including these Articles in the Contested Act.

6. Conclusion

In this Request for Internal Review, the Applicants have put forward facts and legal arguments raising serious doubts about the lawfulness of the Contested Act.

The Applicants have demonstrated that the Contested Act is an administrative act in accordance with Article 2(1)(g) of the Aarhus Regulation; that it is a non-legislative act adopted by a Union institution; that it has legally binding and external effects, and that it contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1) of the Aarhus Regulation.

Namely, the Contested Act breaches Articles 191 and 194 of the TFEU, due to a failure to ensure the preservation and improvement of the environment, as it entails both explicit and implicit derogations from current EU environmental legislation by removing the requirement for environmental impact assessments for renewable energy projects in designated areas, as well as presuming that projects with a significant negative impact on Natura 2000 sites or rivers should be designated as being of overriding public interest and serving health and safety.

The Contested Act breaches the EIA Directive and Aarhus Convention, as the deadlines in Article 5 are incompatible with carrying out an environmental impact assessment, where needed, and the requirement to examine only the 'change or extension' of a repowering project during the EIA process contravenes the requirement to examine the whole project and cumulative impacts with other existing projects. Exempting renewable energy projects and related grid infrastructure in dedicated renewable or grid areas from environmental impact assessments, as allowed by Article 6 of the Contested Act, is a breach of the EIA Directive and the Aarhus Convention.

The Contested Act also breaches the Birds, Habitats and Water Framework Directives by presuming all renewable energy projects to be of overriding public interest and serving health and safety, and thus making derogations the rule, not the exception, in this sector. This also negatively impacts the application of Article 6 of the Aarhus Convention by weighting decision-making in favour of derogations and rendering public participation less effective.

Moreover, the Contested Act also breaches the Alpine Convention and its protocols in both its Article 5 and 6 as it undermines the need for EIAs and assessments under the Habitats- and Birds Directives as stated above. The Contested Act is likely to endanger the Alpine area, due to its suspension of important environmental safeguards for certain projects. The Alps constitute a very vulnerable area when it comes to their ecosystems, which was acknowledged by the Alpine Convention and the protection measures its protocols put in place.

Given that the Contested Act regulates environmental matters, and that it breaches EU existing environmental law, the Applicants have demonstrated that the wrong legal basis was chosen for the adoption of such an Act.

Article 192 of the TFEU stipulates that environmental law must be adopted via the ordinary legislative procedure, involving, *inter alia*, the European Parliament. Exceptions exist, but they do not apply to the Contested Act.

Moreover, Article 122(1) of the TFEU can only be used for the adoption of temporary economic measures, whereas Articles 1, 3, 5 and 6 of the Contested Act clearly regulate environmental permitting and not economic measures.

Permitting non-legislative acts such as 'measures' under Article 122(1) of the TFEU to deviate from

legislative acts essentially permits the Council to circumvent the European Parliament, thus undermining the democratic values on which the Union is founded. The Contested Act both explicitly and implicitly derogates from higher-ranking legislative acts, which amount to environmental law for the purpose of the Aarhus Regulation.

Moreover, the use of Article 122(1) TFEU to adopt the Contested Act breached Article 8 of the Aarhus Convention by denying the public the right to participate in decision-making during the preparation of executive regulations and/or generally applicable legally binding normative instruments.

The adoption of the Contested Act under Article 122 breaches Articles 296 and 191 of the TFEU by failing to select the type of act to be adopted in compliance with the principle of proportionality and by failing to base its content on the available scientific and technical data and analysis of the potential benefits and costs of action or lack of action. The Council has failed to select the *'least onerous'* measures, and has failed to ensure that *'the disadvantages caused must not be disproportionate to the aims pursued.'*[70]

Namely, it has included a disproportionately wide range of technologies in the Contested Act compared to those which can realistically contribute to increasing renewable energy supply within the period of the 'urgent situation', and has thus weakened environmental rules without adequate benefits.

In addition, the Council's decision to include Articles 3, 5 and 6 was not proportionate or evidence-based. Article 6, exempting renewable projects from EIAs in certain circumstances, is not based on the available evidence on what is needed to alleviate the barriers to renewable energy projects in the EU. Article 3 on 'overriding public interest' is not proportionate in relation to the impact that the Habitats, Birds and Water Framework Directives have on realisation rates for renewable energy projects. And Article 5, restricting the EIA scope and permitting timeline for repowering projects, did not take account of the results of changes already introduced in the 2018 Renewable Energy Directive and was not based on real needs stemming from current evidence. Moreover, the Council's inclusion of Article 3 is particularly unlikely to be effective in speeding up renewable energy project permitting because the procedures remain the same as currently, but with additional legal uncertainty. Thus Articles 3, 5 and 6 are disproportionate to the stated aim of the Contested Act.

We therefore ask the Commission to review the Contested Act in accordance with the Aarhus Regulation.

[70] Judgment of the Court (Fifth Chamber) of 13 November 1990, The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others. Case C-331/88