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ClientEarth contribution to the European Commission's call for evidence

Renewable energy – guidance on designating renewables acceleration areas

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A.Call for Evidence

The final text of the revised Renewable Energy Directive (hereinafter: RED) is a result of a political compromise achieved during a tumultuous period of EU legislative activity, serving as a response to broader geopolitical and financial developments and the resulting need for an immediate reduction of foreign fossil gas dependency, alongside the acceleration of the green energy transition. Consequently, some of the clauses related to the mapping of areas necessary for the achievement of the 2030 renewable energy targets, as well as the designation of renewables acceleration areas may prove challenging for Member States to implement in a manner consistent with the EU Treaties, the Aarhus Convention and other pieces of EU legislation. The present document is prepared in response to the Commission's Call for Evidence and attempts to contribute to the joint undertaking of developing implementation guidance for national competent authorities, in order to ensure that RED is implemented in a seamless manner, while simultaneously minimizing risks for Member States' non-compliance and unnecessary delays in the renewables' energy transition.

Please note that the following comments assume a baseline understanding of the Birds & Habitats Directives, the Water Framework Directive, the Strategic Environmental Assessment Directive and the Environmental Impact Assessment Directives, and therefore do not include a comprehensive or general discussion of their purpose and structure. However, it is critical that relevant units and departments with purview over and deep experience in implementing and applying these laws are closely involved in the development of the Guidance.

B.Environmental impacts of onshore and offshore wind and solar projects

1. Mapping of necessary areas

Article 15b (paragraphs 1 and 3) provide the spatial planning backdrop for Member States' mapping of areas necessary for their national contributions towards the Union's 2030 renewables targets. With regards to "spatial planning documents" and "plans" that Member States can rely on, due consideration needs to be paid to the fact that there is no terrestrial equivalent to the Maritime Spatial Planning Directive (2014/89/EU). Given the absence of horizontal EU legislation on spatial planning, the burden falls upon Member States to rely on a series of other documents, including relevant national, EU and international geospatial registries, including those of the Natura 2000 network (where relevant also Member States Prioritized Action Frameworks) and of nationally protected areas, and River Basin Management Plans under the Water Framework Directive. Furthermore, nature units inside Ministries of Environment and independent environmental authorities should play a special role in the mapping of available areas. Despite the fact that relying on pre-existing spatial plans is only discretionary according to the RED ("Member States *may use or build upon…"*), it is in Member States' best interest to leverage existing work, rather than generate additional administrative burden. Finally, when implementing this provision, Member States need to consider the obligation prescribed in Article 11(6) of the Nature Restoration Regulation, pursuant to which they will need to coordinate RED mapping with the development of the National Restoration Plans to be adopted and implemented under the Nature Restoration Regulation. Given the significant chronological overlap between the two mapping

processes, their coordination will lead to a significant reduction of administrative burden and boost their respective comprehensiveness. With this in mind, the term “existing” under RED 15b(1) should be interpreted in such a way that it includes National Restoration Plans, to avoid non-compliance with the Nature Restoration Regulation.

Furthermore, Member States’ discretionary reliance on existing spatial planning documents and plans is limited by their obligation to favour multi-use of land (15b(3)), an obligation which can only be met through the careful mapping of existing and prospective uses of land- and seascapes (including ongoing, completed, approved but uncompleted and proposed uses of a given area), the objectives they seek to achieve and the compatibility of renewables’ deployment (both individually and in combination with other concurrent uses) with the achievement of said objectives. Through this provision, the law seeks to minimize conversion of land and sea, in an effort to minimize the already substantial land- and sea- use pressures challenging a series of Member States. Favouring multiple uses of land will enable Member States to coordinate the implementation of different legal and policy instruments with area-based implications (most notably the Common Agricultural Policy Strategic Plans Regulation, the Birds and Habitats Directives, the Nature Restoration Regulation, the Water Framework Directive, among others), generating financial and spatial co-benefits, without compromising their compliance with obligations deriving from different instruments. Still, the law restricts the Member States’ obligation to “favour multiple uses” by noting that, for renewables projects to co-exist with pre-existing land uses of areas included in the maps developed under RED Article 15b(1), they need to be compatible with those pre-existing land uses. Effectively, this provision must trigger an initial compatibility assessment in Member States, which should already identify areas where it is not possible to achieve both the renewables’ and other concurrent objectives. **While RED Article 15b(3) does not specify the legal implications from the incompatibility of renewable energy projects, it follows that, where multiple uses of the areas are not possible (due to the incompatibility of the different uses), the pre-existing use should be favoured**, in order to ensure homogeneity in the interpretation of this provision**.** Whether the outcome of this assessment is the unavailability of the given area (and – consequently – it’s non-inclusion in the map) is a matter of judicial interpretation.

The process of mapping, in order for it to be comprehensive, should be conducted in a manner that would inform the obligations stemming from the SEA and Habitats Directive, and mitigate against noncompliance with the RED 15c(1) and (2). With a proper reference to the **Articles 6(2) and 6(3) of the Habitats Directive, Article 4(4) of the Birds Directive** and **Article 5(1) and Annex I(b)(c)(d)(e)(f) of the SEA Directive** at the early stage of mapping, Member States can successfully delineate areas that have likely significant effects and are in conflict with nature, as contemplated by RED 15c(1), ahead of the environmental impact assessment pursuant to the RED 15c(2). Thus, in order to prevent noncompliance with other pieces of horizontal and sectoral legislation, to ensure future acceptance of renewables projects by local communities and to reduce the risk of potential errors, litigation and/or other legal challenges, the process of mapping should at least consider the above-mentioned obligations already at this stage. With proper coordination with existing spatial planning instruments, the mapping will, thus, go beyond achieving the objectives listed in RED 15b(1), namely the *“available surface, sub-surface, sea or inland water areas that are necessary for the installation of renewable energy plants and their related infrastructure”* . As a co-benefit, it will generate essential knowledge on the suitability and sensitivity of Member States’ areas, feeding into relevant Strategic Environmental Assessments and appropriate assessments under the Birds and Habitats Directives and serving as a key tool to fast-track the next stages of the process (i.e., designation of renewables acceleration areas), in a manner compliant with applicable law.

Finally, and to avoid discrepancies among different spatial planning instruments covering the same areas, Member States should develop appropriate processes in order to ensure that any updates in "*existing spatial planning documents or plans*" (including legally-binding periodic reviews) are reflected in the RED's coordinated mapping via the periodic review procedure established under RED Art 15b(4).

2. Designation of Renewables Acceleration Areas

a. Excluding Natura 2000 sites and other environmentally sensitive areas

In determining renewables acceleration areas, it is imperative to ensure a thorough understanding of species and habitats potentially affected, and exclude relevant areas, in order to ensure compliance with EU and national environmental standards and rules. This will lead to the prevention, or at least minimization of adverse environmental, climate-related and socioeconomic impacts of the designation and operation of renewables acceleration areas.

With regards to Article 15c(1)(a)(i), reference is made to *"degraded land not usable for agriculture"*. Given the timing of the adoption of the RED, no reference is made to the Nature Restoration Regulation, since it has yet to enter into force. That being said, Member States should also exclude *"degraded land not usable for agriculture"*, if these have significant biodiversity value and they plan to adopt restoration measures on this land, for the purposes of meeting targets set in Articles 4(1) or 4(2) of the Nature Restoration Regulation. Inclusion of such land in renewables acceleration areas might lead to its further degradation and thus exponentially increase restoration costs.

Although **Article 15c(1)(a)(ii)** is explicitly "*excluding Natura 2000 sites and areas designated under national protection schemes for nature and biodiversity conservation, major bird and marine mammal migratory routes as well as other areas identified on the basis of sensitivity maps and the tools referred to in the point (iii), except for artificial and built surfaces located in those areas such as rooftops, parking areas or transport infrastructure;"* it is important to note that as regards geographical scope, the provisions of **Article 6(3) of the Habitats Directive** are not restricted to plans and projects that exclusively occur *inside* a protected site; they also target plans and projects situated *outside* the site but **likely to have a significant effect on it regardless of their distance from the site in question**[1]. This means that *a likelihood of significant effects*, under **Article 6(3) of the Habitats Directive**, may arise not only from plans or projects located within a protected site, but also from plans or projects located outside a protected site[2].

Therefore, it is important that Member States, during the determination of renewables acceleration areas in line with Article 15c, apply the **Article 6(3) of the Habitats Directive safeguards** to any development pressures – including those which are external to Natura 2000 sites, but which are likely to have significant effects on any of them. After all, the appropriate assessment is also the most "*appropriate and proportionate tool*", in the meaning of 15c(1)(iii) that Member States have in their disposal when assessing "significant environmental impacts" on all sites of community importance. This

[1] CJEU, Cases C-98/03, Commission v Germany, para 51 and C-418/04, Commission v Ireland, paras. 232, 233.
[2] CJEU, Case C-142/16, Commission v Germany, para 29.

also applies to **potential transboundary effects** that a plan or project in one Member State is likely to have in another Member State.[3]

Furthermore, proper assessment of the environmental impacts of onshore and offshore wind and solar projects cannot be done without a proper **cumulative impact assessment** in accordance with the **Article 6(3) of the Habitats Directive** and **Article 5(1) and Annex I(f) of the SEA Directive**[4], since the assessment of the likelihood of potentially significant effects of the plan or project should be done, **either alone or in combination with other projects or plans**.

During the planning stage, it will be possible to identify all other plans or projects that could give rise to cumulative impacts with the plan or project in question, meaning that any other plans and projects that can **act in combination** should be identified. Data available in spatial plans, and river basin management plans under the Water Framework Directive, could be relevant for this purpose.

Since the cumulative impacts often occur only occur over time, it is imperative to take account of plans and/or projects which are **completed, approved but uncompleted, or proposed**. This should also include those projects and plans preceding the date of transposition of the Directive or the date of designation of the site[5], since the assessment of biodiversity impacts should work with the **notion of environmental limits**, which define an ecosystem's capacity to cope with changes without losing its core attributes or functions.[6] Because of this, the fact that some projects were already approved does not give a presumption in favour of any other projects that may be proposed in the future. On the contrary, the approval of one project may mean that the ecosystem will have reached its carrying capacity and may lose its integrity if any further developments, however small, occur.

This is relevant not only for renewable projects, or similar types of plans or projects, but any other plans or projects that have been already completed, approved but not yet completed, or submitted for consent. Similarly, the assessment should consider the cumulative effects **not just between projects or between plans, but also between projects and plans** (and vice versa).[7]

In conclusion, **the obligation of Article 15c(1)(a)(ii) to exclude Natura 2000 sites from being considered as renewables acceleration areas also extends to those areas located outside Natura 2000 sites where the plans designating renewables acceleration areas (or individual renewables projects contained therein) *individually* or *in accumulation with* other projects** (regardless of whether they are ongoing, completed, approved but uncompleted, or proposed adverse and regardless of whether they take place within the jurisdiction of the developing Member State or not) are likely to **have an adverse environmental impact on the Natura 2000 site.**

The *ratio legis* for the exclusion of Natura 2000 sites from being considered as renewables acceleration areas consists in the need to ensure the integrity and sustain the ecological condition of the Natura 2000 network as a whole and of individual sites. Excluding Natura 2000 sites in order to avert adverse effects on them, only to allow such adverse effects on them by projects taking place outside of them goes both against the intention of the co-legislators and against relevant case law. In any case, Member States would also draw the same conclusions on the exclusion of the above set of areas when applying

[3] Managing Natura 2000 sites, the provisions of Article 6 of the Habitats Directive 92/43/EEC, European Commission, 2018, p. 40.
[4] CJEU, Case C-418/04, Commission v Ireland, Case C-392/96, Commission v Ireland, paras. 76, 82.
[5] See, for example, Case C-142/16 - Commission v Germany, paras 61 and 63.
[6] https://ec.europa.eu/environment/eia/pdf/EIA%20Guidance.pdf, p. 17.
[7] Managing Natura 2000 sites, (n. 3), p. 42.

15c(1)(a)(iii), given the likely "*significant environmental impacts*" that renewables would have in those areas.

Further, drawing conclusions from the appropriate assessment under Article 6(3) of the Habitats Directive in a manner that would lead to authorisation of an activity, would only be possible if it was made certain that an activity would not adversely affect the integrity of the protected site. This is so, when there is no reasonable doubt from a scientific point of view as to the absence of such adverse effects[8]. Reflecting on the precautionary principle, the assessment must be sufficiently detailed and reasoned[9], in light of the best scientific knowledge in the field[10], to demonstrate the absence of adverse effects rather than their presence.

The above argumentation also applies to **all sites included in the list of Sites of Community Importance, even when such sites have yet to be designated as protected areas** and inducted in the Natura 2000 network[11].

Concerning **species**, it is important to map sensitive areas outside of the protected areas where animal and plant species listed under **Annex IV of the Habitats Directive** reside, as well as bird species protected under the Birds Directive, and are likely to be affected by the proposed plans or projects, in order to prevent any potential conflict with nature. Apart from these species, it is also important to map areas where other important species reside, such as endemic species, wide-ranging species (such as bears, wolves or lynx that require large blocks of habitat in order to survive and to provide enough area where they can forage, find a mate or hunt prey), disjunct species, as well as areas where aggregation of species may occur. Species sensitivity mapping should also highlight temporal (e.g. Seasonal) sensitivity considerations that may affect conservation status of a given species, or its natural habitat. Further essential elements of habitats and species sensitivity mapping should include disambiguation of data in line with elements set out in Habitats Directive Article 1(c) and 1(g), as well as Article 4(1) of the Birds Directive (cases (a) - (d)), to allow for informed decision-making.

While not representing a separate methodology or tool, the identification of sensitive areas needs to incorporate clear delineation of habitats in poor, bad or unknown condition. For the purposes of sensitivity mapping, Member States should consider areas where habitats from Annex I of the Habitats Directive are in unknown condition, as being in bad condition, and they should render these areas ineligible for deployment of renewables. The outcomes of Member States' mapping under Nature Restoration Regulation's Articles 11(2)(a) and 11(4) should be coordinated with and reflected in Member States' preliminary mapping under the RED.

This exercise should ideally have already been undertaken during the mapping stage prescribed in Art. 15b, in order to avoid data gaps for the necessary exclusions imposed upon Member States via Art. 15c(1)(a)(ii).

Finally, with regards to Article 15c(1)(a)(iii), the provision guides the Member States to "identify the areas where the renewable energy plans would not have a significant environmental impact". Following the analysis above, this exercise goes beyond the strict limits of the Natura 2000 network, covering a series of other types of areas, whose sensitivity needs to be assessed, to a rigour equivalent to the one established under Article 6(3) of the Habitats Directive, so that they can also be excluded from

[8] CJEU, Case C-142/16, Commission v Germany, para. 33.
[9] CJEU, Case C-157/96, The Queen v Ministry of Agriculture, Fisheries and Food and Commissioners of Customs & Excise, ex parte National Farmers' Union and Others, para. 63.
[10] CJEU, Case C-127/02, Waddenvereniging and Vogelbeschermingsvereniging" (Waddenzee), para. 61.
[11] Case C-117/03 Dragaggi and Others, para. 25.

renewables acceleration areas. Simultaneously, the provision makes explicit reference to *"the development of a coherent Natura 2000 network"*, a formulation indicating that the RED considers the future designation of areas, aimed at completing the Natura 2000 network. Pursuant to the EU Biodiversity Strategy and the biogeographical "pledge and review" process, Member States are currently planning the designation of additional protected areas, as well as strictly protected areas, while simultaneously improving their connectivity, with the objective to complete the Natura 2000 network. Areas planned to be designated as protected areas (under the Natura 2000 network or national protection schemes) should also be excluded from the plans designating renewables acceleration areas, as their inclusion would render the plans in violation with the RED Article 15c(1)(a)(iii), once they are formally designated for protection.

b. Mitigating adverse environmental impacts from renewables acceleration areas

In line with Article 15c(1)(b), Member States need to *"establish appropriate rules for the renewables acceleration areas on effective mitigation measures".* As a first clarification, the Commission's Guidance needs to delve deeper into the normative content of the terms of "*appropriate*" and "*effective*", with a view of establishing what these rules and measures should consist of, to be assessed on a case-by-case basis in line with the specificities of the affected species and/or habitat, the expected environmental impact (nature, gravity, etc.), as well as the type of the renewable energy and size of the project in question.[12]

For Member States to implement 15c(1)(b), whose objective is for measures to be taken in order to avoid and/or minimize the adverse environmental impacts in certain areas, Member States need to first ascertain the *likelihood of* significant effects that renewables acceleration areas would have on the site (either alone or in combination with other plans or projects) ("screening", pre-assessment).[13] It should be underscored in the guidance that Member States' obligation to adopt the "mitigation measures" referenced in 15c(1)(b) arises "**even in the face of uncertainty as to the absence of adverse effects on the site concerned**"[14], by analogy to the obligations under Article 6(3) of the Habitats Directive. In other words, the appropriate rules and effective measures of Article 15c(1)(b) will always have to be adopted unless there "remains no reasonable scientific doubt as to the absence of" adverse environmental effects,[15] by analogy to the threshold of application of the appropriate assessment with regards to the greenlighting of a plan or project under Article 6(3) of the Habitats Directive.

In order to ensure compliance with the obligations laid down in Article 6(3) of the Habitats Directive, it is important to stress that the mitigation measures cannot be used in determining the likelihood of significant impacts, and hence the need for an appropriate assessment during the screening procedure under Article 6(3) of the Habitats Directive. This is confirmed by the Court in its ruling in case C-323/17, where the Court said that *'in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site*'. Such measures can only be considered during the

[12] Managing Natura 2000 sites, (n 3), pp. 35 – 36.
[13] Commission Notice, 'Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC' (2021/C 437/01), pp. 7 – 9.
[14] CJEU, Case C-127/02, Waddenvereniging and Vogelbeschermingsvereniging ("Waddenzee"), para. 44.
[15] Ibid.

appropriate assessment. The use of term “mitigation measures” under Art 15c(1)(b) of the RED arises, thus, as particularly puzzling, since it seems to suggest that by establishing appropriate rules for the renewables acceleration areas on effective mitigation measures, Member States can avoid the adverse environmental impact that may arise, and consequently comply with the provisions of the Habitats Directive, contrary to the abovementioned case law.

Mitigation measures should also not be confused with compensation measures. Specifically, measures which are not functionally part of the project, such as habitat improvement and restoration (even if contributing to a net increase of the habitat area within the affected site) or creation and improvement of breeding or resting places for the species, should not be considered as mitigation as they do not reduce negative impacts of the project as such. These types of measures, if they are outside the normal practice required for the conservation of the site, meet rather the criteria for compensatory measures.

Furthermore, it should be clarified that effective mitigation measures taken in line with 15c(1)(b) do not replace or in any way substitute Member States’ extant and continuous obligations under Article 6(2) of the Habitats Directive. Even if Member States have taken all measures to “*avoid the adverse environmental impact that may arise*” or “*to significantly reduce it*," they are still bound by the obligation to avoid deterioration or significant disturbances occurring from any activity on the site in question, as confirmed by the CJEU: “*Nevertheless, it cannot be precluded that such a plan or project subsequently proves likely to give rise to such deterioration or disturbance, even where the competent authorities cannot be held responsible for any error. Under those conditions, application of Article 6(2) of the Habitats Directive makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to that directive.”*[16]

This is still applicable, in spite of the clause in the next sub-paragraph which establishes **a (rebuttable) presumption of compliance with relevant environmental provisions (including Article 6(2) of the Habitats Directive)**. The Guidance should explain to Member States that the presumption only reverses the burden proof, establishing that adoption of rules should be perceived as compliance with relevant environmental provisions **until proven otherwise**. In the case of Article 6(2) Habitats Directive in particular, **any deterioration or disturbance caused to potentially affected habitats and/or species would mean that mitigation measures adopted were not “effective” in achieving the outcome-based obligation of Article 6(2) of the Habitats Directive, thus rebutting the legal fiction of “compliance”, in the meaning given to it by Art 15c(1)(b) second subparagraph.**

Concerning measures laid down in **Article 12(1) of the Habitats Directive**, it’s important to stress that they are of a preventive nature and not purely prohibitive[17]. Preventive measures anticipate the threats and risks a species may face and are particularly important in preventing deterioration or destruction of breeding sites or resting places of Annex IV(a) species (Article 12(1)(d)).

Moreover, it is important to distinguish between the measures under Article 12(1)(d) and those that would only be applicable when derogating from those prohibitions under Article 16 of the Habitats Directive. Namely, measures under Article 12(1)(d) need to ensure the continued ecological functionality of a breeding site/resting place and aim to minimise or even cancel out the negative impact of an activity through a range of preventive actions. In accordance with the precautionary principle, if the measures proposed do not guarantee the continued ecological functionality of a site, they should not be considered under Article 12(1)(d). There must be a high degree of certainty that the measures

[16] CJEU, Case C-127/02, Waddenvereniging and Vogelbeschermingsvereniging (Waddenzee), para. 36.
[17] CJEU, Cases C-103/00,Commission v Greece, C-518/04, Commission v Greece, and C-183/05, Commission v Ireland.

are sufficient to avoid any deterioration or destruction, especially in the context of rare species with an unfavourable conservation status that require a higher degree of certainty regarding the functionality of the measures, than in the case of common species with a favourable conservation status.[18]

Similar to the measures under Article 6(3), measures under Article 12(1)(d) should not be confused with compensatory measures that aim to compensate for, or offset specific negative effects on species, rather than minimise or cancel out the negative impact of an activity.

With regards to the *"novel mitigation measures to prevent, to the extent possible, the killing or disturbance of species protected under Directives 92/43/EEC and 2009147/EC, or any other environmental impact"* referenced in 15c(1)(b) second subparagraph, extreme caution needs to be exercised given the marginal compliance of the derogation provided here with the precautionary principle of Article 191 of the Treaty on the Functioning of the European Union, a principle which according to the Court serves as a foundation for the interpretation of the Birds and Habitats Directives.[19] The substantive content of the precautionary principle,[20] as a legally binding principle upon all actions undertaken by the EU and its Member States, has been concretized and defined in different contexts, through ample normative analyses, scientific methodologies and judicial interpretation, allowing for significant certainty as to which Member States' activities are deemed to be in non-compliance with it.

In this specific context, for the adoption of the *novel mitigation measures* to be aligned with the precautionary principle (and thus legal), a case-by-case assessment of a series of considerations needs to be made:

- the gravity of potential damage (in this case: i) "killing or disturbance of species protected under Directives 92/43/EEC and 2009/147/EC" and ii) "other environmental impact"),
- the quality of scientific evidence supporting the deployment of such "novel" measures,
- the conclusiveness of the findings of "pilot projects",
- the effectiveness of novel measures for the non-disturbance of individual species, other dependent species, habitats and the integrity of the Natura 2000 network
- the risks on the long-term impacts (including deterioration of ecological condition of relevant affected species and habitats)
- the degree of certainty that "appropriate steps" have to restore the prior ecological condition and cease further disturbances and impacts

In line with the final subparagraph of 15c(1)(b), Member States' competent authorities need to provide explanations on the identification of appropriate mitigation measures, including novel ones. From the outset it should be clarified that, with regards to habitats and species mitigation measures, the competent authority will most certainly be different to the competent authority designating renewables

[18] Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, February 2007, p. 48.
[19] See above *Waddenzee* and also CJEU, Case C-180/96, United Kingdom v Commission, paras. 50, 105 and 107.
[20] European Environmental Agency, 'Late lessons from early warnings II: science, precaution and innovation' (EEA Report, 1/2013).

acceleration areas, or permitting individual projects, a reality that necessitates inter-ministerial coordination as a precondition for compliance with this provision. With regards to the content of the explanations that will need to be provided, a detailed explanation of what the novel mitigation measures consist in, their scientific basis and their likelihood of success would be necessary. Simultaneously, science-based explanations need to be provided on why the Member State chose to adopt such measures, and why other mitigation measures, ecologically tested on their mitigation success rate, were not deployed instead.

Given the high risks associated with the adoption of previously untested measures on sensitive species, compliance with both the Habitats Directive and the precautionary principle would necessitate the adoption of a series of safeguards. Firstly, the "testing period" for pilot projects should be limited, given that the concept already contravenes the precautionary principle, in the sense that it allows potential activities, even though such activities are potentially damaging to the environment. The testing period should be determined from the outset, with the caveat of its termination whenever likelihood of damage (in the form of species disturbance, killing or any other environmental impact) arises. Furthermore, measures that are profoundly inadequate, unsuitable or inappropriate to achieve the expected outcomes set out in 15c(1)(b) second subparagraph should *not* be considered novel mitigation measures in the meaning of the term given here. Lastly, a temporary pause or even the termination of the renewables plan or project in question should be among the considered *"appropriate steps"* if the "*novel mitigation measures"* prove ineffective.

Finally, a limitation to the Member States' discretion to adopt such measures should be the *current conservation status* of a given species. Whenever the conservation status of a habitat or species is listed as unfavourable, in line with Articles 1e and 1i of the Habitats Directive, the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned is limited,[21] and Member States are expected to consider the implementation of restoration measures in order to allow recovery under Article 6(1) of the Habitats Directive.[22] Thus, no measures leading to further deterioration of their status (and much more their extinction or disappearance from a certain area of occurrence) can be adopted, since that would defeat the overarching objective of the Habitats Directive (Article 2).

C. Public Participation

1. General considerations

The revised RED recognizes that public support and acceptance are essential for a fast and effective renewable energy transition.[23] To ensure broad public acceptance of the renewable energy transition, the revised RED endorses several measures such as promoting the participation of local communities in renewable energy projects,[24] repowering of existing projects,[25] inclusion of renewable energy

[21] CJEU,Case C - 293/17, Coöperatie Mobilisation for the Environment UA.
[22] CJEU, Case C - 281/16, Hoekschewaards Landschap.
[23] Recital 30 of the Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652.
[24] Recital 20 of the Directive 2023/2413.
[25] Recital 34 of the Directive 2023/2413.

communities in joint offshore renewable energy projects,[26] and others. However, public participation in the decision-making process on all aspects of renewables acceleration areas is a key means to ensure public support and to reduce the risk of errors and delays in the permitting process due to legal challenges. Therefore, Member States should keep the public informed from the early stages of the mapping and designation process and provide early and effective opportunities for the public on a local level to express their opinion through public consultations. An obligation to conduct public consultations is separate from stakeholder involvement in the mapping process. While close cooperation with relevant stakeholders such as environmental NGOs is important, it cannot substitute public consultations referred to in Article 15d of the revised RED.[27]

Under the revised RED, acceleration of the permitting process under the revised RED is achieved through a modified planning process during the designation of renewables acceleration areas. The SEA carried out in the designation process would fully or partially replace an EIA on a project level, thereby shortening the permitting process. Where no EIA may be carried out at a later stage or where planning and permitting stages overlap to the extent that they can be considered as a part of a single process, public participation must fulfil the requirements of both Articles 6 and 7 of the Aarhus Convention.[28]

This means that public participation must be organized locally and cover the detailed impact of each type of renewable energy source for each area, as well as the specific mitigation measures for the negative environmental effects in each area and for each type of renewable energy technology to be deployed. [29] Member States must prepare and conduct public consultations in the renewables acceleration areas' designation process, keeping in mind the essential steps and the required level of detail under Article 6 of the Aarhus Convention, meaning that the public participation procedure must in practice fulfil the requirements reflected in Art. 6 EIA Directive.

To optimize the participation processes, Member States should also refer to the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters prepared under the Aarhus Convention for guidance on planning, carrying out and taking due account of the outcomes of public participation.

2. Ensuring effective and meaningful public participation

To ensure effective and meaningful public participation in line with Article 15d of the revised RED, the SEA Directive, and Articles 6 and 7 of the Aarhus Convention, MSs must plan their actions to facilitate public involvement early on in the mapping process. The planning and preparation of the public consultations should follow these general recommendations.

1. Ensure transparency and access to background information.

The CJEU has recognized that "a right to participate in the decision-making procedure could not be effective unless the interested party also has the right to be informed about the project and the

[26] Article 1(4)(b) of the Directive 2023/2413.
[27] The Aarhus Convention Compliance Committee (ACCC) confirmed that consultations of selected stakeholders cannot replace consultation of the public as required by the Convention (see findings on Communication (Romania) ACCC/C/2010/51, para. 110 and Communication (Czechia), ACCC/C/2012/70, para. 55.
[28] See ACCC findings on Communication (United Kingdom) No. ACCC/C/2014/100, para.57, and ACCC Communication No. ACCC/C/2013/98 (Lithuania), para. 95.
[29] Article 15c(b) of the revised RED.

procedure envisaged, and the right of access to information documents." [30] Therefore public involvement should start by providing comprehensive information about the process early on.

This means that detailed information about mapping, designation, and public consultation processes should be proactively published by the local/national authorities. This information should include:

- Up-to-date information about the process/timeline of the mapping/designation process, and contact details of all relevant authorities;
- Clear criteria for designation of acceleration areas;
- Up-to-date information about the mapping process, results/requests for revisions of the mapping exercise, draft plans of the acceleration areas, and any information regarding possible environmental consequences[31] (e.g. environmental impact report);
- Cost-benefit and other economic analyses and assumptions to be used in the decision-making, main reports, and advice issued to the competent authority;[32]
- An outline of the main alternatives studied by the competent authority (see point 3 below);[33]
- Simplified summaries of complex/technical or long documents;[34]
- Provisional timeline of the public consultations, including the time/place/location/format of planned consultations;
- Information on the public's right to access information (documents), right to public participation, and access to justice.

2. Identify the public to be notified and choose appropriate communication channels.

To inform the public, Member States, firstly, identify the relevant public and secondly, identify the most effective communication channels to reach the identified public.

Article 6(4) of the SEA Directive requires Member States to "identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organizations, such as those promoting environmental protection and other organizations concerned." This overlaps with the "public concerned" under Article 1(2)(e) of the EIA Directive, which is defined as "public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest." Therefore, in the planning process, Member States should work with local authorities to identify the public affected by the deployment of renewable energy projects in each renewables acceleration area.

Concerning communication with the public, it is important to stress that only communication channels that convey information effectively will fulfil the requirements of the Aarhus Convention. Advocate-General Kokott noted in *Fausch* that "it cannot [..] be sufficient to employ any means of information if it

[30] CJEU, Case C–826/18, LB and Others, para. 43 and Case C-280/18, Flausch and Others, paras 45.-54.
[31] See ACCC findings on Communication (United Kingdom) No. ACCC/C/2014/100, paras.82.
[32] See ACCC findings on Communication (United Kingdom) No. ACCC/C/2014/100, paras.82.
[33] See ACCC findings on Communication (United Kingdom) No. ACCC/C/2014/100, paras.82.
[34] Maastricht Recommendations, II. Public participation in decision-making on specific activities article 6), Section H, p.34.

is not ensured that the public concerned is actually reached. Rather, the information must give the public concerned a reasonable chance to learn about decision-making on proposed activities and how they can participate. Only in this way is it possible to achieve the objective of Article 6(4) of the EIA Directive of giving the public concerned effective opportunities to participate in the decision-making procedure."[35]

MSs should therefore make sure that this information is available to the identified public if necessary through various channels of communication. On a national level, information channels should include a free-access website containing information about all aspects of mapping/point for all relevant information. A similar suggestion is found in the politically agreed text of the upcoming Net-Zero Industry Act.[36]

In addition, where the plans involve their administrative area, the local authorities[37] should identify the appropriate communication channels to make information available for local communities/NGOs and other stakeholders in their area. The CJEU has recommended that "where there are established information channels whose effectiveness is known from past experience, these should be used. If there are not, it must be examined by which information channels those persons can be reached. Possibilities include not only local, but also national newspapers, radio and television, the internet, notices and even notifications to individuals."[38] Methods of communication could also involve bill posting notices in most frequented places in the municipality or at the very place the renewables acceleration zone is envisaged to be located in the municipality in question[39] or where appropriate also individual notices.[40]

The same information channels should be used to notify the public of the timeframe and manner of participation in the consultations, including the dates, times, and locations of upcoming consultations.

3. Consult the public when all options are still open.

The public should be involved from the early stages of the process when all options, including an option to not designate a particular area as a potential renewables acceleration area (the zero option), are still open. At this stage, all these options must still be open *de facto* and *de jure*, meaning that the competent authority must neither be formally nor informally prevented from choosing any of the options.[41] The

[35] Case C-280/18, Flausch and Others, Opinion of the Advocate-General, para.53.; see also the C-280/18, Flausch and Others, Judgement, para. 32.
[36] See e.g. Article 6(7) of the politically agreed text for the Framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act), which proposes publishing a detailed schedule of the permit granting process by the designated authority on a free access website.
[37] In Flausch and Others the CJEU concluded that regional announcement was not sufficient to reach the public concerned: "However, in order to provide it with a useful answer, it may be pointed out that, inasmuch as, on the date on which the invitation to participate in an EIA was made public, most of the interested persons resided or owned a property on the island of Ios, the posting of a notice in the regional administrative headquarters, located on the island of Syros, even accompanied by publication in a local newspaper of the island of Syros, would not appear to have been liable to contribute sufficiently to informing the public concerned", see Case C-280/18, Flausch and Others, judgement, para. 34.
[38] Case C-280/18, Flausch and Others, Opinion of the Advocate-General, para.54.; see also Case C-280/18, Flausch and Others, judgement, para. 32.
[39] See Case C-280/18, Flausch and Others, judgement, para. 34.
[40] Maastricht Recommendations, General Recommendations, Section I.
[41] ACCC findings on Communication (France), No. ACCC/C/2007/22, para. 38 and Communication (Slovakia), ACCCC/C/2009/41, para. 63.

generally proposed alternatives that should be open to the public during the public consultations include:

- different methods that mitigate the negative impact;
- different locations (e.g., modification of the borders of renewables acceleration area);
- different concepts (e.g., different types of renewable energy, etc.) and
- zero option (not designating a particular area as a renewables acceleration area).

The ACCC has concluded that the requirement for "early public participation, when all options are still open" refers to the availability of options at a given stage of decision-making. It implies that members of the public should be able in their comments to challenge the options put forward in the draft plan and to propose other options, including the zero option.[42] It is important to note, that the requirements of early public participation would not be met if options were *de jure* and *de facto* still open but this was in no way apparent to the members of the public participation in the decision-making procedure.[43]

4. Allocate sufficient time for each stage of the consultation process.

Member States should make sure that sufficient time is allocated to each step of the public consultation process, including the provision of background information, the consultation, and for the authority to take received comments into account (see point 6 below). The CJEU has stated that "[i]n order that due account may be taken of those opinions by the authority envisaging the adoption of such a plan or programme, Article 6(2) [of Directive 2001/42/EC] makes clear, first, that such opinions must be received before the adoption of that plan or that programme and, secondly, that the authorities to be consulted and the public affected or likely to be affected must be given sufficient time to evaluate the envisaged plan or programme and the environmental report upon it and to express their opinions in that regard."[44]

In allocating the time to the preparation and consultation process, Member States should take into account factors such as the volume and complexity of the material to be discussed (full technical reports, non-technical summaries, etc.), and the format in which the information is provided (searchable electronic documents, paper format etc.) and other factors. Sufficient time should be allocated for the public to familiarize themselves with all background information necessary to fully participate in the public consultation. As a good practice example, the public authorities may also consider organizing in-person or online information sessions, town halls (local roadshows), or other types of information sessions to discuss the proposals and answer questions about the background information in advance of the public consultation.[45]

What constitutes sufficient time should be evaluated on a case-by-case basis. Article 6(7) of the EIA Directive provides that the time frames for consulting the public concerned should not be shorter than 30 days, however in practice this minimum period, especially where a proposal involves a large amount of information, will likely be too short. The CJEU has recognized in this regard, that "laying down the period within which such opinions can be expressed on a case-by-case basis may, in certain

[42] ACCC Communication (United Kingdom), No. ACCC/C/2014/100, para.84.
[43] ACCC Communication (United Kingdom), No. ACCC/C/2014/100, para.84.
[44] CJEU, Case C474/10, Department of the Environment for Northern Ireland v Seaport (NI) Ltd and Others, para.46.
[45] ACCC findings on Communication (United Kingdom), No. ACCC/C/2014/100, para.32.

circumstances, allow for greater recognition of the complexity of a proposed plan or programme and lead, if appropriate, to the allowance of periods longer than those that might be laid down by law or regulation. [..] However, in that situation, Article 6(2) requires that, for the purposes of consultation of those authorities and the public on a given draft plan or programme, the period actually laid down be sufficient to allow them an effective opportunity to express their opinions in good time on that draft plan or programme and on the environmental report upon it."[46]

The Maastricht Recommendations provide guidance in this regard stating that generally a period of six weeks for the public to inspect the documentation and prepare itself for the public inquiry and a further six weeks for the public to submit comments, information, analyses, or opinions could be considered reasonable.[47] This may not be sufficient time in all cases but gives an indication as to the minimum appropriate period.

5. Ensure effective possibility to express opinion

The timeframe, format, and location of the public consultations should be adapted to the needs of the public identified for the consultation process taking into account their location and ability to travel, access to the internet, special needs, and other factors.

For example, the CJEU has recognized that a decision to organize public consultations regarding a project located on an island in Greece, at the headquarters of a regional authority, which is located on another island, would place a burden on the public to travel to participate in the consultation. The CJEU recognized that in such situations an evaluation has to be made whether the effort required of the public concerned to cross between the two islands would be disproportional compared with the possibility of organizing the consultations in the municipality concerned.[48]

The possibility to comment should be open to anyone expressing an interest and not limited to those persons that were informed/notified (in line with point 2 above).[49]

6. Take comments into account and provide detailed feedback.

It is crucial that the competent authority "seriously consider all the comments received".[50] Opinions expressed in the public consultations must be taken into due account in the designation of renewables acceleration areas, including the determination of any mitigation measures applicable to future renewable energy projects. According to Article 9 of the SEA Directive following the consultation Member States must inform the public of the following:

- The plan/program as adopted;
- Statement on how environmental considerations have been integrated into the plan or program and how the environmental report, opinions expressed during consultations have been taken into account, and the reasons for choosing the plan or program as adopted, in the light of the other reasonable alternatives dealt with;

[46] CJEU, Case C474/10, Department of the Environment for Northern Ireland v Seaport (NI) Ltd and Others, paras.49-50.
[47] Maastricht Recommendations, II. Public participation in decision-making on specific activities (article 6), Section E, p.31.
[48] Case C-280/18, Flausch and Others, judgment, paras. 40 and 44.
[49] ACCC findings on Communication (Lithuania), ACCC/C/2006/16), para. 80.
[50] ACCC findings on Communication (Spain), ACCC/C/2008/24, para. 99 and Communication (Czechia), ACCC/C/ 2012/70, para. 61.

- The measures of monitoring (e.g. identifying the significant unforeseen environmental impacts or implementation of the mitigation measures in the renewables acceleration areas).

The feedback provided should be appropriately detailed and ideally contain specific responses to the most important objections/suggestions raised. A good practice example in this regard is provided in Annex 6 of the response from the government of the Netherlands concerning communication No. ACCC/C/2014/104 before the ACCC. Annex 6 of the response contains the decision to grant a license to the applicant N.V. Elektriciteitsproductiemaatschappij Zuid-Nederland for the extension of the design lifetime of the Borssele Nuclear Power Plant. The final section (section 6) of the decision contains detailed and specific responses to the points raised in the public consultation, including the summary of views expressed, a general response to the views expressed, a detailed response to specific points raised, and a general conclusion.[51]

For greater predictability and ease of access, all decisions and feedback on how the opinions expressed during consultations have been taken into account in the decision-making process should be published and communicated using the same communication channels.

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[51] Decision on the Amendment of the Nuclear Energy Act licence granted to N.V. Elektriciteits-Produktiemaatschappij Zuid-Nederland (NV EPZ) for the extension of the design lifetime of the Borssele Nuclear Power Plant (long term operation) granted by The Minister of Economic Affairs of the Netherlands, Section 6, pp.32-66.