

RePower EU Proposal for a REDII amendment

Expediting renewable technologies' permitting procedures

Background

On 18 May 2022, the European Commission published its 'REPowerEU' Plan, which aims to speed up the transition to renewable energy and to reduce Europe's dependency on Russian fossil fuel imports. This Plan includes a Commission legislative proposal for a directive that would amend certain aspects of Directive (EU) 2018/2001 in an effort to accelerate the permitting procedures for renewable energy projects in the EU.¹

The roll-out of renewable energy is pivotal to Europe's efforts to become more energy independent and resilient, and central to reaching the EU's climate goals. This is an essential goal and any unnecessary obstacles must be removed. However, certain aspects of the proposal – as currently drafted – would seriously undermine Europe's most important nature laws in a way that will hinder the achievement of both biodiversity and climate goals.

We fully support the aim of fast-tracking lengthy, bureaucratic and complex permitting and approval procedures, but this should not mean disapplying vital environmental legislation. These laws have been in place for decades and are backed by civil society and businesses alike for both their high environmental ambition and the legal certainty they provide, which facilitates rapid sustainable development.

¹ 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 2022/0160 (COD)

It is also alarming that the development of this legislative proposal did not correctly follow fundamental administrative and democratic procedures, raising major concerns about the rule of law, legitimacy, and public participation in environmental decision-making. This was done under the guise of urgently needing to publish a proposal following the war in Ukraine, but in reality ignoring these procedural safeguards will only serve to delay the effective implementation of this proposal and accelerated roll-out of the renewable energy transition. The serious implications of the legal flaws in the Proposed Directive, coupled with the procedural flaws below, mean that significant changes are required to this legislation.

This briefing provides a concise overview of the main legal problems of the proposal and the procedural shortcomings in its development. Due to the need to reply to the Commission's proposal as quickly as possible, only a summary is being included at the moment. But this can be followed up by a more detailed ClientEarth briefing that will drill down into these issues in further detail.

Substantive Legal Flaws in the Proposed Directive

The Commission is proposing to amend Directive (EU) 2018/2001 (the Renewable Energy Directive or REDII) in order to make changes to the permitting procedure for renewable projects in the EU. It is important to note, however, that underlying some of the proposed amendments to Directive (EU) 2018/2001, are de facto amendments to much more established pieces of EU law, including Directive 92/43/EEC (the **Habitats Directive**), Directive 2009/147/EC (the **Birds Directive**) and Directive 2011/92/EU (the **Environmental Impact Assessment Directive**).

In this light, some of the amendments that the Commission is proposing would seriously undermine, without justification, the existing environmental acquis and would also prove unworkable for Member States who would be burdened with attempting to implement incompatible legal requirements in an incoherent and inconsistent manner, which would only serve to create legal uncertainty and likely delay, for developers, investors, and other important stakeholders.

The main legal flaws in the proposal are as follows:

1. The proposed **Article 16a(3)** is a **profoundly misguided attempt to accelerate the permitting procedure in renewables go-to areas by doing away with the obligation to carry out environmental assessments for renewables projects at the permitting stage**. In particular, such projects in renewables go-to areas would be exempted from the requirement to carry out an Environmental Impact Assessment under the EIA Directive 2011/92/EU and new applications for renewable energy plants would not be subject to any assessment required under Article 6(3) of the Habitats Directive to assess their impacts on Natura 2000 areas.

This Habitats Directive derogation represents a lawfully dubious attempt to amend a key provision of the Habitats Directive by the back door and in circumstances where no proper effort has been made to assess the impacts and consequences of such an amendment, including the dangerous precedent it sets of rowing back on environmental protection, potentially contrary to the EU Treaties which call for a high level of environmental protection

Attempts to exclude projects inside go to areas from environmental assessment are likely to result in less certainty for promoters and investors. One of the great strengths of the Habitats and EIA Directives is that they have 30 years of application and a rich case law, which has produced a time-tested and coherent system where project developers understand the applicable legal duties and have built their own know-how and internal procedures for ensuring compliance with the relevant

legislation. The contents of these amendments are likely to upend this system, create legal uncertainty, and raise the potential for legal challenge at the project permitting stage, which is likely to cause significant delay.

2. Article 16a(4) would require Member States to carry out a screening of the permit applications for renewable projects in go-to areas in order to identify if any such project is highly likely to give rise to significant unforeseen adverse effects on the environment that were not foreseen during the process for designating the applicable renewables go-to area. **This Article also proposes that such screening would be finalised as soon as 15 or 30 days (depending on the project type) from the date of submission of the application.** From a practical point of view, this sets down an unrealistic deadline for already under-resourced public authorities, creating a perverse incentive to take shortcuts and to miss or overlook potentially significant environmental effects. This provision is bound to create difficulty and confusion, which could instead be avoided if the screening of such projects were take place in the usual way i.e. as part of the Environmental Impact Assessment or Appropriate Assessment procedure. Considering the potential environmental risks at stake, such attempts to rush the screening process are not justified or proportionate.
3. Article 15c(1)(b) seeks to undercut the EU environmental acquis **by creating a presumption that mitigation measures implemented for renewables projects would be deemed in compliance with key environmental law obligations**, including on species protection and the duties not to cause deterioration of protected nature areas or of the status of surface water bodies. Mitigating the environmental impacts of renewable projects in go-to areas is a laudable aim. However, it is not appropriate for such mitigation, which it appears would have limited oversight, to be used to minimise or bypass essential protection provisions in the EU Nature Directives and the Water Framework Directive.
4. **Article 16d** would create a presumption that the development of renewable projects is an ‘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 essentially permits certain activities or projects for public interest reasons in circumstances where they have been identified as harmful. Any time such an exemption is being applied it must be done by way of a case-by-case assessment and there are also other tests to be met to ensure that such projects do not have major adverse effects on the environment which cannot be avoided, mitigated or compensated.²

The Commission’s rationale for proposing that renewable projects would 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. However, it is far from clear that this provision would create a simplified assessment. Instead, there is a risk that this will muddy the waters around the application and interpretation of existing EU legislation. There is already ample jurisprudence and Commission guidance on what constitutes ‘overriding public interest’ in the context of the Nature Directives, and it is clear that many renewables projects will satisfy these tests with some ease. The remaining tests would also still need to be satisfied regardless of the presumption that would be created by this provision.

² For example, 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, and the Member State must also be in a position to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

5. **Articles 15b and 15c** propose to establish a new two-step procedure for Member States to first map the specific land and sea areas needed to deploy renewables to meet their contribution towards renewable energy targets, and second adopt a plan to designate ‘renewables’ go-to areas within these areas for the purpose of prioritising the development of renewables projects.

While these procedures could provide a way to streamline the development of important renewables projects (if done correctly), it is regrettable that these provisions do not adequately address how they will interact with the existing environmental acquis. For example, both the mapping of land and sea areas and the plans for designating ‘renewables go-to areas’ would likely fall under the definition of a ‘plan’ for the purpose of Article 6(3) of the Habitats Directive.³ These processes would therefore need to be subject to an ‘appropriate assessment’ if the plans are likely to have a significant effect on any Natura 2000 areas. A similar definition of ‘plan’ is also used in Directive 2001/42/EC, meaning that a Strategic Environmental Assessment would also need to be carried out for each process. Accordingly, **Articles 15b and 15c should be amended to clarify the need for such environmental assessments as an integral part of the mapping of renewables areas and the designation of renewables go-to areas.** This would also clarify that it may not always be consistent with the Habitats Directive for artificial and built surfaces (such as rooftops, parking areas or transport infrastructure) in Natura 2000 areas to be designated as renewables go-to areas (as is currently envisaged under Article 15c(1)).

6. **Articles 16a(5)** appears to be an effort to upend the permitting procedure for renewables projects in go-to areas by providing that such **permitting applications are to be authorised from an environmental perspective without requiring any express decision from the competent authority**, unless a decision is made by the competent authority that the specific project will give rise to significant adverse environmental impacts that cannot be mitigated.

The proposition that a permit would be automatically or implicitly granted without the decision of a competent authority is highly problematic from a legal standpoint. In some Member States it is simply not legally possible under national constitutional provisions. This amendment also seems to misunderstand the nature of permitting in many Member States, where there is not one simple permit which can be granted or refused, but a series of administrative steps which must be completed. Even in Member States where implicit permitting might theoretically be possible, the likelihood that a permit can be decided within 30 days, as envisaged under Article 16a(4), is extremely unlikely. We consider that the likely result is that many competent authorities will simply refuse permissions on day 29 in order to avoid a situation where an implied consent is granted, thereby significantly delaying the permit application process.

³ The CJEU has confirmed that ‘plan’ has a very broad meaning in this context. This includes **land-use plans and spatial plans**, even when they do not as such authorise development, given that they would still have great influence on development decisions (Case C-6/04, paragraph 52). In its own Guidance, the Commission has also indicated that **sectoral plans, including energy plans**, should also be considered as covered by the scope of Article 6(3) of the Habitats Directive (See European Commission, ["Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC"](#) C(2018) 7621, page 39).

Overarching and Procedural Flaws

Compounding the legal flaws identified above are a series of procedural flaws which we consider mean that significant amendments need to be made to the Proposed Directive. We outline these procedural flaws below.

“Backdoor” amendment of environmental legislation

Despite no indications as to the need for amendments to Directives 92/43/EEC (Habitats Directive), 2009/147/EC (Birds Directive), 2000/60/EC (Water Framework Directive) and 2011/92/EU (EIA Directive),⁴ which industry has repeatedly shown its support for,⁵ the proposal introduces *de facto* amendments to some of their most essential provisions, effectively risking to undermine the achievement of their respective objectives. Contrary to the measures contained in the operative provisions of the proposal, a series of options to reduce administrative burdens to the deployment of renewable technologies deriving from the improper implementation of the aforementioned Directives have been included in both the “RES Simplify” Study⁶ (the single scientific foundation of the proposal) and the Birds & Habitats Directives’ Fitness Check.

Absence of an Impact Assessment

Impact assessments constitute the rule for all legislative amendments, which are expected to have significant economic, environmental or social impacts.⁷ The obligation of the Union to provide adequate explanation for its actions derives from the Aarhus Convention, Regulation 1367/2006, Article 41 of the EU Charter of Fundamental Rights, the Union’s obligation deriving from Article 296 of the TFEU and a series of legally binding principles (subsidiarity, proportionality, adherence to fundamental rights).⁸

The Commission invokes “political sensitivity” and “urgency” as justifications for its omission to undertake an impact assessment. With regards to the former, it is *particularly* due to the “politically sensitive” nature of those amendments (which could lead to significant environmental degradation, as well as major land use changes with socioeconomic consequences for local communities) that the need for an impact assessment and an in-depth opinion by the Regulatory Scrutiny Board are imperative. Neither the “urgency” argument seems convincing, as the impact assessments “*must not lead to undue delays in the law-making process*”⁹ and, in any case, when viewed in the broader context of the lengthy ordinary legislative procedure and the long-term objective of the proposal, the time added for the completion of an impact assessment seems trivial. In case the Commission would not like to launch an impact assessment on the impacts of the aforementioned amendments, a feasible solution would be their elimination from the proposal to ensure the unhindered progression of the legislative file.

⁴ Of which the three first have recently undergone a Fitness Check Evaluation, being considered “fit-for-purpose”, while the latter has been recently revised (2014)

⁵ For instance, see p 58 of 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

⁶ Technical support for RES policy development and implementation – Simplification of permission and administrative procedures for RES installations (“RES Simplify”). <https://data.europa.eu/doi/10.2833/239077>

⁷ As enshrined in Article 13 (Chapter III) of the Inter-institutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (13 April 2016)

⁸ *Ibid*, Art 12

⁹ C-128/17, para 83; Art 12 Inter-Institutional Agreement

As a more general observation, the political choice of the Commission sets a dangerous precedent that risks disrupting rule of law across EU legislative procedures, including through the abuse of the malleable concepts of “urgency” and/or “political sensitivity” for the advancement of other industries’ private financial interests.

Inadequate Call for Evidence

The Call for Evidence¹⁰ is in violation of Chapter III of the Inter-Institutional Agreement, Article 5 of Regulation 1367/2006 and several principles of EU law and thus, neither it, nor the evidence collected pursuant to it can constitute a legitimate basis for the proposal, as the latter’s scope, subject matter, legal basis, legal implications, targeted audience and likely impacts are significantly wider than their scientific underpinnings, namely the Call for Evidence (and accompanying questionnaire) and the RES Simplify Study. In order to avoid further delays to the proposal, the amendments that were not covered and/or explored by the scientific underpinnings of the proposal should be eliminated.

Scant Stakeholder Participation

The public consultation process followed for the development of the proposal is in violation of a series of procedural requirements, that call for “open and transparent” public consultation through early and effective opportunities which “allow for the widest possible participation”.¹¹ Contrary to those requirements, civil society and environmental organizations have been neither included among the “target audience”, nor consulted for the drafting of the industry-led RES Simplify Study,¹² while an insignificant amount of public authorities have provided their input in the questionnaire, despite the unprecedented changes that the proposed measures would bring to their functions. The only stakeholder group that was provided with early and effective opportunities to participate was the energy sector (*renewable energy producing companies, energy communities, and branch organisations*). Consequently, the input provided in the consultation is not comprehensive and the stakeholder consultation exercise incomplete. Such a process cannot lead to well-informed decision-making on matters which touch the existing environmental acquis.

Erroneous Interpretation of Article 37 of the EU Charter of Fundamental Rights

The principle of high environmental protection introduced in Article 37, also enshrined in Art 11 of the TFEU, obliges the Union to integrate into its policies the “improvement of quality of the environment”. Such an obligation also applies to energy sector policies.¹³ The elimination of the obligation to conduct an assessment of environmental impacts of renewable technologies, namely the quintessential EU processes safeguarding the environment from plans and projects with potentially negative environmental impacts, does not, in any way, contribute to the “improvement of the quality of the environment”, thus being in violation of both Article 37 of the Charter and Art 11 of the TFEU. Further systematic interpretation of

¹⁰ Published on Jan, 18th; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13334-Renewable-energy-projects-permit-granting-processes-power-purchase-agreements/public-consultation_en

¹¹ Article 9 of Regulation 1367/2006 and Article 19 of the Inter-institutional Agreement

¹² Co-written by WindEurope and SolarPower Europe, two entities with significant financial stakes on the outcome of the file

¹³ Case C-594/18, paras 42, 100

Article 37, indicates that the proposal also disregards the principle of non-regression,¹⁴ violates Articles 53 and 54 of the Charter and ignores Arts 191(3) and 194 of the TFEU.

Violation of the Principle of Proportionality

After a joint reading of the scientific underpinning and the objectives of the proposal amending Directive 2018/2001, it could be argued that *-despite pursuing a legitimate objective-* the mere introduction of exemptions to the secondary EU legislation cited above through the proposed amendments is disproportionate (namely, not in line with the principle of proportionality).¹⁵ The exemptions introduced are neither strictly necessary, nor the most appropriate measures that would resolve the shortcomings identified by the Consortium conducting the RES Simplify Study and the participants to the public consultation. Prior to resorting to such onerous and pervasive measures the Commission would have to assess the effectiveness of the ample other recommendations proposed by the Consortium (none of which goes as far as to propose, or even imply, an exemption from an appropriate assessment or an EIA),¹⁶ rather than going for the “simplest” and least nuanced one.

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¹⁴ According to the principle of non-regression, no subsequent Union act can reduce the protection of Nature already established by a previous Union act unless such reduction is strictly tailored to the achievement of compelling objectives of general interest, neither can environmental protection provisions be repealed by subsequent acts. It should be noted that the principle has been endorsed by the European Parliament and is also binding upon the EU and its Member States through multilateral environmental agreements to which they are Parties to.

¹⁵ Such a conclusion can be drawn from the application of any of the proportionality tests developed under well-established case law, such as C-331/88, para 13

¹⁶ see particularly, see RES Simplify p 73 onwards