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Renewable Energy for Nature and People

A Practical Guide to the revised Renewable Energy Directive

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Glossary

Aarhus Convention Compliance Committee	**ACCC**
Alternative dispute resolution	**ADR**
Common Agricultural Policy	**CAP**
Court of Justice of the European Union	**CJEU**
Environmental Impact Assessment	**EIA**
European Union	**EU**
National Energy and Climate Plan	**NEPC**
Non-governmental Organisation	**NGO**
Nature Restoration Law (Regulation 2024/1991)	**NRL**
Renewables Acceleration Area(s)	**RAA**(s)
Renewable Energy Directive (Directive 2018/2001)	**RED**
Sites of Community Interest	**SCI**
Special Area of Conservation(s)	**SAC**(s)
Special Protection Area(s)	**SPA**(s)
Strategic Environmental Assessment	**SEA**
Treaty on European Union	**TEU**
Treaty on the Functioning of the European Union	**TFEU**
Water Framework Directive (Directive 2000/60/EC)	**WFD**

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Executive Summary

This Practical Guide has been prepared to provide guidance on nature and people-oriented obligations under the Renewable Energy Directive (RED).[1] With references to international and European Union (EU) law, as well as the case law of the Court of Justice of the European Union (CJEU) we provide recommendations on how to implement the provisions of the RED while maintaining consistency with EU environmental law and obligations under the Aarhus Convention.

1 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, p. 82.

This guide provides recommendations on mapping and designation of Renewables Acceleration Areas (RAAs) and subsequent permitting of renewable energy projects. It does not cover provisions of RED dedicated to the areas of grid and storage infrastructure, permitting of repowering projects, and installation of solar equipment or heat pumps.

Mapping

To support the faster deployment of renewable energy projects within the EU, the RED introduced different stages that Member States are required to follow, such as carrying out a coordinated mapping for the deployment of renewable energy and related infrastructure in their territory, in coordination with local and regional authorities, and to designate as a sub-set of those areas, specific land and sea or inland water areas as renewables acceleration areas where the deployment of the specific type of renewable energy source is not expected to have a significant environmental impact.

For the mapping stage to be as effective and sustainable as possible, careful coordination and integration of environmental, spatial, and land-use considerations at various stages of planning and implementation is needed. The process begins with Member States ensuring that environmental factors are incorporated into the coordinated renewables mapping phase. This approach provides a robust foundation for the designation of RAAs and supports compliance with the broader environmental objectives of the RED.

To enhance alignment with existing frameworks, renewable energy mapping must integrate with spatial planning instruments, such as those outlined in the Maritime Spatial Planning Directive. Additionally, synchronizing the preparation of National Restoration Plans with renewable energy mapping is crucial to balancing development goals with ecological restoration efforts.

Given the limited availability of land and sea resources, conflicts over competing uses present a significant challenge. In areas identified for renewable energy that overlap with pre-existing uses, Member States must assess the feasibility of coexistence and actively promote multi-use strategies. These efforts can be supported by best practices available through the Technical Support Instrument.

In cases where renewable energy projects are incompatible with pre-existing land uses, the latter should take precedence. Such areas should be excluded from renewable energy suitability maps unless deliberate changes to land use are implemented. Ignoring these potential conflicts risks future legal challenges to area designations or project permits, highlighting the importance of careful planning and coordination.

By prioritizing these measures, Member States can effectively balance renewable energy objectives with environmental protection, legal compliance, and sustainable land-use practices.

Designation

Concerning the designation phase, Member States must exclude areas with high ecological sensitivity RAAs. This includes Natura 2000 sites, nationally protected areas, Sites of Community Interest (SCI), and major migratory routes. Areas eligible for Natura 2000 designation should also be pre-emptively excluded to align with EU conservation objectives and finalisation of the Natura 2000 network.

Member States must assess environmental sensitivity using appropriate tools and datasets, ensuring that renewable energy projects within RAAs have no significant environmental impact. Although the legislation does not explicitly define "significant environmental impact," decisions must follow established methodologies under the Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), and Birds and Habitats Directives, with criteria aligned with site-specific conservation objectives.

The designation of RAAs requires detailed and robust SEAs, extending beyond standard practices. SEAs must address both plan-level and project-level impacts, in order for projects in RAAs to be exempt from EIAs. Appropriate assessments must also expand in scope and depth to identify significant environmental impacts and safeguard unsuitable areas from inclusion in RAA plans. Cumulative impact assessments will be central, requiring competent authorities to evaluate the combined effects of all RAA plans, grid and storage infrastructure projects, and other relevant developments on the environment and Natura 2000 sites.

Mitigation measures must be habitat- and species-specific, based on a thorough analysis of environmental sensitivities in proposed RAAs. While adopting novel mitigation measures, Member States must prioritise the precautionary principle and monitor effectiveness rigorously, avoiding unproven methods if existing measures are more effective. Comprehensive planning and robust environmental assessments are essential to balance renewable energy development with biodiversity protection.

Permitting

When permitting renewable energy projects in RAAs, Member States must ensure that any exemptions from EIA or appropriate assessment obligations under the revised RED are contingent on the implementation of targeted, effective mitigation measures. These measures must be based on comprehensive knowledge of project-level impacts identified during the RAA designation stage, ensuring they address specific environmental concerns associated with each project.

To provide legal certainty and foster investor confidence, Member States should apply the screening criteria outlined in Annex III of the EIA Directive when assessing the "highly likely significant unforeseen adverse effects" under the RED. This structured approach ensures consistency and transparency in evaluating environmental impacts, differentiating between thresholds such as "likely" impacts under the general EIA Directive and "highly likely" impacts under the RED. This distinction is key to streamlining permit decision-making processes in RAAs.

For projects with potential transboundary environmental impacts, Member States must adhere to the standard EIA Directive requirements and screen for "likely significant effects" rather than "highly likely" effects. Article 7 of the EIA Directive mandates full assessment procedures for such projects, ensuring that transboundary impacts are comprehensively evaluated without derogation. This approach upholds environmental accountability and maintains compliance with EU biodiversity and conservation objectives.

Renewable energy projects outside RAAs remain subject to the standard EIA procedure under the EIA Directive and appropriate assessment requirements of the Habitats Directive. While the RED mandates a streamlined single procedure for such projects, it is crucial to ensure that each assessment remains clearly identifiable within the EIA report.

Under Article 16b(2) of the RED, renewable energy projects that incorporate necessary mitigation measures are exempt from prohibitions on the deliberate killing or disturbance of protected species under Article 12(1) of the Habitats Directive and Article 5 of the Birds Directive. However, stricter protections for breeding and resting sites under the Habitats Directive continue to apply to projects outside RAAs.

Article 16f of the RED presumes that renewable energy projects are in the overriding public interest and serve public health and safety. Nonetheless, this presumption is restricted when there is clear evidence of significant, unmitigable adverse environmental impacts. Member States may also limit its application in specific, justified cases.

Before granting a project's status as being in the overriding public interest, Member States must ensure that an appropriate assessment is conducted under the Habitats Directive. Additionally, such status should only be conferred after confirming compliance with Articles 6(4) and 16 of the Habitats Directive, Article 4(7) of the Water Framework Directive, and Article 9(1) of the Birds Directive. These strict assessments safeguard ecological integrity while aligning renewable energy development with environmental and conservation objectives.

Public participation

Public support plays a key role in the success of the energy transition envisaged by the RED. The public's acceptance of the renewable energy installations in their area will contribute to the smooth permitting process as it is likely to increase the quality of decision-making, spot and correct potential mistakes, reduce administrative and judicial challenges and thus contribute to legal certainty.

One way to gain public support is for project promoters to engage with the stakeholders and take their opinions into account in the design and implementation of the project. Engagement with stakeholders, including experts, civil society and members of local communities can be very beneficial, however, it is important to note that it does not replace public consultations in the decision-making process of the competent authorities.

The creation of RAAs potentially changes the existing public participation practices for renewable energy projects. Normally creation of such areas would offer the public an opportunity to have its views heard twice – following an SEA in the planning stage of the RAAs and after an EIA in the permitting process of an individual renewable energy project. Under the RED it is possible, under certain circumstances, to skip the EIA and follow public consultations for individual renewable energy projects located in the RAAs.

For this reason, public consultations in the planning and designation stage of RAAs must be conducted broadly and meaningfully, involving all local communities that are affected or likely to be affected by the RAA and the projects (infrastructure) located in it or around it. Such consultations are unlikely to be successful without the involvement of local (municipal) governments, who are in a better position to identify the public affected and the best channels of communication to reach them.

Transparency is a key aspect of a successful public consultation. The public must have access to complete, if necessary, simplified, information about the draft plans, their environmental and social impacts and other key information

related to the provisional RAA. Information about the process, including a clear explanation of when and how to make their views known, must be published through channels the public affected are likely to access.

The public must be consulted early, when all options, including the option not to designate the RAA or change its borders, are still open. The public has sufficient time to familiarize itself with the information and submit (express) its opinion. The competent authorities must also have sufficient time to review the opinions, incorporate them into the draft plan or provide feedback as to why the opinion may not have been fully taken on board.

Where an EIA or an appropriate assessment is carried out for individual projects, detailed local-level public consultation following the same basic steps must be carried out.

Access to justice

There is no dedicated provision for access to justice in the RED, however, access to justice in all stages of the process is granted under the Aarhus Convention and EU environmental law. Member States are obliged to make sure that the public concerned has effective access to courts to challenge violations of environmental law both in the mapping and designation stage of the RAAs and later in the permitting process of individual projects.

Member States can decide at what point in the process to grant access to justice to the members of the public concerned. But regardless of the point in the process such access is granted, the courts must be able to review the complaint on merits and provide effective remedies, including injunctive relief, the suspension or even annulment of the adopted plan for RAAs or issued permits.

It is important that the public is informed about its right to challenge breaches of environmental law. Therefore, information about access to justice, including applicable procedures, timelines, and practical details of filing a complaint should be included in all communications with the members of the public concerned. The information channels used to communicate information about public participation, as well as meetings or other interactions with the public concerned, can also be used to inform the public concerned about their rights to access justice.

In the mapping and designation stage of the RAAs access to justice should be granted as a minimum to the public concerned, including those members of the public whose interests are sufficiently affected by the designation of the RAA or who are directly concerned by the potential negative effects stemming from alleged breaches of environmental law in the RAA designation process. They must be able to access courts to challenge any violations of national environmental law, which includes any provisions of national law somehow related to the environment, as well as the applicable EU law.

In the permitting stage, the members of the public concerned have the right to challenge the substantive and procedural legality of decisions in the permitting process. This includes negative screening decisions, final permitting decisions and any other breaches of environmental law, as well as violations of provisions on public participation. The public has a right to access decisions that are subject to judicial review therefore to avoid unnecessary delay they should be written, well-reasoned and published from the outset. Although the RED allows for certain decisions to be adopted by tacit administrative approval, it should not apply to decisions that are subject to public participation or can potentially breach environmental law as those decisions are subject to judicial review.

Projects presumed to be in overriding public interest are still subject to judicial review. The presumption of overriding public interest cannot limit Member States' courts' power to make a full assessment of permitting disputes, including the proportionality of potential damage to the environment against other competing interests.

Introduction

In this Practical Guide, we provide guidance on nature and people-oriented obligations under the RED. With references to international and EU law, as well as the case law of the CJEU we provide recommendations on how to implement the provisions of the RED while maintaining consistency with EU environmental law and obligations under the Aarhus Convention.

Over the life of the first Von der Leyen Commission, the European Union saw an influx of new legislation aimed at addressing three complex and intertwined environmental crises: the breakdown of climate, biodiversity loss and land use change. However, leading up to and following the 2024 EU elections, these concerns generally diminished among policymakers, who turned their attention instead toward efforts to boost EU economic security and competitiveness. This shift in focus derives in large part from a false premise that economic and environmental interests are necessarily in conflict and that promoting one comes at the other's expense.

Accelerating the renewable energy transition and decarbonizing Europe's economy is vital to the future of the EU and the well-being of its current citizens and future generations alike. It is a crucial part of the effort to slow down climate change and achieve the EU-wide target of climate neutrality by 2050[2] thus preventing further calamitous effects of global warming. The transition requires both a steep reduction in overall energy demand and a significant expansion of renewables-based electrification and related infrastructure. Still, for the energy transition to be successful it is important to keep in mind two key aspects.

Firstly, climate objectives and the protection of the environment are often viewed as conflicting. In fact, the protection of the environment is sometimes falsely perceived as a factor that could undermine the speedy transition to renewable energy.[3] Healthy, resilient and biologically diverse ecosystems, such as nature-based solutions able to mitigate climate change through the sequestration of carbon, are indispensable in the global fight to reduce the atmospheric concentration of greenhouse gases.[4] They are also essential for the EU to meet its own climate neutrality target[5] and its binding obligations under the Paris Agreement.[6] One of the numerous objectives of the policies regulating the conservation and restoration of biological diversity is climate change mitigation, an objective shared by the EU's energy policy on the development and acceleration of renewable energy technologies. Given their shared objectives, it is imperative that any measures taken to counter climate change do not undermine the biodiversity and health of existing ecosystems. From a legal perspective, there is no formal hierarchy between different legal acts at the EU level, which means that EU laws need to be consistent with each other.[7] Simultaneous pursuit of different constitutionally recognised policy objectives – protection of the environment[8] and development of new and renewable sources of energy[9] – can only be achieved in a mutually enabling, supportive and balanced way. This ensures that advancing one EU policy area does not undermine or even render impossible the achievement of the objectives of another.

Secondly, the transition to renewable energy cannot succeed without the involvement and support of people. A crucial aspect of a just transition is the involvement of local communities likely to be affected by the plans for the renewable acceleration areas and individual renewable energy projects. Local communities must be consulted in a timely and meaningful manner to foster acceptance and a sense of ownership in the energy transition. Enhancing public participation in

2 Article 2(1) of Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law).

3 European Commission, 'The future of European competitiveness. Part A: A competitiveness strategy for Europe', report by Mario Draghi, September 2024, p. 46.

4 Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), "Global Assessment Report on Biodiversity and Ecosystem Services", E. S. Brondizio, S. Settele, S. Díaz, and H. T. Ngo (editors), IPBES secretariat (Bonn, Germany), 2019, p. xxii.

5 See, e.g., Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law), preamble para 33.

6 Pörtner, H.O. et al., IPBES-IPCC co-sponsored workshop report on biodiversity and climate change, IPBES and IPCC, 2021, p. 16.

7 Article 7 of the Treaty on the Functioning of the European Union (TFEU) states: *"The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."*, see Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal of the European Union C 202, 07.06.2016, pp. 47-360.

8 Articles 11 and 191 TFEU.

9 Article 194 TFEU.

energy-related decision-making also helps to reduce the disproportionate influence of large players on European energy systems, addressing structural conflicts of interest that could hinder progress in the energy transition.

Regrettably, some of the choices made by the EU legislator in amending RED may not have fully reflected these considerations in a balanced way.[10] In several places throughout the RED, we can see this unfounded division, whereby compliance with obligations deriving from environmental legislation, including the protection of the environment and public participation in environmental decision-making, is viewed as hindering the acceleration of renewable energy deployment. While concerns about unnecessary delays in the energy transition are valid and must be addressed, it appears that the EU legislator has mistaken Member States' failures to properly transpose and implement relevant EU environmental laws for problems with the laws themselves. This has resulted in amendments that may not only have unintended consequences but also fail to address the root causes of the delays in permitting processes, which remain first and foremost the lack of administrative capacity and digitalisation of national procedures. Furthermore, the new procedures established under the RED, which supposedly help advance the EU's "simplification agenda"[11] may – as explored in this guide– create legal uncertainty, potentially fostering a less favourable investment climate and increasing litigation risks for both the Member States and developers.

Given the consequences of any further delays in the energy transition, it is imperative that Member States deliver the objectives of the RED in a way that is coherent with other policies, and fully compliant with the EU environmental acquis, in particular with EU biodiversity legislation and the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).[12]

This Practical Guide focuses on mapping and designation of RAAs and subsequent permitting of renewable energy projects. It does not cover provisions of RED dedicated to the areas of grid and storage infrastructure, permitting of repowering projects, and installation of solar equipment or heat pumps.

Chapters 1 and 2 of this Guidance focus on the mapping and designation of the RAAs. Chapter 3 lays out the main principles and steps in organising a meaningful public consultation in the designation of RAAs, while Chapter 4 focuses on access to justice in the designation process. Chapters 5 and 6 examine the permitting of individual projects both in and outside the RAAs, including the necessary environmental assessments and overriding public interest. Chapters 7 and 8 cover public participation and access to justice in the permitting stage.

10 For some of our concerns on the procedural shortcomings of the RePower EU legislative revision of the Renewable Energy Directive (RED), see RePower EU - Proposal for a REDII amendment: Expediting renewable technologies' permitting procedures, Summary Briefing, June 2022.

11 European Commission, 'The future of European competitiveness, Part B: In-depth analysis and recommendations', report by Mario Draghi, September 2024, p. 323.

12 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters Aarhus, Denmark, 25 June 1998.

Recommendations

Mapping and designation

Mapping necessary and available areas

- Member States must incorporate environmental considerations at the stage of the coordinated renewables mapping in order to provide an informed basis for the next stage of the process – the designation of RAAs.
- Member States should ensure that renewable energy mapping aligns with existing spatial planning documents, such as the Maritime Spatial Planning Directive, as required by the RED. The planning and preparation of National Restoration Plans should be closely coordinated with the mapping of available and necessary areas for renewable energy development.
- In areas mapped for renewables with pre-existing uses, Member States should identify overlaps, assess feasibility for coexistence, and promote multi-use. The Technical Support Instrument can provide best practices to support these efforts.
- Pre-existing land uses should take precedence in areas where renewable energy projects are incompatible. Such areas should be excluded from suitability maps unless a change in land use is made. Including areas where renewable installations conflict with other objectives risks legal challenges to future designations or permits.

Designating Renewable Acceleration Areas

- Areas with high environmental sensitivity, such as Natura 2000 sites, nationally protected areas, and major migratory routes, must be excluded automatically from the RAAs. This also concerns Sites of Community Interest. Additionally, Member States should pre-emptively exclude areas eligible for Natura 2000 designation, particularly those hosting habitats or species listed under the Habitats Directive, even if the formal designation is incomplete, to align with conservation requirements and prevent biodiversity loss, and enable finalisation of the Natura 2000 network.
- Member States should exclude ecologically sensitive areas from the RAAs based on appropriate tools and datasets, to ensure that renewable energy projects in RAAs have no significant environmental impact. Although the legislation does not explicitly define "significant environmental impact" or prescribe specific tools, Member States must follow established definitions and methodologies under the SEA, EIA, and Birds and Habitats Directives. Areas where renewable energy deployment could potentially harm ecological integrity, particularly within the Natura 2000 network, must be excluded. The determination of "significant effect" should be grounded in objective criteria and aligned with the conservation objectives of specific sites to ensure consistency and coherence of the Natura 2000 network. Any adverse impact on site integrity or significant disturbances under Article 6(2) of the Habitats Directive must be avoided.
- The prioritization of "artificial and built surfaces" for RAAs under Article 15c(1)(a)(i) of RED is conditional upon ensuring that projects in these areas cause no significant environmental impacts.
- Member States should ensure that while they may opt to combine the SEA and the appropriate assessment, the SEA cannot substitute or override the legal obligation to carry out a comprehensive appropriate assessment. The designation of RAAs requires SEAs to be more detailed and robust than in other contexts, as projects located within RAAs may be exempt from the EIAs at the permitting stage. Therefore, Member States must conduct SEAs with an increased level of specificity to evaluate both the plans and the projects intended for the RAAs. Furthermore, the appropriate assessment must also expand its scope and detail to ensure that potential significant environmental impacts are identified and addressed, safeguarding areas unsuitable for renewable energy development from inclusion in the RAA plans.
- A crucial aspect of the SEA and appropriate assessment will be the evaluation of cumulative impacts, which is vital for assessing the environmental effects of all potential projects within RAAs, as well as all RAA plans and other

plans or projects that may contribute to cumulative impacts. Therefore, competent authorities must identify and assess the cumulative impact of other RAA plans, grid, and storage infrastructure plans under Article 15(e) of the RED, along with any other projects or plans that may impact the environment and Natura 2000 network.

- When compiling the "mitigation rulebook", Member States must be aware that general information on categories or types of mitigation measures that can be proposed at the planning level may not be compatible with what is legally required of them. This is why a comprehensive analysis of the environmental sensitivity of individual habitats and species occurring in the proposed RAA or potentially affected by it, should be undertaken, as it will, in most cases enable Member States to identify the species and habitat-specific and concrete measures that they will need to put in place.
- When adopting novel mitigation measures, Member States should exercise increased caution and fully prioritise the monitoring of their effectiveness, in full alignment with the precautionary principle. Novel mitigation measures should be avoided when existing measures are more appropriate in mitigating the (risk of) environmental damage.

→ *Public participation in the designation of RAAs*

- Public consultations are essential to accelerate the permitting process. While early stakeholder involvement is important, Member States must ensure it does not replace proper public consultations conducted by the competent authorities with local communities affected by the RAAs.
- The public concerned should have early access to all relevant information, including the draft maps, assessments, timeline of the mapping and designation process and the provisional consultation schedule.
- Local authorities should be involved in the planning and organising of the consultation process as they are best placed to identify the public concerned, as well as effective communication channels to reach them.
- Consultations should be organised early in the process when all options are still open. The public should be granted enough time to familiarize itself with the relevant information and express its opinion effectively.
- Competent authorities must seriously consider the opinions received and provide the public concerned with feedback. It should include a summary of the outcome of the consultations, how the opinions have been taken into account in the decision-making or why they have been rejected.

→ *Access to justice (designation of RAAs)*

- The national law must grant access to the public to challenge violations of environmental law in the mapping and designation process in line with Article 9(3) of the Aarhus Convention.
- Access to justice should be granted as a minimum to the public concerned, including those members of the public whose interests are sufficiently affected by the designation of the RAA or who are directly concerned by the potential negative effects stemming from alleged breaches of environmental law in the RAA designation process.
- The members of the public should be able to rely on any applicable national environmental law, including the EU law, to challenge breaches of that law in the mapping and designation process.
- The members of the public concerned should have access to Member States' courts. They should provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. The court's decisions must be given or recorded in writing.
- Information about access to justice, including applicable procedures, timelines, and practical details of filing a complaint should be included in all communications with the members of the public concerned. The information channels used to communicate information about public participation, as well as meetings or other interactions with the public concerned, should be used to inform the public concerned about their rights to access justice.

Permitting

Permitting inside of RAA

- When planning renewable energy projects within RAAs, Member States must ensure that any derogation from environmental impact assessment (EIA) and appropriate assessment obligations under the RED is contingent upon implementing targeted mitigation measures. These measures must be based on sufficient knowledge of project-level impacts at the RAA designation stage, ensuring they are specifically designed to address and effectively mitigate the environmental impacts of each project within the RAA.
- To ensure legal certainty, investor confidence, and clear accountability in permit decisions, Member States should use the screening criteria set out in Annex III of the EIA Directive when assessing "highly likely significant unforeseen adverse effects" under the RED in RAAs. This approach will provide a structured, reliable basis for evaluating impacts, ensuring consistency and supporting transparent decision-making processes.
- Member States must screen all projects with potential transboundary environmental impacts for "likely significant effects" rather than "highly likely" effects, as projects under Article 7 of the EIA Directive must adhere to the standard assessment procedures without derogation.

Permitting outside of RAA

- Projects located outside of the RAAs must remain subject to the EIA procedure in accordance with the EIA Directive and must undergo appropriate assessment, according to the Habitats Directive. Although the RED mandates a streamlined, single procedure integrating all relevant assessments for renewable energy projects, it is essential to maintain clear distinction and identifiability of each assessment within the EIA report.
- The prohibition on the deterioration or destruction of breeding or resting sites—whether deliberate or incidental—must be enforced for renewable energy projects outside of RAAs. Member States should ensure rigorous compliance with relevant species protection provisions to uphold robust species and habitat protections in areas beyond RAAs.
- While Article 16f of the RED allows Member States to presume that renewable energy projects, including their construction, operation, grid connection, and storage assets, are in the overriding public interest and serve public health and safety, this presumption must be applied with caution and restricted in cases where there is clear evidence of significant adverse environmental impacts that cannot be mitigated or compensated.
- Member States must ensure that an appropriate assessment is conducted as a prerequisite under the Habitats Directive before discussing whether a project qualifies as being of overriding public interest.
- Member States must ensure that a project's status as being in the overriding public interest and serving public health and safety is only granted after a thorough and strict assessment confirming that all conditions under Articles 6(4) and 16 of the Habitats Directive, Article 4(7) of the Water Framework Directive, and Article 9(1) of the Birds Directive have been fully satisfied.

Public participation in the permitting stage

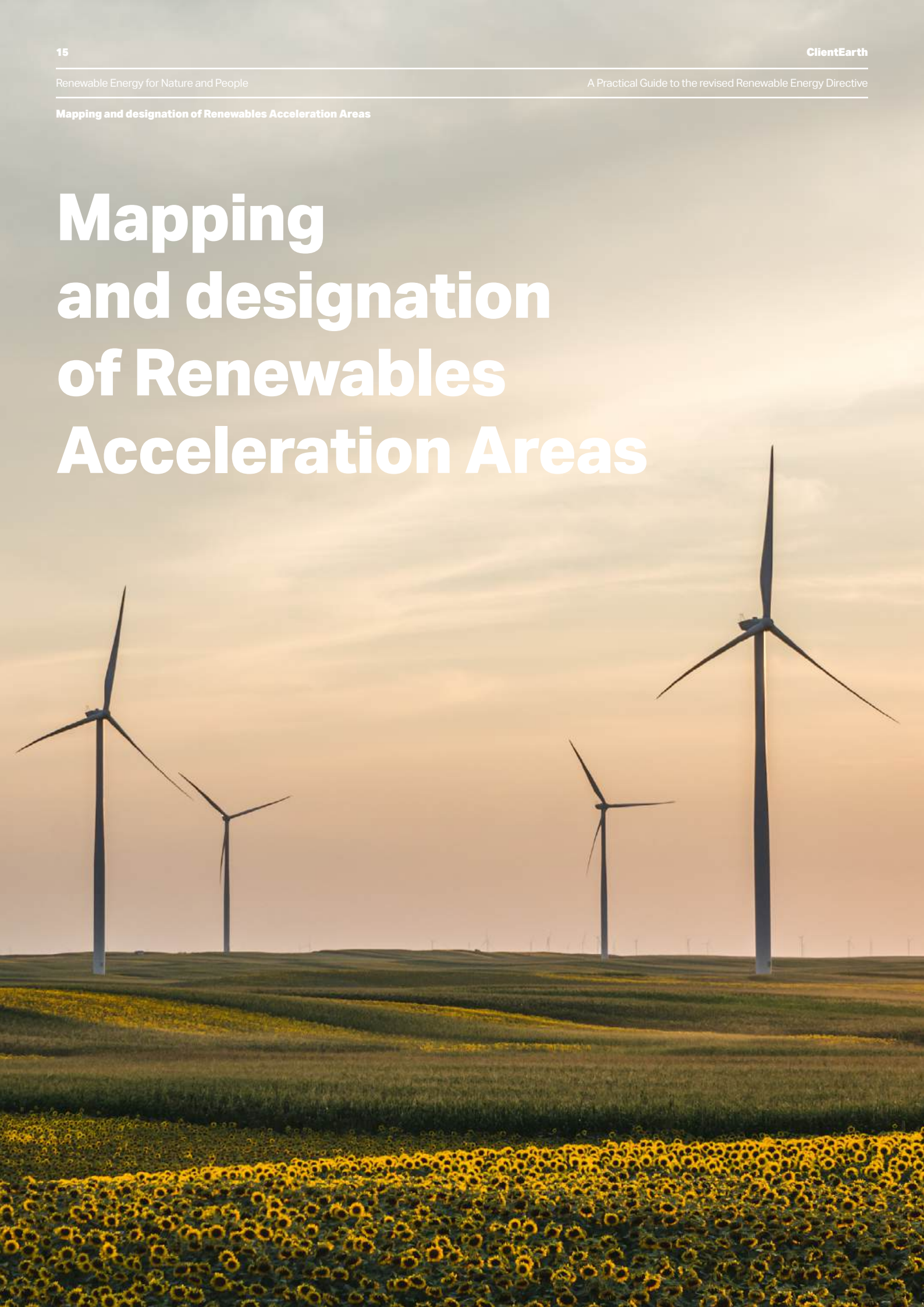
- Public consultations on projects that have a significant effect on the environment should be carried out on a local level regardless of whether an EIA is or is not carried out. Where an EIA is carried out, public consultations should be carried out in accordance with the EIA Directive. Where no EIA is carried out, the public concerned on a local level be consulted if it has not already been done in the RAA mapping and designation stage.

Access to justice in the permitting stage

- The national law must grant access to the public to challenge violations of environmental law in the mapping and designation process in line with Article 9(2) of the Aarhus Convention.
- The public concerned should be given access to justice to challenge negative screening decisions, final permitting decisions and any other breaches of environmental law, including provisions on public participation, in the permitting process.
- All decisions subject to judicial challenge, including the decision not to require an EIA for an individual project, should be written, reasoned and available to the public.
- Member States have the freedom to decide when in the process of granting access to justice – during the permitting process or after the final decision is issued. Regardless of the procedure chosen by the Member States, the courts must be able to examine any substantive issues raised by the public concerned and address and remedy them on their merits.

- Access to justice should be granted to the members of the public concerned that either have sufficient interest or maintain that their rights have been impaired, where the administrative procedural law requires this as a precondition. None of these criteria can be interpreted so narrowly as to bar access to justice for individuals who may be harmed or exposed to other kinds of inconvenience by an environmentally harmful activity allowed by a permit.
- Environmental NGOs must be deemed to have sufficient interest to be recognised as public concerned. They cannot be required to demonstrate impairment of an individual right to have the right to access courts.
- The members of the public concerned should have access to Member States' courts. They should provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. The court's decisions must be given or recorded in writing.
- Presumption of overriding public interest must be subject to judicial review and cannot prevent Member States' courts from making a full assessment of permitting disputes, including the proportionality of potential damage to the environment against other competing interests.
- Tacit administrative approval should not apply to decisions that are subject to public participation or can potentially breach environmental law as those decisions are subject to judicial review.
- ADRs with exceptional (non-permanent) jurisdiction cannot ensure that disputes involving EU law are settled in a manner that ensures the full effect of EU law therefore they should be used in disputes that involve interpretation of EU law and should not replace judicial proceedings before Member States' courts.
- Where ADRs are used, their scope of application should be limited and accompanied by safeguards to guarantee independence and impartiality, adequate consideration of public interests, consistent application of law and transparency.
- Information about access to justice, including applicable procedures, timelines, and practical details of filing a complaint should be included in all communications with the members of the public concerned. The information channels used to communicate information about public participation, as well as meetings or other interactions with the public concerned, should be used to inform the public concerned about their rights to access justice.

Mapping and designation of Renewables Acceleration Areas



1. Mapping of necessary areas for the deployment of renewable technologies

The first stage in the acceleration of the deployment of renewable technologies is detailed in Article 15b of the RED.[13] The provision outlines a *spatial planning* exercise (also framed as "strategic planning" in the RED's preamble) and obliges Member States to "*carry out a coordinated mapping for the deployment of renewable energy in their territory to identify the domestic potential* and the *available land surface, sub-surface, sea or inland water areas that are necessary for the installation of renewable energy plants and their related infrastructure such as grid and storage facilities, including thermal storage, that are required in order to meet at least their national contributions towards the overall Union renewable energy target for 2030 set in Article 3(1) of this Directive…"*.[14]

1.1. Incorporating environmental considerations in the coordinated renewables mapping

Article 15b(1) of the RED, makes it clear that not all areas within a Member State's territory are suitable or available for the deployment of renewables. During mapping, Member States need to identify both: i) the areas necessary for the achievement of the targets[15], as well as ii) the areas available for such use.

The process of identifying each type of area is distinct; but, the areas required to meet renewable energy targets will, in most cases, be more extensive than those suitable for project deployment. The overlap of these areas is where new renewable energy projects and related infrastructure will be developed. In other words, Member States are not allowed to go beyond what is needed and what is available. The location and size of the areas necessary for the achievement of the EU-wide targets are limited by two factors: i) the Member State's domestic potential, and ii) land, sea and inland water availability.[16] In making this distinction, Article 15b acknowledges the finite nature of land use as a resource,[17] and imposes a list of binding, *yet non-exhaustive*, considerations that Member States need to embed in their decision-making while carrying out the mapping, including, the pre-existence of relevant energy infrastructure (grid availability).[18] Member States are, to a large extent, expected to rely on available data for the purposes of coordinated renewables mapping.

These considerations stem directly from the principle of sustainable development in Article 11 TFEU (and Article 3 of the TEU),[19] which require resources, especially finite ones, to be used responsibly and efficiently to meet current needs, without compromising the ability of future generations to meet their own needs.[20] This is particularly relevant if renewables mapping leads to land take (through land use change), leaving less space for other legitimate objectives of the EU, not least the protection of biological diversity.[21] Article 11 TFEU and the integration of environmental considerations in other policy areas are, in part, applied by subjecting plans, programmes

13 Article 15b of the 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 (RED) is titled *"Mapping of areas necessary for national contributions towards the overall Union renewable energy target for 2030."*

14 In line with the last section of 15b(1) RED, the areas identified through this exercise will, in conjunction with the already existing renewable energy plants and cooperation mechanisms of Articles 5, 7, 9 and 11 of the RED, need to meet Member States' *"estimated trajectories and total planned installed capacity by renewable energy technology set out in their national energy and climate plans (NECPs) submitted pursuant to Articles 3 and 14 of Regulation (EU) 2018/1999."*

15 See Article 3(1) RED for binding overall Union targets for 2030.

16 Unfortunately, Article 15b(2) mostly covers Member States' potential, rather than providing a legally binding definition of the terms "available land surface, sub-surface, sea or inland waters". While the meaning of "availability" of a certain area is undefined, some of the criteria framing the term are set in Article 15b(3) RED.

17 Unless otherwise specified the term "land use" should be considered as referring to the use of "land surface, sub-surface, sea or inland water areas". See also, P.R. Shukla, et al (eds.), 'Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems', IPCC, Cambridge University Press, 2019, pp. 40, 62.

18 In this analysis we have focused on the renewables acceleration areas. Dedicated areas for grid and storage infrastructure are not covered by this document.

19 Consolidated version of the Treaty on the European Union (TEU), Official Journal of the European Union C 115, 09.05.2008.

20 For more information on the legal dimensions of the principle of sustainable development in resource management in the European Union, see also Ludwig Krämer (ClientEarth), Giving a voice to the environment by challenging the practice of integrating environmental requirements into other EU policies (2012).

21 The European Union has led numerous initiatives to minimise the risk of land-take from the expansion of sectoral infrastructure, including energy, such as the proposed Soil Monitoring Law and the Soil Strategy, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee Of The Regions, 'EU Soil Strategy for 2030: Reaping the benefits of healthy soils for people, food, nature and climate', COM(2021) 699 final.

and projects which are likely to have adverse effects on the environment, to an environmental assessment.

The incorporation of environmental considerations in the mapping stage is required under Article 11 TFEU and the RED. Recital 25 of Directive (EU) 2023/2413, requires the identification of the required land, surface, sub-surface and sea or inland water areas to consider, among other things, the screening criteria on environmental sensitivity as regulated by the Annex III of the Environmental Impact Assessment Directive (EIA Directive)[22], taking into account that such criteria should fit a mapping exercise, rather than an individual project. [23]

All of these elements indicate that environmental protection should be central to renewables mapping.

In addition, the implementation measures taken by a Member State need to be reflected in the National Energy and Climate Plans (NECPs) (Art 15b(1) RED, final sentence), established under Articles 3 and 14 of Regulation 2018/1999 (Governance Regulation).[24] When determining the amount and modalities of their national contribution to the EU's renewable energy targets, Member States are expected to take into account a series of circumstances that may affect the deployment of renewable energy, explaining how their own contributions are affected (Governance Regulation Article 5(1,, including the potential for *"cost-effective renewable energy deployment"* and *"geographical, environmental and natural constraints"* (Article 5(1)(e)(iii) and (iv) Governance Regulation).

Finally, gathering all relevant information related to biodiversity and land use and completing the mapping stage, is necessary for the next stage of designating RAAs. This seems to be supported by the renewables industry,[25] and shows the importance of comprehensive mapping as a precondition for informed and science-based decision-making at the later stage of RAA designation.

→ **RECOMMENDATION**

Member States must incorporate environmental considerations at the stage of the coordinated renewables mapping in order to provide an informed basis for the next stage of the process – the designation of RAAs.

1.2. Alignment with other plans under EU law

Article 15b(1) of the RED, encourages Member States to make use of the existing spatial planning instruments when identifying suitable areas. With regards to biodiversity in particular, a series of documents and plans prescribed by EU legislation, could facilitate Member States' mapping. Although Article 15b(1) of the RED currently addresses only pre-existing instruments, it should also be applied to instruments under development. Lack of proper coordination among these instruments could lead to potential conflicts and thus non-compliance with the existing EU biodiversity legislation. The following section highlights the instruments that can assist decision-makers in avoiding such conflicts.

→ **RECOMMENDATION:**

Member States should ensure that renewable energy mapping aligns with existing spatial planning documents, such as the Maritime Spatial Planning Directive, as required by the RED. The planning and preparation of National Restoration Plans must be closely coordinated with the mapping of available and necessary areas for renewable energy development.

22 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification).

23 Recital 25 Directive 2023/2413 states: *"The identification of the required land, surface, sub-surface, and sea or inland water areas should take into consideration in particular the availability of energy from renewable sources and the potential offered by the different land and sea areas for renewable energy production of the different types of technology, the projected demand for energy, taking into account energy and system efficiency, overall and in the different regions of the Member State, and the availability of relevant energy infrastructure, storage, and other flexibility tools bearing in mind the capacity needed to cater for the increasing amount of renewable energy, as well as environmental sensitivity in accordance with Annex III to Directive 2011/92/EU of the European Parliament and of the Council"*. See also, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive), as amended, Annex III(2) Location of the Projects.

24 Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council.

25 SolarPower Europe, Renewables mapping guidance: A step-by-step approach, January 2024, p. 4.

Below is a list of biodiversity-related instruments with spatial planning components that Member States are expected to consider:

– Federal, national, regional and/or local land use plans and zoning laws, regulations, ordinances and decrees, which incorporate biodiversity considerations, ranging from ecosystem services to ecological networks (and any available SEA or appropriate assessment report that preceded their adoption).

– Maritime Spatial Plans under Directive 2014/89 (Maritime Spatial Planning Directive, MSPD)[26] (as well as Marine Strategies for achieving good environmental status for marine ecosystems under Directive 2008/56/EC (cc, MSFD))[27] which describe any *use* or *activity* of a marine area. One of the Maritime Spatial Plans' core objectives is "sustainable development of energy sectors at sea",[28] while the Directive even specifies that it seeks to achieve the objectives of the (predecessor to the) RED.[29] Their comprehensiveness comes from their reliance on the ecosystem-based approach,[30] thus allowing for a more holistic understanding of the social, economic and environmental interplay of the different sea uses and activities, as well as their individual and cumulative implications. The promotion of coherence between Maritime Spatial Plans and other relevant plans, such as RED Article 15a renewable areas mapping, is an obligation under the MSPD.[31]

– Natura 2000 Management Plans for Special Protection Areas (SPAs) under Article 4 of Birds Directive[32] and Special Areas of Conservation (SACs) under Article 4(4) of the Habitats Directive,[33] as well as Management Plans for nationally designated protected areas and Other Effective Area-Based Conservation Measures (OECMs).[34] Such Plans include conservation objectives and management measures corresponding to the ecological requirements of each site, and regulate certain activities undertaken in the site (including in line with Article 6 of the Habitats Directive). The information included in these Plans Habitats Directive Article 17 reports (national level), which also include distribution maps for species and habitats covered in Annexes I, II, IV and V of the Habitats Directive. In addition, Member States may need to consult national Prioritised Action Frameworks, when the latter include additional site designations for the completion of the Natura 2000 network.

– River Basin Management Plans (including associated Programmes of Measures) under Article 4 of Water Framework Directive (WFD),[35] incorporate land use planning elements. Similarly, and to the extent relevant for the renewables mapping, Member States may also rely on Flood Risk Management under Article 7 of Floods Directive;[36] which are often integrated into River Basin Management Plans.[37]

– CAP Strategic Plans under Regulation 2021/2115[38] particularly for Member States who include geospatial information on *good agricultural and environmental condition* and agricultural areas with environmental restrictions.

– National Biodiversity Strategies and Action Plans under Article 6 of the Convention on Biological Diversity, where they contain spatial elements such as priority areas for conservation and spatial information contributing to Target 1 of the *Kunming Montreal Global Biodiversity Framework*).[39]

26 Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning (Maritime Spatial Planning Directive), OJ L 257, 28.8.2014, p. 135–145.

27 Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ L 164, 25.6.2008, p 19–40.

28 See Article 5(2) Maritime Spatial Planning Directive, and Article 1(3) Marine Strategies for achieving good environmental status for marine ecosystems under Directive 2008/56/EC.

29 Maritime Spatial Planning Directive, preamble, paragraph 15.

30 The Convention on Biological Diversity provides the most widely used definition and characteristics of the ecosystem-based approach, adopted in Decision V/6 of its Conference of the Parties: *"The ecosystem approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way"*. According to the European Commission's Maritime Spatial Planning Platform's policy brief "Implementing the Ecosystem-Based Approach in Maritime Spatial Planning".

31 See Maritime Spatial Planning Directive, Article 6(2)(c).

32 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (Birds Directive), OJ L 20, 26.1.2010, p. 7–25.

33 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

34 The most widely used definition of OECMs is that included in CBD's Decision 14/8, namely: *"a geographically defined area other than a Protected Area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the in situ conservation of biodiversity, with associated ecosystem functions and services and where applicable, cultural, spiritual, socioeconomic, and other locally relevant values."* This is the definition also used by the Commission in its most recent guidance document on protected area designation: European Commission, Staff Working Document Criteria and guidance for protected areas designations, SWD(2022) 23.

35 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 (WFD).

36 Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks (Floods Directive).

37 Floods Directive, Article 9.

38 Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013.

39 Target 1 of the Kunming Montreal Global Biodiversity Framework, which the EU and all its Member States have agreed on, reads as follows *"Ensure that all areas are under participatory, integrated, and biodiversity inclusive spatial planning and/or effective management processes addressing land and sea use change, to bring the loss of areas of high biodiversity importance, including ecosystems of high ecological integrity, close to zero by 2030, while respecting the rights of indigenous peoples and local communities."*. Further information on the Target can be found here: https://www.cbd.int/gbf/targets/1.

Coordinating Nature Restoration Plans with Mapping under RED

The adoption of Regulation 2024/1991 (the Nature Restoration Regulation (NRL))[40] requires Member States to ensure a co-ordinated approach to spatial planning for renewable energy.

Overview:
The NRL sets a series of binding, timebound targets for the restoration of degraded habitats and species, with the overarching objective to restore 20% of EU's land and sea by 2030 and all EU areas in need of restoration by 2050.[41] To that end, Member States need to prepare National Restoration Plans that outline how they will achieve the NRL's targets, designating specific restoration areas, identifying measures to be implemented and establishing concrete timelines for each of the measures listed.

Policy Coherence in the NRL:
Article 14(9) of NRL, requires Member States to *"take into account"* energy policy and when developing their National Restoration Plans, in particular, Member States' National Energy and Climate Plans, national long-term greenhouse gas reduction strategies and the RED's binding overall 2030 renewable energy target (Article 3 RED).

National Restoration Plans and renewables mapping
With regards to renewables, the NRL goes one step further, by obliging Member States to *"coordinate the development of national restoration plans with the mapping of areas that are required in order to fulfil at least their national contributions towards the 2030 renewable energy target"*. This coordination exercise at the preparatory/planning level is required to ensure "*synergies"* between restoration plans and *"the build-up of renewable energy and energy infrastructure and any renewables acceleration areas and dedicated infrastructure areas that are already designated"*(Article 14(14), second sentence NRL).

In other words, the two planning processes, both of which contain strong mapping elements, must occur jointly not only for the sake of the efficient use of public resources, but also in order to ensure compliance with the NRL.
Article 15b RED mapping is required by May 21st, 2025 and preparation of National Restoration Plans under the NRL is required by September 1st, 2026 Article 16.[42]
For the sake of clarity, the objective of such a coordination (either in the meaning of Article 14(14) NRL or Article 15b(1) RED) is not to exclude certain areas from the Article 15b RED mapping, but rather to expand Member States' knowledge base, facilitating the choice of the most appropriate type and scale of renewable technology to be developed and aiding the mapping process .
With over 80% of habitats across the EU not being in good condition and the Union's overarching objective to restore all ecosystems in need of restoration by 2050 on the one hand,[43] and the EU's 2050 climate neutrality ambition, with almost half of its energy consumption coming from renewables by 2030, overlaps between nature restoration and renewable energy projects are unavoidable. The legally binding coordination of the preparation of the National Restoration Plans and renewables mapping can i) minimise unavoidable overlaps, and ii) when such an overlap exists, identify the most appropriate restoration measures and renewable technology types, to avoid conflict between the two.

40 Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869 (NRL).

41 NRL, Article 1(2).

42 According to NRL, Article 16, Member States shall submit their draft national restoration plans by the first day of the month following 24 months from the date of the entry into force of this Regulation. Given the publication of the NRL in the EU's Journal on July 29th 2024 and its entry into force on August 18th (per NRL Article 28), the submission of the draft national restoration plans is thus expected by September 1st, 2026.

43 NRL, Article 1(2).

1.3. Coordination with relevant authorities

Member States are required to *"ensure coordination among all relevant national, regional and local authorities and entities"*[44] in order to reduce the risk of creating overlaps or gaps in the mapping exercise and to ensure timely public consultations. Lack of coordination among competent authorities, and relevant ministries, has long been recognised as one of the main causes of delay in the planning and permitting of renewable technology installations.[45] The absence and/or ineffectiveness of inter-ministerial coordination, and lack of clarity in decision-making capacity and distribution of competence are generally accepted as key causes of improper implementation of EU legislation.[46]

Mapping requires significant site-level knowledge, so Member States need to ensure that the competent authorities undertaking the mapping are provided, at the earliest stage possible, with the relevant technical information and data. Without this, the mapping process may encounter significant delays, as well as be riddled with gaps.[47] Removing administrative bottlenecks, training staff and the facilitating outcome-based collaboration are all essential.

The European Commission has set up a Technical Support Instrument to provide tailored support to Member States, with the aim of, strengthening administrative capacity and improving inter-ministerial coordination.[48]

1.4. Multi-use of areas

Land and sea are limited resources, increasing the likelihood of conflicts over their use. These conflicts can obstruct the EU's ability to achieve its objectives, sometimes making it particularly difficult for Member States to comply with applicable legislation. Weak enforcement of the EU's environmental laws further accelerates biodiversity loss.[49]

This is made worse by growing land use conversion trends (due to urban, agricultural, industrial expansion) that lead to loss of key habitats and species, as well as by the direct (over) exploitation of natural resources, predominantly due to poorly regulated unsustainable land use practices, such as industrial agriculture, bottom trawling and so on.[50] Such practices are incompatible with the concept of "multi-use of areas", which promotes the shared use of the same space for multiple activities.[51]

Certain types and scales of renewable energy may allow for a "shared" use of the area with other uses, such as agricultural production and environmental conservation or restoration.[52] However, this is not always the case, which is why the potential for multi-use of an area must be carefully evaluated based on the specific circumstances and relevant regulations. For example, numerous concerns have been raised over the feasibility of meeting the WFD objective of *"good ecological status"* of river basins (Article 4(c) of the WFD) with hydropower plants, mostly due to their significant ecological and hydromorphological impacts on ecological status of the river, either individually or cumulatively with other uses.[53] Similar

44 Article 15b(1) of RED.

45 'Technical support for RES policy development and implementation – Simplification of permission and administrative procedures for RES installations' ("RES Simplify"), Trinomics, June 2021, available at, https://op.europa.eu/en/publication-detail/-/publication/949ddae8-0674-11ee-b12e-01aa75ed71a1

46 European Parliament, 'Briefing: Challenges in the Implementation of EU Law at national level', commissioned by JURI Committee; authored by Melanie Smith), November 2018.

47 See Technical support for RES policy development and implementation – Simplification of permission and administrative procedures for RES installations' ("RES Simplify"), Trinomics, June 2021, available at, https://op.europa.eu/en/publication-detail/-/publication/949ddae8-0674-11ee-b12e-01aa75ed71a1; European Commission, Staff Working Document Guidance on designating renewables acceleration areas accompanying the document 'Commission Recommendation on speeding up permit-granting procedures for renewable energy and related infrastructure projects' {SWD(2024) 124 final}, Brussels, 13.5.2024.

48 Regulation (EU) 2021/240 of the European Parliament and of the Council of 10 February 2021 establishing a Technical Support Instrument.

49 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Environmental Implementation Review 2019: A Europe that protects its citizens and enhances their quality of life', COM(2019) 149 final (Brussels, 4.4.2019) pp 5-6; European Environment Agency', 'State of nature in the EU: Results from reporting under the nature directives 2013-2018', Report No 10/2020 (2020), pp 7, 106, 121 – 124; See also European Environmental Bureau, Birdlife Europe, 'Stepping up enforcement: Recommendations for a Commission 'Better Compliance' agenda to ensure the application of EU environmental law', April 2022, Chapter B.

50 See, European Environment Agency', 'State of nature in the EU: Results from reporting under the nature directives 2013-2018', Report No 10/2020 (2020).

51 United Nations Environment Programme, Global Resources Outlook 2024, 'Summary for Policymakers: Bend the Trend – Pathways to a liveable planet as resource use spikes', International Resource Panel, Nairobi (2024); European Parliament, 'Social and environmental impacts of mining activities in the EU', Study requested by the PETI Committee (May 2022).

52 See for instance best practice examples for nature-positive solar PV projects in SolarPower Europe & Birdlife, 'Solar, Biodiversity, Land Use: Best Practice Guidelines' (2022) and other examples of nature positive renewable energy projects in European Environmental Bureau, 'Renewables Best Practices: solutions for nature-positive, community-led renewable energy in Europe' (May 2023).

53 Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), 'Global Assessment Report on Biodiversity and Ecosystem Services', E. S. Brondizio, S. Settele, S. Díaz, and H. T. Ngo (editors), IPBES secretariat (Bonn, Germany), 2019, pp 652 – 653.

concerns have been expressed over certain adverse biodiversity impacts of bioenergy,[54] as well as its minimal carbon sequestration benefits, given the high carbon emissions of burning biomass, as well as the risks of deforestation and intensification of monoculture plantations to satisfy needs for biomass.[55]

1.4.1. Favouring multiple uses of areas

Article 15b(3) of the RED requires Member States to "*favour multiple uses*" of areas identified as essential for achieving their national contributions to the EU-wide renewable energy target.

The precise scope of this provision is a little unclear, due to its broad wording. However, the obligation appears to extend beyond simply giving "*due consideration*" to different uses. Whilst the practical meaning of the requirement "*to favour*" and how it will be enforced in practice is not totally clear, the obligation can be interpreted as including the following key components:

- The existing or future allocation of a different use of a certain area does not, on its own, prevent that area from being included in the mapping under Article 15b(1) of the RED;
- When another use has already been allocated for a certain area included in the mapping, Member States need to be certain about what that use is and any limitations (spatial, time scale, etc.) on the renewable potential of the area, and the permitting and operation of future renewable projects there;
- Member States must then evaluate whether the uses are, in principle, "*compatible*", namely whether the two can be pursued at the same time;
- Then Member States must take concrete actions to ensure that both uses can be pursued simultaneously,[56] without one undermining the other (otherwise, the obligation to "*favour multiple uses*" under Article 15b(3) of the RED would not be fulfilled). In some cases, Member States may need to take additional measures in order to ensure compatibility;
- Member States can use the Technical Support Instrument to access best practices for promoting and facilitating multiple uses.

→ **RECOMMENDATION:**

In areas mapped for renewables with pre-existing uses, Member States should identify overlaps, assess feasibility for coexistence, and promote multi-use. The Technical Support Instrument can provide best practices to support these efforts.

54 See, for instance, Bowyer, C, et al, 'Potential impacts of bioenergy developments on habitats and species protected under the Birds and Habitats Directives. Final report under EC Contract ENV.D.3/SER/2017/0002 Project: "Reviewing and mitigating the impacts of renewable energy developments on habitats and species protected under the Birds and Habitats Directives', Institute for European Environmental Policy, Arcadis, BirdLife International, NIRAS, Stella Consulting, Ecosystems Ltd, Brussels (2020).

55 See, for instance, Camia, A., et al, 'The use of woody biomass for energy production in the EU', EUR 30548 EN, Publications Office of the European Union, Luxembourg (2020).

56 According to the preamble of the revised RED (para 27): *"To that end, Member States should facilitate changes in land and sea use where required, provided that the different uses and activities are compatible with one another and can co-exist."*, meaning that, in some cases, Member States may need to additional measures in order to ensure the compatibility of uses.

Multi use to create benefits for both biodiversity and the climate

The NRL adopts an approach similar to RED regarding the obligation for Member States to favour multiple uses of areas, though with different phrasing. NRL Article 14(9) says that Member States need to *"...identify synergies with climate change mitigation"*,[57] while they "*shall also take into account...*" their NECPs and *"... prioritise restoration measures accordingly*". Given the limited availability of land where synergies between renewable energy deployment and climate change mitigation are possible, Member States are expected to prioritise restoration measures in these areas.

Neither the RED's multi-use obligation, or the NRL's prioritisation requirement have detailed substantive guidance. However, it is clear that Member States must actively prioritise measures that deliver benefits for both biodiversity and climate change mitigation where possible. This could involve accelerating the adoption of these measures, allocating additional administrative resources, or increasing funding.

There are several recent examples of renewable energy projects that align with nature restoration goals, with positive outcomes for both biodiversity and energy production. However, such cases are exceptions rather than the norm. Without proper application of relevant legislation — particularly through careful assessment of impacts on Natura 2000 sites and the Natura network's integrity and connectivity — such dual benefits will continue to be incidental.

1.4.2. Compatibility of renewable energy projects with pre-existing uses

Article 15b(3) of the RED requires Member States to ensure compatibility of each renewable energy project taking place in the areas included in the mapping, with the pre-existing uses of each area.

At first glance, the inclusion of this obligation within Article 15b appears unusual. While the rest of Article 15b focuses on "*areas*" that are eligible (i.e. available and with domestic potential) and necessary for the deployment of renewable technologies, this specific provision directly references "projects", which are otherwise regulated under Articles 16 to 16f of the RED. This means that Member States should, from the outset, consider how the construction and operation of a renewable energy project, as well as its grid connection, align — at least in general terms — with other designated uses within the same area.

This strategic-level consideration is not intended to look into the specifics of the type or scale of each renewable energy project, since specific project proposals have not yet been developed. Such detailed evaluations will only occur later, during the designation of Renewable Allocation Areas (RAAs) and the permitting of individual projects (see chapter 2).

The provision does not address the legal consequences of renewable energy projects which are incompatible with the pre-existing uses of the area. However, its placement in Article 15b of the RED indicates that any incompatibilities must be evaluated, during the mapping phase. As described above, the compatibility of renewable energy projects with pre-existing uses should be evaluated based on objective criteria, taking into account the objectives and nature of the pre-existing use.

Given the purpose of Article 15b — namely, to establish a comprehensive map of all areas suitable for renewable energy projects — when no renewable technology (regardless of type or scale) is compatible with the pre-existing use of a specific area, the following conclusions apply:

- the pre-existing use needs to be favoured, as Article 15b gives precedence to the use that had previously been allocated to the area;
- such areas should be excluded from the map unless land use is modified. Including where renewable installations would conflict with other concurrent objectives in a way which would likely provide a legal basis for invalidating any subsequent designations — such as renewable acceleration areas — or individual project permits that apply to the area in question.

→ **RECOMMENDATION:**

Pre-existing land uses should take precedence in areas where renewable energy projects are incompatible. Such areas should be excluded from suitability maps unless a change in land use is done. Including areas where renewable installations' conflict with other objectives risks legal challenges to future designations or permits.

57 As well as *"...climate change adaptation, land degradation, neutrality and disaster risk prevention..."*.

Coordinating the review processes of the national restoration plans and the renewables mapping

In line with the NRL, two processes may trigger the revision of Member States' national restoration plans, namely:

– the periodic review and revision, by 2032, 2042 and every 10 years after that (Article 19(1) NRL);

– the review and revision as a policy response to monitoring, namely when measures included in the initial national restoration plans are not considered sufficient in meeting the Member States targets (Article 19(2) NRL).

For periodic review, provided that communication between national authorities is good, Member States have adequate time to reflect any changes to their renewables mapping, triggered by the revision of their national restoration plans.

As for the revision of the national restoration plans pursuant to the Member States' progress monitoring (that can happen any time), competent authorities need to inform the renewables mapping authority of any changes made to national restoration plans that could have an impact on the spatial availability for the deployment of renewables. Given that national restoration plans are covered by Article 2(a) of the Strategic Environmental Assessment Directive (SEA Directive)[59], any modifications to them should follow the procedures established by the SEA Directive. This should enable competent renewables planning authorities to be consulted, through the targeted stakeholder consultation of the SEA Directive Article 6(3).

1.5. Periodic review of maps

Under Article 15b(4) of the RED, Member States are expected to periodically review and make necessary changes to the areas identified during the mapping, aligning their review with the updates of their NECPs and incorporating any changes.

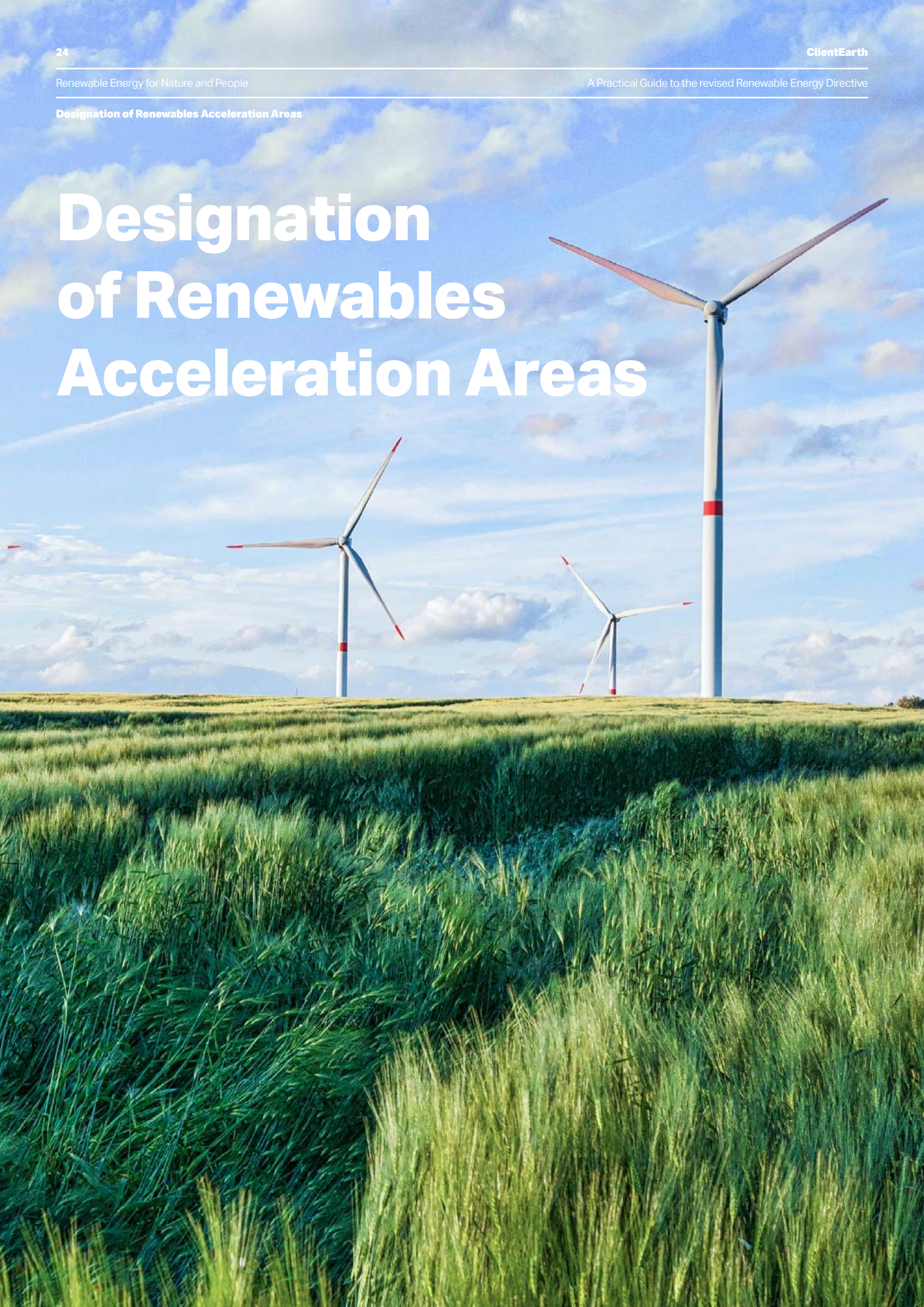
To ensure efficiency and in order to minimise unnecessary administrative burden, Member States may also align the updating of their areas identified during the mapping with the reviews required under other EU law, especially where they may affect the availability of areas for the development of renewable energy projects (such as nature restoration plans, maritime spatial plans etc.).

Particularly in the context of nature conservation, Member States are currently in the process of pledging and designating additional protected (and strictly protected) areas to achieve compliance with the Birds and Habitats Directive, in line with the EU Biodiversity Strategy to 2030[58] and Target 3 of the Kunming Montreal Global Biodiversity Framework. Member States may wish to incorporate potential land use changes to be imposed by these designations in their renewables mapping.

58 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'EU Biodiversity Strategy for 2030: Bringing nature back into our lives,' Brussels, 20.5.2020.

59 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.

Designation of Renewables Acceleration Areas



2.1. What are Renewables Acceleration Areas?

The RED defines Renewable Acceleration Arears (RAA) as "*areas particularly suitable to develop renewable energy projects, differentiating between technologies, and where the deployment of the specific type of renewable energy is not expected to have a significant environmental impact"* (Article 15c 1(a)). RAAs constitute a sub-set of the areas identified in the mapping[60] and can only be designated where they do not create significant adverse environmental effects.

It should be noted that RAAs are not the only areas where renewable energy projects can be permitted and installed, they are just considered as the most suitable ones due to their expected minimal environmental impact. Permitting requirements for Mapped areas and for RAAs are dealt with in detail in Chapter 3 of this document.

Projects proposed in the RAAs may, under certain conditions, be exempt from the obligation to carry out an environmental impact assessment (EIA). Therefore, Member States should be cautious[61] in choosing the RAAs and must carry out a full SEA and Habitats Directive appropriate assessment, if applicable, prior to the adoption of the plans designating the RAAs.[62]

RAAs envisaged under the RED, and in particular any derogations to EU environmental law which apply within the RAAs should be interpreted narrowly and are not intended to diminish the obligations under biodiversity conservation legislation or environmental protection. RAAs are also not intended to reduce the protection for protected habitats and species, but merely to accelerate the permitting process in areas that, after a proper assessment, are deemed to not have a significant environmental effect.

2.2. Designation criteria

The RED sets out a series of conditions for an area to be designated as an RAA, which are as follows:

- RAAs can only be situated in areas where "*the specific type… of renewable energy sources is not expected to have a significant environmental impact in view of the particularities of the selected area*" (Art 15c(1)(a) RED), meaning that Member States need to assess, in a general manner and on the basis of objective criteria, all potential environmental impacts of the renewable energy projects in specific RAAs;
- Member States must prioritise artificial and built surfaces (Art 15c(1)(a)(i) RED);
- Member States must exclude Natura 2000 sites, nationally protected sites, major bird and marine mammal migratory routes, as well as all other areas (i.e., those not listed among the excluded areas) where environmental sensitivity mapping indicates a potential[63] of significant environmental impact (Art 15c(1)(a)(i) and (iii) RED).

Before designating an RAA Member States must also:

- Adopt *"appropriate rules (…) on effective mitigation measures"* to avoid the adverse environmental impact that may arise or, where that is not possible, to significantly reduce it ("mitigation rulebook") (Art 15c(1)(b) RED), making sure that such mitigation measures correspond to the legal requirements set forth by Article 6(2) and 12(1) of the Habitats Directive (namely, appropriate conservation measures for protected habitats and species, under Habitats Directive Annexes I and IV), Article 5 of the Birds Directive (namely, conservation measures for naturally occurring bird species), as well as Article 4(1)(a) of the WFD (conservation measures for surface water bodies).
- Subject the plans designating the RAAs and mitigation rulebooks to SEA and, where necessary, an AA before their adoption (Art 15c(2) RED); This is how Member States will assess any potential impact in line with the requirements of Article 15c(1)(a) of the RED.

60 RED, Article 15c(1).

61 Particularly in light of the principles of precaution, prevention, rectification of environmental damage at its source and polluters' obligation to pay for environmental damage caused, enshrined in Article 191(2) TFEU.

62 The explicit obligation to undertake an SEA prior to the adoption of plan is set in Article 15c(2) RED, but is regardless required by SEA Directive, given the nature of the plans designating RAAs as falling under Article 3(2) SEA Directive.

63 It is clear from the formulation of the provision that an area is to be excluded even if there is a likelihood of significant environmental impact, as Article 15c(1)(a)(iii) RED makes reference to the identification of *"areas where the renewable energy plants would not (contrary to "will not") have a significant environmental impact"*.

- In their plans designating the RAAs, explain how each RAA meets all of the cumulative conditions outlined above. Designation of an area that fails to meet any of the above conditions, including failure to carry out the necessary assessments, could lead to a violation of the RED, which could also affect the permits granted at a later stage.

The following sections analyse some of the environmental conditions that must be met for an RAA to be designated. In particular, they focus on the condition of *"no significant environmental impact expected"* and the exclusion of certain types of areas, as well as the need to undertake an SEA and an AA, and the obligation to adopt the "mitigation rulebook".

The main factor distinguishing RAAs from the rest of the areas identified in the renewables mapping relates to the expectation that projects developed in such areas are not expected to have a significant environmental impact. In its study on the designation of RAAs,[64] the Commission analyses various impacts on the environment that may facilitate Member States' assessment in a useful (yet non-exhaustive) way. These include different types of environmental impact, affected ecosystem elements, the potential magnitude of impact (this is key as only *significant* impacts justify the exclusion of a certain area from being designated as an RAA) and others.[65] In the past, the Commission has also suggested other ways in which Member States and developers may standardise how they assess impacts, particularly on Natura 2000 sites.[66]

The notion of *"not expected to have significant environmental impact"* should be defined taking into account the likelihood that the designation of an RAA and subsequent development of renewable energy projects would have a negative effect on the environment. It should be noted that the RED does not require that authorities be absolutely certain that there will be no significant environmental impact from projects set up in the RAAs, but only requires a reasonable degree of confidence of the competent authorities, on the basis of sufficient and reliable evidence within the SEA and AA procedure.[67]

2.2.1. Excluding certain types of areas

The main factor distinguishing RAAs from the rest of the areas identified in the renewables mapping is the expectation that projects developed in such areas are not expected to have a significant environmental impact. In order to ensure that, Article 15c(1)(a)(ii) of the RED allows for the exclusion of certain areas based on either their ecological or normative characteristics (e.g., Natura 2000 sites, nationally protected areas, major migratory routes for birds and marine mammals) or their sensitivity, as identified through environmental sensitivity mapping indicating potential significant environmental impacts.

It is important to clarify that areas in the first category (Natura 2000 sites, nationally protected areas, major migratory routes) are automatically excluded without requiring prior assessment.

The following points are essential to consider:

1. The Natura 2000 network is still being finalised[68] and Member States are currently in the late stages of identifying areas that host habitats and species listed in the Annexes of the Birds and Habitats Directives, both at national and biogeographical levels[69], as required under Article 4 and Annex III of the Habitats Directive. It is important to emphasize that areas included in the list of Sites of Community Interest (SCI), even before their formal designation as Special Areas of Conservation (SAC), are protected under Article 4(5) of the Habitats Directive. Similarly, for future SCIs, Member States must implement interim protection measures.[70]
2. Under the RED, Article 15c(1)(a)(iii) requires Member States to consider data available for the development of a coherent Natura 2000 network, including habitat types and species under the Habitats Directive as well as birds and sites under the Birds Directive. Member States are instructed to identify areas where renewable energy installations would not cause significant environmental impact and consider designating them as RAAs.

64 'Study on the designation of Renewables Acceleration Areas (RAAs) for onshore and offshore wind and solar photovoltaic energy', Final Report, Trinomics, June 2024, Chapter 4, pp. 34 – 65.

65 'Study on the designation of Renewables Acceleration Areas (RAAs) for onshore and offshore wind and solar photovoltaic energy', Final Report, Trinomics, June 2024, Chapter 4, pp. 34 – 65.

66 European Commission, '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', Notice 2021/C 437/01), pp 9 – 11.

67 For an analysis on the different types of ecological impacts on habitats, species and ecosystem integrity and connectivity, caused in particular by onshore/offshore wind and solar photovoltaic energy, see 'Study on the designation of Renewables Acceleration Areas (RAAs) for onshore and offshore wind and solar photovoltaic energy,' Final Report, Trinomics, June 2024, Chapter 4, pp. 34 – 65.

68 As indicated in the Commission's Action Tracker set under the EU Biodiversity Strategy 2030; this is line with the European Environmental Agency's findings in European Environmental Agency (EEA), 'State of nature in the EU: Results from reporting under the nature directives 2013-2018', Report 10/2020, Chapter 5, pp 107 – onwards.

69 This process (Natura 2000 Biogeographical Process, commonly referred to as the "pledge and review" process) is being led by the Commission. Still, it has, as of the date of publication of this analysis, failed to lead to a substantial number of additional designations of Protected Areas and Other Effective area-based Conservation Measures (OECMs), while also encountering significant delays, with only 8 Member States having submitted their pledges.

70 C-117/03, Dragaggi and Others, para 30.

3. Member States are encouraged to consider areas that should have been designated as part of the Natura 2000 network, especially those hosting natural habitat types listed in Annex I or native species in Annex II of the Habitats Directive, even if formal designation has not yet occurred. Overlooking such areas could delay the completion of the Natura 2000 network, which would conflict with the objectives of Article 3 of the Habitats Directive. Furthermore, established CJEU case law emphasizes that Member States should avoid relying on domestic circumstances or non-compliance as a justification for not meeting EU obligations.
   Given the limited discretion Member States have in identifying SCI, decisions should be guided exclusively by scientific criteria. Member States should avoid bypassing site designation processes to circumvent exclusions under Articles 15c(1)(a)(ii) or (iii) RED. This consideration is particularly important as additional Marine Protected Areas (MPAs) should be designated by 2030, ensuring the necessary expansion and completion of the marine Natura 2000 network.

RECOMMENDATION:

Areas with high environmental sensitivity, such as Natura 2000 sites, nationally protected areas, and major migratory routes, must be excluded automatically from the RAAs. This also concerns Sites of Community Interest. Additionally, Member States should pre-emptively exclude areas eligible for Natura 2000 designation, particularly those hosting habitats or species listed under the Habitats Directive, even if formal designation is incomplete, to align with conservation requirements and prevent biodiversity loss, and enable finalisation of the Natura 2000 network.

2.2.2. Excluding areas based on their sensitivity

In addition to the above category, Member States will also have to exclude a series of additional areas from their plans designating RAAs, on the basis of their ecological sensitivity, which should be assessed using *"all appropriate and proportionate tools and datasets, … including wildlife sensitivity mapping"* (Article 15c(1)(a)(iii) of the RED). The objective of this exercise is to *"identify areas where the renewable energy plants would not have a significant environmental impact"*, meaning that only those areas can be included in the provisional RAAs.

The main uncertainty arising from the formulation of this provision is that it refers to renewable energy plants, namely individual projects, rather than RAAs. At this stage, however, Member States will not have received permit applications for individual projects that would contain information on the type, size, duration and technical specifications of the project in question. It is therefore particularly worrying that Member States are called to assess the potential impact of an undefined project at the planning stage.

In its study on the designation of RAAs,[71] the Commission analyses various impacts on the environment that may facilitate Member States' assessment in a useful (yet non-exhaustive) way. These include different types of environmental impact, affected ecosystem elements, the potential significance of impact (this is key as only significant impacts justify the exclusion of a certain area from being designated as an RAA) and others. In the past, the Commission has also suggested other ways in which Member States and developers may standardise how they assess impacts, particularly on Natura 2000 sites.[72]

Nevertheless, the legislation neither defines the meaning of "*significant environmental impact*", nor does it prescribe a list of "*appropriate and proportionate tools and datasets*", thus Member States need to rely on the generally applicable definitions of these terms established under the SEA Directive[73], EIA Directive and the Birds and Habitats Directives, and their legal understanding shaped by the implementation of those instruments. It should be noted that the RED does not require that authorities be absolutely certain that there will be no significant environmental impact from projects set up in the RAAs, but only requires a reasonable degree of confidence of the competent authorities, on the basis of sufficient and reliable evidence within the SEA and appropriate assessment procedure.[74]

Defining what impact is "significant"

The degree of likelihood of environmental impacts and their significance which is needed in order to exclude an area on the basis of its environmental sensitivity, is established by the obligation on Member States to designate RAAs in areas

71 'Study on the designation of Renewables Acceleration Areas (RAAs) for onshore and offshore wind and solar photovoltaic energy,' Final Report, Trinomics, June 2024, Chapter 4, pp. 34 – 65.

72 European Commission, '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', Notice 2021/C 437/01), pp 9 – 11.

73 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.

74 For an analysis on the different types of ecological impacts on habitats, species and ecosystem integrity and connectivity, caused in particular by onshore/offshore wind and solar photovoltaic energy, see 'Study on the designation of Renewables Acceleration Areas (RAAs) for onshore and offshore wind and solar photovoltaic energy,' Final Report, Trinomics, June 2024, Chapter 4, pp. 34 – 65.

where the "*deployment of a specific type or specific types of renewable energy sources is not expected to have a significant environmental impact*",[75] while "*using all appropriate and proportionate tools and datasets to identify the areas where the renewable energy plants would not have a significant environmental impact*".[76] Member States should also apply the precautionary principle and relevant CJEU jurisprudence on the assessment of environmental effects of plans, programmes and projects. In practical terms, Article 15c(1)(ii) of RED obliges Member States to only include those areas for which it can be established with certainty that the deployment of the type(s) of renewable technologies for which the RAA is being proposed, will have no significant environmental effect. In other words, if Member States conclude that there is a likelihood of significant environmental impact caused by renewable projects, these areas must be excluded from the RAA.

As explained above, since the revised RED does not define the meaning of "*significant*" in its provisions, Member States will have to rely on its meaning under the SEA Directive and the Birds and Habitats Directives. Since Member States are also called to assess the potential impact of planned projects inside the RAAs, the meaning of 'significance' under the EIA Directive also needs to be considered.

Article 3 of the SEA Directive obliges Member States to subject plans or programmes which are likely to have significant environmental effects to an environmental assessment, as well as those which set framework for future development consent of projects under the EIA Directive, or those which would require the appropriate assessment under the Habitats Directive. The likely significant effects on the environment, should be assessed in accordance with Annex I of the SEA Directive.[77] In case a specific plan or programme needs to be subject to screening, such effects need to be assessed according to the screening criteria outlined in Annex II of the SEA Directive.

Annex I of the EIA Directive defines some project categories are always considered likely to have significant effects on the environment and must be subject to an EIA in all cases. Annex II of the EIA Directive lists project categories which are considered likely to have significant effects depending on their nature, size and location. Because the EIA Directive is required to be interpreted taking into account the precautionary principle, it is considered that such a risk exists if it cannot be excluded on the basis of objective evidence that the project is likely to have significant effects on the environment.[78]

With regard to plans or projects potentially affecting Natura 2000 sites, the CJEU has confirmed that *"such a risk exists if it cannot be excluded on the basis of objective evidence that the project is likely to have significant effects on the environment"*.[79] This means that the determination of what constitutes a "*significant effect*" in regard to the protection of Natura 2000 network must follow objective criteria rather than being based on subjective or arbitrary judgments. The term "*significant*" is intended to be understood within the framework of measurable, factual, or scientifically grounded assessments, and similarly to the SEA and EIA Directive, it will vary depending on factors such as magnitude of impact, type, extent, duration, intensity, timing, probability, cumulative effects and the vulnerability of the habitats and species concerned.[80] The directive's language does not allow for broad discretion or personal interpretation in applying the term; instead, it must be evaluated using established standards or methodologies that ensure consistency and impartiality. The reason for this is that there needs to be consistency of approach to what is 'significant' to ensure that Natura 2000 functions as a coherent network.[81]

The need for objectivity in the assessment is closely linked to the specific features and environmental conditions of the protected site impacted by a plan or project, and therefore the meaning of 'significance' needs to be examined in context of the conservation objectives of a specific site, as well as of prior baseline information. The basis for this is the fact that what may be significant in relation to one site may not be in relation to another.[82] With this in mind, the CJEU has stated that all projects, that could undermine the conservation objectives of a site should be considered as likely to have a significant effect on the site,[83] regardless of where they are situated.[84]

75 RED, Article 15c(1)(a).

76 RED, Article 15c(1)(a)(iii).

77 SEA Directive, Annex I.

78 See, to that effect, C - 435/09, *Commission v Belgium*, para. 64 and C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging*, para. 44.

79 C-435/09, *Commission v Belgium*, para. 27, C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging (Waddenzee)*, para. 44 (please note that these cases relate to the application of the EIA Directive and Article 6(3) of the Habitats Directive respectively, but these interpretations also applicable to the SEA Directive, given both the shared objective and the fact that all three processes emanate from the precautionary principle).

80 European Commission, 'Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final, p. 41.

81 European Commission, 'Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final, p. 40.

82 European Commission, 'Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final, p. 41.

83 C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging (Waddenzee)*, paras. 46 – 48.

84 C-142/16, *European Commission v Federal Republic of Germany*, para. 29.

Gathering relevant information and data

The RED does not list what tools and datasets Member States should rely on to assess the sensitivity of areas, as long as they are "*appropriate* and *proportionate"*. Whilst terms "*appropriate* and *proportionate"* are not defined in the law, they are still useful qualifiers as to the types of datasets and tools to be used, limiting Member States' discretionary power in their choice.

In complying with this obligation, Member States will, as a first stage, have to identify *in an* impartial and comprehensive manner all relevant tools and datasets, ensuring that they use reliable and best available scientific data as well as *"most recent results of scientific research"* (both international and domestic).[85] Inadequate information flow between authorities does not make data "*unavailable*" under the principle of administrative unity; they simply highlight poor internal communication. Member States' authorities, particularly when not collaborating with environmental ministries or entities managing Natura 2000 sites, risk lacking the necessary tools and datasets for identifying sensitive areas.[86] To comply with their obligations, Member States must enhance decision-making by identifying and consulting relevant authorities promptly, as required by Article 6(3) of the SEA Directive.

Naturally, where there are knowledge gaps, it will be up to the Member States' competent authorities to take appropriate measures to supplement existing data, including, carrying out further ecological and survey field work.[87] Member States must allocate sufficient time and resources to identify and evaluate diverse EU-wide, regional, national, and local tools, datasets, and stakeholders critical to the RAA designation process.

Data gaps due to poor compliance with Article 17 of the Habitats Directive cannot justify limiting RED Article 15c(1)(a)(iii)'s scope or omitting sensitive areas from exclusion. If screening indicates potential significant environmental impacts, these areas must be considered. As the CJEU has ruled, assessments lacking up-to-date and reliable data are not "appropriate."

85 Member States' obligation to rely on best available scientific data has long been established in CJEU's case law; see C-333/08, *Commission v France*, para. 92.

86 Inadequate coordination between competent authorities, both horizontally (i.e. mainly among different Ministries), and vertically (i.e. between the central or federal government and regional, municipal or local authorities is a long-standing pervasive issue in the implementation of EU environmental legislation. See for instance: European Committee of the Regions, 'Study: Effective multi-level environmental governance for a better implementation of EU environment legislation' (2017), pp. 17 – 21, 29 – 34; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Environmental Implementation Review 2022: Turning the tide through environmental compliance and Annex', Brussels, 8.9.2022.

87 European Commission, 'Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final, pp. 47 – 48.

→ **RECOMMENDATION:**

Member States should exclude ecologically sensitive areas from the RAAs based on appropriate tools and datasets, in order to ensure that renewable energy projects in RAAs have no significant environmental impact. Although the legislation does not explicitly define "significant environmental impact" or prescribe specific tools, Member States must follow established definitions and methodologies under the SEA, EIA, and Birds and Habitats Directives. Areas where renewable energy deployment could potentially harm ecological integrity, particularly within the Natura 2000 network, must be excluded. The determination of "significant effect" should be grounded in objective criteria and aligned with the conservation objectives of specific sites to ensure consistency and the coherence of the Natura 2000 network. Any adverse impact on site integrity or significant disturbances under Article 6(2) of the Habitats Directive must be avoided.

2.2.3. Prioritizing Artificial and Built Surfaces

When deciding which areas can be included in the plans designating RAAs, Member States must give priority to "artificial and built surfaces", under certain conditions. RED provides a non-exhaustive list of such areas which includes *"... rooftops and facades of buildings, transport infrastructure and their direct surroundings, parking areas, farms, waste sites, industrial sites, mines, artificial inland water bodies, lakes or reservoirs and, where appropriate, urban waste water treatment sites, as well as degraded land not usable for agriculture"*.

This prioritisation under Article 15c(1)(a)(i) of the RED applies only if it is determined that renewable energy projects in the area are "*not expected to have a significant environmental impact*,"[88] according to the sensitivity-based criterion.

As mentioned previously, renewable energy projects may not only produce a series of localised effects (in the area where the technologies have been installed) but may also have broader regional impact. Even installations on artificial or built surfaces may generate significant environmental impacts, which must be considered under both the SEA and Habitats Directives. Article 15c of the RED reinforces this requirement, stipulating that if assessments identify significant environmental impacts from a renewable energy project in a particular area, both the project and the area must be excluded from RAAs.

88 This is because the prioritisation is placed under the chapeau (RED, Article 15c(1)(a)), and the word "while..." is used to link the two conditions.

With regard to the prioritisation of degraded land not usable for agriculture, in the RAA designation stage, Member States will need to assess whether such land contains:

– habitats included in Annex I of the NRL, for which restoration measures will need to be put in place (Article 4(1) NRL);
– areas where Member States are planning to re-establish NRL Annex I habitats with the aim of reaching their favourable reference area (Article 4(4) NRL);
– habitats of species of Annexes II, IV, V of the Habitats Directive and habitats of wild birds under the Birds Directive; which are not part of the Natura 2000 network.

In these cases, Member States must, prior to the prioritisation of such areas, additionally assess whether the establishment of RAAs will adversely affect the effectiveness of restoration measures and the future compliance of the Member State with the NRL targets. Member States must also consider the potential adverse impact of the prioritisation of degraded land not usable for agriculture, on the effectiveness of measures aimed at the improvement of pollinator diversity and the reversal of their decline (Article 10 NRL), as well as the measures aimed at the achievement of increasing trends on biodiversity indicators of agricultural ecosystems (Article 11 NRL).

Thus, the decision to include and prioritise degraded land not usable for agriculture in RAAs must be made in consultation with the national authorities developing Member States' national restoration plans, so that the two processes are coordinated in accordance with Article 14(13) NRL.

While the prioritization of such sites must take place on a case-by-case basis, there are some positive examples of solar photovoltaic installations which include restoration of both semi-natural grasslands (through controlled livestock grazing), and pollinator populations.[89] In line with Article 15(3)(t)(iv) of the NRL, Member States will need to provide information on synergies like these in their National Restoration Plans.

→ **RECOMMENDATION:**

The prioritisation of "artificial and built surfaces" for RAAs under Article 15c(1)(a)(i) of RED is conditional upon ensuring that projects in these areas cause no significant environmental impacts.

89 SolarPower Europe, 'Solar, Biodiversity, Land Use: Best Practice Guidelines' (2022), Chapters 3 and 4; Association of Energy Market Innovators (bne/Bundesverband Neue Energiewirtschaft e.V.), 'Solar parks – profits for biodiversity', November 2019; H. Blaydes, et al, 'Opportunities to enhance pollinator biodiversity in solar parks', Renewable and Sustainable Energy Reviews, Vol. 145 (2021).

2.3. The obligation to undertake a Strategic Environmental Assessment and an Appropriate Assessment

Under Article 15c(2) of the RED Member States will need to undertake an SEA, as well as an appropriate assessment for the draft plans designating RAAs, in line with the SEA Directive and Article 6(3) of the Habitats Directive, respectively. Although the Member States may choose to combine these assessments.[90]

It is important to note that the SEA does not substitute, or in any way override, Member States' obligation to undertake an appropriate assessment; thus, *"the information and conclusions relevant to the appropriate assessment must be distinguishable and differentiated from those of the (...) SEA."91* This is mainly because the two processes have a series of differences, including their scope, the responsible authorities and their legal consequences. Member States have more discretion in incorporating the findings of an SEA in their decision-making.[92] The findings of the appropriate assessment are binding on Member States, meaning that they may only authorise a plan or project once they have ascertained that it will not adversely affect the integrity of the site.[93] This is why the two processes are distinct and cannot replace each other.[94]

2.3.1. Strategic Environmental Assessment

Member States will have already gathered relevant information at the mapping stage (RED Article 15b), which will have already significantly reduced the area eligible for consideration and will have led to the identification of areas which Member States would need to assess, prioritise or exclude.[95]

The designation of RAAs allows projects within these areas to potentially bypass an EIA at the permitting stage by ensuring a more detailed and rigorous SEA is conducted during the designation process. Article 15c(2) of the RED thereby modifies the standard SEA requirements, mandating a higher level of specificity and detail for SEAs in the context of RAAs compared to typical cases. [96]

These differences are as follows:

- **Scope and level of detail of the assessment:** Normally, the SEA Directive only regulates the assessment of plans and programmes (in this case *plans designating RAAs)*, while individual projects (namely, *renewable energy plants*) are assessed through an EIA under the EIA Directive. The RED deviates from this clear-cut division of the two processes, requiring Member States to assess the impacts of the type of renewable energy and technology used and to predict what measures will be appropriate to mitigate this impact. Normally, this would only be done at the permitting stage, while carrying out an EIA for a specific project, and it may be difficult to do at a time when no concrete project applications are submitted. Under RED an SEA will need to include the assessment of the following areas:
  - *"Environmental characteristics of areas likely to be significantly affected"* (Annex I, point (c) SEA Directive), and "*the likely significant effects on the environment, including on issues such as biodiversity, (...) , fauna, flora, soil, water, air, climatic factors, (...), landscape and the interrelationship between the above factors, including secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects"* (Annex I, point (f) SEA Directive). In these cases, Member States will need to pay particular attention to the ecology of the areas to be assessed, centring their assessment around environmental sensitivity (including wildlife sensitivity), per Article 15c(1)(a) of revised RED.
  - *"Description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information"* (Annex I, point (h) SEA Directive), which will need to include the knowledge bases (i.e. tools and datasets) that Member States have relied on to identify the areas that can legally be included in the plans designating RAAs.

90 European Commission, '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', Notice 2021/C 437/01), pp. 71 and 73.

91 European Commission, 'Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final, p 44.

92 SEA Directive, Article 6.

93 Habitats Directive, Article 6(3).

94 C-418/04, *Commission v Ireland*, para. 231.

95 Driven, among others, by the set of non-binding guiding considerations of the coordinated mapping, provided in RED, Article 15b(2).

96 SEA Directive, Article 1.

- Finally, the "*measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme*" (Annex I, point (h) SEA Directive) are defined in Article 15c(1)(b) of RED, which sets the characteristics of the mitigation measures that Member States need to take and the qualitative threshold that these need to meet. Such measures will be complemented by any additional obligations that Member States may have, prescribed in other pieces of legislation.

– **Legal consequences of the assessment:** In line with Article 6 of the SEA Directive, the outcomes of the assessment and the associated environmental report and transboundary consultations on the likely significant effect of plans or programmes, need to be duly considered by Member States in their subsequent decision-making. This includes decision-making on the specific RAA. In addition to the obligation under Article 6 of the SEA Directive, Article 15c(1)(b) final sub-paragraph of RED, obliges Member States to explain, in the plans designating RAAs, the *"assessment made to identify each designated RAA on the basis of the criteria set out in point (a) of the first subparagraph"*. This assessment should be included in the SEA and the appropriate assessment. The outcome of these assessments must be considered in the decision to designate the RAA, the determination of its borders, applicable mitigation measures or even a decision not to designate the RAA in question. Additionally, the RED reserves an additional legal consequence for those areas for which the assessment establishes the likelihood of significant environmental effects, which is their exclusion from the plans designating RAAs. However, renewable energy projects may still be proposed for the areas that have been excluded from the plans designating RAAs, but the permitting procedure for them will follow the default Article 16b procedure under RED, rather than, the expedited procedure under Article 16a of the RED.

– **Stakeholders and the public to be consulted, per Article 6(3) and 6(4) of the SEA Directive:** As mentioned above, the SEA under RED must be significantly more robust and detailed. Since no EIA may be carried out at a later stage for the projects located in the specific RAA, Member States will need to identify and consult stakeholders, and the public concerned at the SEA stage. In contrast with the normal, high-level consultation process carried out in other cases where the SEA Directive is applied, it is important that this consultation process identifies and properly engages with all relevant stakeholders and local communities affected or likely affected by the RAA and the projects located within those areas, including any adjacent infrastructure.

2.3.2. Appropriate Assessment

The appropriate assessment under Article 6(3) of the Habitats Directive is mandatory for all plans and projects likely to have a significant effect on a Natura 2000 site. This assessment aims to ensure that the conservation objectives of Natura 2000 sites (and compliance with Articles 6(1) and 6(2) of the Habitats Directive) are not adversely affected by human activities. Key steps in the appropriate assessment process, which – according to the European Commission - constitutes a *"permitting regime setting out the circumstances within which plans and projects with likely significant negative effects on Natura 2000 sites may or may not be allowed"*,[97] are the following:

– A preliminary screening which determines whether a plan or project that is not directly linked to the pursuit of the conservation objectives of the Natura 2000 site, is likely to have a significant effect on the site; and

– the main assessment which analyses and specifies the effects.

Normally, should a plan or project affect the integrity of a Natura 2000 site, it must not receive a permit.[98] By derogation to this general principle, established in Article 6(3) of the Habitats Directive, plans or projects may still go ahead, even if the appropriate assessment indicates the likelihood of a significant effect, if the following conditions, enshrined in Article 6(4) of the Habitats Directive are met:

– there are no alternative solutions;

– the plan or project needs to be undertaken for *imperative reasons of overriding public interest*;

compensatory measures, necessary to ensure that the overall coherence of Natura 2000 network is protected, are taken.[99]

As mentioned previously, one of the main concerns at the RAA designation stage is that Member States will lack the necessary details, usually provided at the individual project level, in order to fully assess the type, gravity, duration and extent

97 European Commission, *'Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats'* Directive 92/43/EEC', Notice 2018/C 7621 final, pp. 33 onwards.

98 European Commission, *'Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats'* Directive 92/43/EEC', Notice 2018/C 7621 final, pp. 33 onwards.

99 For a full analysis of the above conditions, please see Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC Clarification of the Concepts Of: Alternative Solutions, Imperative Reasons of Overriding Public Interest, Compensatory Measures, Overall Coherence (Opinion Of The Commission, Companion to the Guidance document (below) (January 2007). For more comprehensive Guidance: European Commission, 'Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final.

of the project's impact on environment. While an appropriate assessment is also undertaken for plans or projects, adequate information is needed to ensure the comprehensiveness of that assessment. The CJEU has previously ruled on the degree of specificity that needs to be contained in national plans, for the appropriate assessment to be considered robust and aligned with the requirements set by Article 6(3) of the Habitats Directive.[100] The location of the RAAs, as well as the prior knowledge on the types of technology to be deployed therein and an estimate of the total energy output will already be known to Member States,[101] all of which will provide Member States with some certainty on the type, significance and extent of impacts, informing the outcome of the appropriate assessment test. If a Member State cannot provide conclusive evidence on the absence of adverse effects from the plan in question,[102] or concrete scientific criteria on which its assessment is based, then the plan in question must be refused, and can only go ahead following the derogation procedure under Article 6(4) of the Habitats Directive. [103]

When screening to decide if an appropriate assessment is required, Member States cannot take mitigation measures into account.[104] This is because such measures already assume the likelihood of adverse effects, which can only be confirmed after the appropriate assessment is conducted. This means that during screening stage for plans designating RAAs, measures formulated in the mitigation rulebook as per Article 15c(1)(b) of the RED, cannot be taken into account.

With regards to the scope of the assessment, the following needs to be highlighted:

- Given that Natura 2000 sites are excluded from plans designating RAAs, the inclusion of a reference to Member States' obligation to undertake an *appropriate assessment* might be unexpected. Yet, 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[105] With this in mind, an appropriate assessment will need to be undertaken for all plans designating RAAs, regardless of their location and/or proximity to Natura 2000 sites.[106] Sole screening criterion can be their likelihood to have significant effects on a Natura 2000 site.
- Content-wise, Member States' authorities have extremely limited discretion, given that all aspects of a plan or project that may affect a site's conservation objectives (or, in their absence, cause deterioration or significant disturbance) need to be identified.[107]
- The level of detail in the SEA outlined in the RED is applicable to the Appropriate Assessment. Member States will need to assess, on the basis of compelling evidence, the potential significant environmental impacts of future projects on Natura 2000 sites, in line with Article 15c(1)(a)(iii) of the RED, even if such projects have yet to be formulated. This means that the Appropriate Assessment under the RED will have to be wider in its' scope and level of detail, since it will need to look at both impacts of the plans, but also of the projects planned inside of the RAAs.

→ **RECOMMENDATION:**

Member States should ensure that while they may opt to combine the SEA and the appropriate assessment, the SEA cannot substitute or override the legal obligation to carry out a comprehensive appropriate assessment. The designation of RAAs requires SEAs to be more detailed and robust than in other contexts, as projects located within RAAs may be exempt from the EIAs at the permitting stage. Therefore, Member States must conduct SEAs with an increased level of specificity to evaluate both the plans and the projects intended for the RAAs. Furthermore, the appropriate assessment must also expand its scope and detail to ensure that potential significant environmental impacts are identified and addressed, safeguarding areas unsuitable for renewable energy development from inclusion in the RAA plans.

100 C-293/17 and C-294/17, Coöperatie Mobilisation for the Environment and Others, para. 104: *"In the light of the foregoing, the answer to the second question in Case C-294/17 is that Article 6(3) of the Habitats Directive must be interpreted as not precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an 'appropriate assessment' within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection. That so, however, only in so far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain."*

101 In line with RED, Article 15c(3) and the preparatory work undertaken during the coordinated renewables mapping under Article 15b.

102 C-127/02 Waddenvereniging and *Vogelbeschermingsvereniging ("Waddenzee")*, paras. 57 – 58.

103 C-98/03, *Commission v. Germany*, paragraphs 51, C-239/04, *Commission v Portugal*, para. 20.

104 C-323/17 - *People Over Wind and Sweetman.*

105 C142/16, *European Commission v Federal Republic of Germany*, para. 29; C-98/03, *Commission v Germany*, para. 51 and C-418/04, *Commission v Ireland*, paras. 232 and 233.

106 C-98/03, *Commission v. Germany*, para. 51.

107 C-127/02 Waddenvereniging and Vogelbeschermingsvereniging, para. 97: *"This assessment must, of necessity, compare all the adverse effects arising from the plan or project with the site's conservation objectives. To that end, both the adverse effects and the conservation objectives must be identified."*

2.3.3. Cumulative impact assessment

The unique scope and detailed requirements for environmental assessments under the RED — such as evaluating the environmental impacts of all projects potentially installed in RAAs and allowing derogations from project-level assessments — highlight the critical importance of cumulative impact assessments. These assessments, conducted under the frameworks of the SEA and Habitats Directives, will be central during the RAA designation stage, ensuring comprehensive consideration of overlapping impacts and compliance with EU biodiversity objectives.

According to the SEA Directive, the need to consider cumulative effects is a requirement in both SEA report, as highlighted in Annex I of the Directive, and in the screening phase, as stated in the Annex II(2) of the Directive. For instance, the assessment of the likely significant effects on the factors such as "*biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between these factors)",* will need to consider whether there are any "*secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative"* effects.[108] Similarly, one of the criteria for determining the likely significant effects during the screening process under the SEA Directive, is the assessment of cumulative nature of the effects.[109]

Concerning the assessment under the Habitats Directive, examination the cumulative effects is necessary in both the screening stage and in the appropriate assessment stage. During screening, the assessment of the likelihood of potentially significant effects should be done of the plans or projects, *either alone or in combination with other plans or projects*. Although the level of detail will be more limited than in the appropriate assessment, competent authorities will still need to identify all other plans and projects that could give rise to cumulative impacts with the plan or project in question.[110]

Since the cumulative impacts often 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,[111] 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. 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 it carrying capacity and may lose its integrity if any further developments, however small, occur.[112]

For the already completed plans and projects their consideration is especially relevant for the site's baseline conditions which are considered at this stage. For instance, if a habitat or species in a Natura 2000 site is already in an unfavourable condition, or if critical impact thresholds are exceeded (including through cumulative effects), any additional plan or project that further increases these impacts is likely to significantly affect the site.[113]

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.[114]

Therefore, during the screening phase for an appropriate assessment, it will be necessary to identify other RAA plans, grid and storage infrastructure plans under Article 15(e) of the RED, as well as any other plans or projects that could potentially impact the same Natura 2000 sites. Next, competent authorities will have to evaluate the likelihood of significant effects. If a definitive conclusion cannot be reached during this stage, a more comprehensive assessment will need to be conducted as part of the appropriate assessment.[115]

Following the screening stage, where any other plans and projects that can act in combination should have been identified,

108 SEA Directive, Annex I(f), footnote (1).

109 SEA Directive, Annex II(2).

110 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), p. 14.

111 See, for example, C-142/16, *Commission v Germany*, paras. 61 and 63.

112 European Commission, 'Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Commission Notice C(2018) 7621 final, Brussels, 21.11.2018, p. 42.

113 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), p. 31.

114 European Commission, 'Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Commission Notice C(2018) 7621 final, Brussels, 21.11.2018, p. 42.

115 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), p. 15.

during the appropriate assessment those identified impacts must be properly evaluated. This requires quantifying and/or qualifying the magnitude of these other impacts and identifying the affected features of the Natura 2000 sites.[116] As already explained in the previous chapter, the competent authorities can only authorise an activity if they have made certain that it will not adversely affect the integrity of the site.[117]

Plan-level assessments can be particularly effective for evaluating cumulative effects, as they can address potential issues early, avoiding complications at the project stage. This is especially relevant for sector-specific plans such as those for transport, energy, or water management, as well as for regional strategies and land use plans, but as explained above, this assessment must also consider and evaluate cumulative effects of plans and projects covering other sectors as well. Stakeholder consultations, along with reviewing environmental assessments from other relevant plans and projects in the same area—such as SEA and appropriate assessments, where available—can provide valuable insights and contribute to a more thorough and informed evaluation.

Moreover, obligations to favour multiple uses of the areas and to ensure compatibility with pre-existing uses of those areas, which was explained in Chapter 1.4.1, will also play an important role during the phase of cumulative impact assessment.

The obligation to prioritise the "multi-use" of areas seeks to harmonize different land and sea uses, addressing conflicts that often arise from limited resources and competing interests. Within the cumulative impact assessment, Member States can have a clearer view of the pre-existing uses, and the limitations they impose, and evaluate whether renewable energy and pre-existing uses can coexist without one undermining the other. Finally, such assessment can also outline how project construction, operation, and grid connections fit within the broader context of other designated uses, and whether renewable energy projects can be compatible with pre-existing uses.

→ **RECOMMENDATION:**

A crucial aspect of the SEA and appropriate assessment will be the evaluation of cumulative impacts, which is vital for assessing the environmental effects of all potential projects within RAAs, as well as all RAA plans and other plans or projects that may contribute to cumulative impacts. Therefore, competent authorities must identify and assess the cumulative impact of other RAA plans, grid, and storage infrastructure plans under Article 15(e) of the RED, along with any other projects or plans that may impact the environment and Natura 2000 network.

2.3.4. Consequences of failure to comply with environmental assessment obligations

The importance of a proper completion of the SEA and the appropriate assessment in line with the process outlined above, goes beyond ensuring a high level of environmental protection and minimizing adverse impacts on biodiversity from human activities. It is also a prerequisite for the future legality of renewable energy projects, which would be directly affected by a Member State's failure to properly undertake these assessments.

With regard to the SEA, the CJEU has ruled that plans or programmes adopted in violation of the SEA Directive need to be annulled by national courts. Such procedural illegalities not only affect the initial plan or programme but, they also affect all projects undertaken pursuant to it.[118] The same will apply to plans designating RAAs, as plans or programmes in the meaning of Article 2(a) and 3(2) of the SEA Directive, as well as all individual projects located within the relevant RAA. Such an annulment of the plans designating RAAs and all the related projects due to failure to comply with EU law would have major consequences on the acceleration of the renewable energy transition and incur significant additional costs.

With regard to the appropriate assessment a plan or project that may have an adverse impact on a Natura 2000 site

116 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), p. 31.

117 C-304/05 *Commission v Italy*; C-239/04 *Commission v Portugal* and C-404/09 *Commission v Spain*.

118 C-41/11, Inter-Environnement Wallonie and Terre Wallonne, paras. 40 – 47: *"Courts before which actions are brought in that regard must adopt, on the basis of their national law, measures to suspend or annul the 'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment (see, by analogy, Wells, paragraph 65). The fundamental objective of Directive 2001/42 would be disregarded if national courts did not adopt in such actions brought before them, and subject to the limits of procedural autonomy, the measures, provided for by their national law, that are appropriate for preventing such a plan or programme, including projects to be realised under that programme, from being implemented in the absence of an environmental assessment"*. See also, Joint Cases, C-196/16 and C-197/16, Comune di Corridonia.

cannot receive a permit, in line with Article 6(3) of the Habitats Directive. A plan or project for which a negative appropriate assessment has been completed may only be approved subject to the derogations in Article 6(4).

Thus, the failure to comply with the requirements of SEA Directive and Habitats Directive (Article 15c(2)) can have broader implications for Member States that reach beyond the stage of designation of RAAs. Failure to comply with these obligations will require Member States to revoke the issued permits potentially slowing down the energy transition.

2.4. Mitigation measures

RAAs must also be accompanied by a "mitigation rulebook", which should *"establish appropriate rules"* containing *"effective mitigation measures to be adopted …. In order to avoid the adverse environmental impact that may arise, or, where that is not possible, to significantly reduce it"*.[119] This provision seeks to establish, in advance, a catalogue of mitigation measures, applicable to different cases of significant environmental impact, in a proactive effort to ensure that such measures will be in place before the significant environmental impact occurs.

Each RAA is expected to have its own mitigation rulebook, meaning that the measures need to be targeted to each identified RAA, to the type or types of renewable energy technologies to be deployed and to the identified environmental impacts.[120] This approach ensures that *appropriate* rules are adopted, reflecting the unique conditions of each RAA, such as the type of renewable energy, installation size, proximity to the grid, and other factors intrinsic to each project within the designated RAA.

Together with the full draft plan, the draft mitigation rulebook needs to be subjected to an SEA, and if applicable, to appropriate assessment under the Habitats Directive, as prescribed under Article 15c(2) of the RED. The aim is to identify potential environmental impacts based on the planned setting of each RAA, in order to select appropriate mitigation measures during its designation.[121]

What constitutes *'effective mitigation measures'* is not clarified in the RED. Commission Guidance on permitting renewable energy projects contains some considerations that can be beneficial for renewables energy projects located in the specific RAAs to adopt and comply with the rules included in the plan. By anticipating some of the most likely impacts resulting from wind and solar energy projects, the Commission Guidance provides an overview of mitigation measures that could address some of these impacts.[122]

On the other hand, the Study on the designation of Renewables Acceleration Areas (RAAs) for onshore and offshore wind and solar photovoltaic energy[123] explains that the mitigation rulebook should consider the impact of all projects that may be installed in an RAA and establish rules on mitigation measures to address the impacts of the expected number of projects in the RAA. The measures identified in the rulebook should, therefore, be applicable to all projects (and ancillary equipment). [124] The idea behind it is, therefore, that by envisaging all mitigation measures at designation/planning level, impact on project level can be minimised in advance. The Study also lists some of the most important criteria when selecting avoidance and minimisation measures for designation.[125]

This means that the designation stage assumes that authorities have sufficient knowledge about the projects that will be developed in each RAA and their possible environmental impacts, to enable identification of appropriate and proportionate mitigation measures that developers of projects in the RAAs will need to implement.[126]

Measures need to be able to lead to either the *avoidance* of the adverse environmental impact that may arise, or – at least – its *significant reduction,* in order to qualify as effective. In other words, Member States may only include those mitigation measures in the "rulebook" which, due to their nature and specificities, can lead to the avoidance or significant reduction of potential adverse environmental impact. This is crucial, as it means that Member States may only prepare the *mitigation rulebook*, once the assessment of RED Article 15c(1)(a) and the appropriate assessment under RED Article 15c(2) have been completed.

119 RED, Article 15c(1) point (b).

120 Ibid.

121 'Guidance on designating renewables acceleration areas Accompanying the document Commission Recommendation on speeding up permit-granting procedures for renewable energy and related infrastructure projects', {C(2024) 2660 final} - {SWD(2024) 124 final}, p. 21.

122 'Guidance on permitting renewable energy projects', SWD(2024) 124 final, 13 May 2024, pp. 21-24.

123 'Study on the designation of Renewables Acceleration Areas (RAAs) for onshore and offshore wind and solar photovoltaic energy,' Final Report, Trinomics, June 2024.

124 Ibid, p. 66.

125 Ibid, p. 71.

126 Ibid, p. 66.

Article 15c(1), point (b) of the RED adopts a hierarchical approach to effectiveness, aiming to firstly make sure that mitigation measures are designed to prevent significant impacts from occurring in the first place, and if this is not possible, to significantly reduce the magnitude and/or likelihood of an impact.[127] The goal is, again, to avoid the occurrence of adverse environmental impact through the adoption of measures that can ensure such an outcome and, only if such measures are impossible, may they, at a second stage, adopt mitigation measures to *significantly reduce* it. This approach is fully in line with both the Habitats Directive and the EIA Directive.

As will be explained in the next chapter, although the projects planned in the RAA can derogate from carrying out the EIA and AA procedure at the permitting stage, they will still have to be screened for any highly likely environmental impact. Depending on the results of such screening, additional specific mitigation measures may be required for certain projects within the RAA. However, these additional mitigation measures fall outside of the rulebook's scope.[128] But, if the project is screened as highly likely to give rise to significant unforeseen effects at the permitting stage, an EIA and AA (if applicable), will be required.

According to the Study on the designation of Renewables Acceleration Areas (RAAs) for onshore and offshore wind and solar photovoltaic energy, if, sometime after the establishment of an RAA, it is observed that more projects are gradually called in for an EIA, this might be a good indication of the need to review the RAA plan and update the mitigation rulebook.[129] This would also be a clear indication that the presumption of compliance with environmental law is rebutted and that measures envisaged on the plan level are not appropriate or efficient for impacts that might arise on project level.

However, this approach raises concerns about the potential for inadequate scrutiny of environmentally sensitive areas, as the reduced assessment process may overlook critical impacts. While additional mitigation measures may be required based on the screening, this reactive approach risks allowing damaging projects to proceed with insufficient safeguards in place. Likewise, during the preparation of designation plans and the mitigation rulebook, Member States may not have sufficient knowledge on the characteristics of the specific projects that would be installed and operated in the RAA, or even the likelihood of impact on project level. It might be difficult for Member States to ascertain which mitigation measures would be *'appropriate'* in order to prevent and reduce significant impacts of a specific project. Defining what is appropriate would normally require previously ascertaining the likelihood of significant effects a renewable energy project would have on the site (either alone or in combination with other plans or projects). In order to comply with the derogation provision of the RED, and presumption of compliance with applicable EU environmental law, Member States will need to acquire sufficient knowledge and understanding the likelihood of significant impact on project level in order to select appropriate measures.

Finally, Article 15c(1) point (b) of the RED calls for measures to *"ensure compliance with the obligations laid down in Article 6(2) and Article 12(1) of [the Habitats Directive], Article 5 of [the Birds Directive] and Article 4(1), point (a)(i) of [the Water Framework Directive] and to avoid deterioration and achieve good ecological status or good ecological potential in accordance with Article 4(1), point (a) of [the Water Framework Directive]."* The meaning of the term *'effective'* needs to be understood within the meaning of "effective" measures in the Habitats, Birds Directives and WFD. Only then can Member States comply with the derogation provision at the permitting stage. In order to provide more clarity on this, the following sub-chapters outline the existing rules and interpretations within the Habitats and Birds Directive and the WFD.

2.4.1. Measures under Article 6(2) of the Habitats Directive

Article 6(2) of the Habitats Directive requires the Member States to avoid deterioration of Natura 2000 sites, such as to "*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."*[130]

What constitutes *"appropriate steps"* under Article 6(2) of the Habitats Directive has been clarified by the CJEU to imply that, although Member States enjoy certain discretion when applying the provision, this discretion is limited by the obligation to guarantee "*that it will not cause any disturbance*

127 'Guidance on permitting renewable energy projects', SWD(2024) 124 final, 13 May 2024, p. 20.

128 'Study on the designation of Renewables Acceleration Areas (RAAs) for onshore and offshore wind and solar photovoltaic energy,' Final Report, Trinomics, June 2024, p. 66.

129 Ibid, p. 27.

130 Habitats Directive, Article 6(2).

likely significantly to affect the objectives of that directive, particularly its conservation objectives".131 Therefore, the article is not based on intention, but rather on the result, and requires Member States to take preventive measures.

The type of legal regime that needs to be put in place in order for measures to be appropriate in light of Article 6(2), has already been clarified by the CJEU in several cases, stressing that it needs to be specific, coherent and complete, capable of ensuring the sustainable management and the effective protection of the sites concerned.[132]

Considering that Article 6(2) is mainly concerned with the habitats and species *"for which the areas have been designated",* in order for measures to be appropriate, they need to be focused on the species and habitats which justify the selection of the site, and cannot therefore be of a general nature.[133]

The requirement also makes a distinction between the *"deterioration of natural habitats and the habitats of species"* and the *"disturbance of species"*. In terms of *"disturbance of species",* their significance will need to be assessed *"in relation to the objectives of the Directive".* However, in terms of *"deterioration of habitats*", reference to the significance in relation to the objectives of the Directive is not explicitly mentioned, which means that it simply needs to be avoided altogether.[134] However, considering that Article 6(2) and 6(3) need to be construed as a coherent whole,[135] the CJEU has already confirmed that the assessment of the deterioration should follow similar criteria and methods as those used in applying Article 6(3), thus the appropriate assessment.[136]

Concerning its spatial limits, the article does not specify that measures have to be taken in the Natura 2000 site, but that they should avoid the deterioration thereof, in order to be appropriate. This means that measures may need to be implemented outside of the Natura 2000 site when an activity may have an impact on the species and the habitats inside the site.[137] This is especially important for projects planned in the RAAs that may impact the species and the habitats inside the Natura 2000 sites, even if their location is distant from the Natura 2000 sites, and thus take appropriate measures to avoid deterioration.

Finally, in the *Grüne Liga Sachsen and Others* case, the CJEU confirmed that if in some occasions the subsequent review of a plan or project could be seen as an *"appropriate step"* to comply with Article 6(2), it would have to be carried out in accordance with the requirements of Article 6(3) of the Habitats Directive.[138] Therefore, the CJEU has confirmed that in some circumstances, appropriate assessment would be necessary in order to ensure the appropriate measures are in place and to ensure compliance with Article 6(2).

To sum up, in terms of Article 6(2) of the Habitats Directive appropriate measures:

- Need to be of preventive nature;
- Need to be specific, coherent and complete;
- Need to focus on the specific species and habitats rather than be of general nature;
- Need to be assessed against the conservation objectives of the site and the conservation condition of the species and habitat types present in the site using the same criteria as for the Article 6(3) procedure;
- May need to be implemented outside of the Natura 2000 site when an activity may have an impact on the species and the habitats inside the Natura 2000 site;
- May require an appropriate assessment to be carried out to ensure the appropriate measures are in place and, thus, compliance with Article 6(2).

2.4.2. Measures under Article 12(1) of the Habitats Directive and Article 5 of the Birds Directive

Article 12(1) of the Habitats Directive requires Member States to take requisite measures to establish and implement an effective system of strict protection for certain animal species

131 C-404/09, *Commission v Spain*, para. 126 and the case-law cited therein.

132 C-293/07, *Commission v Greece*, paras. 26–29; C-491/08, *Commission v Italy*; C-90/10 *Commission v Spain*. European Commission 'Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Commission Notice C(2018) 7621 final, Brussels, 21.11.2018, p. 27.

133 European Commission 'Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Commission Notice C(2018) 7621 final, Brussels, 21.11.2018, p. 26.; See C-166/04, *Commission v Greece*, para. 15.

134 European Commission, 'Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Commission Notice C(2018) 7621 final, Brussels, 21.11.2018, p. 28

135 C-258/11 *Sweetman and Others*, paragraph 32; C-521/12 *Briels and Others*, para. 19.

136 European Commission 'Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Commission Notice C(2018) 7621 final, Brussels, 21.11.2018, p. 28. For determining when does the habitat deterioration or disturbance of species occur, see also pp. 29-31.

137 Ibid, p. 26.

138 C-399/14, *Grüne Liga Sachsen eV and Others v Freistaat Sachsen*, paras. 40, 41, 54. European Commission, 'Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Commission Notice C(2018) 7621 final, Brussels, 21.11.2018, p. 27.

in their natural range, including prohibiting: (a) all forms of deliberate killing of specimens of these species in the wild; (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration; (c) deliberate destruction or taking of eggs from the wild; and (d) deterioration or destruction of breeding sites or resting places.

The Habitats Directive gives a certain margin of manoeuvre for Member States to define, adopt and implement the requisite measures, however this discretionary power is limited by some basic requirements, which are explained below.

What constitutes an adequate system of strict protection in terms of Article 12(1) has already been clarified by the CJEU, stating that it consists of a set of coherent and coordinated measures of a preventive nature.[139] This means that Member States must not only adopt a comprehensive legislative framework but also implement concrete and specific protection measures.[140] The measures need to contribute to the aim of maintaining the species in the long term or restoring its population in its habitats at favourable conservation status, must be effectively enforced[141], and *"make it possible actually to avoid harm to the protected animal species as set out in that provision".142* Moreover, the meaning of the term "*strict*" indicates that not even an individual specimen should be deliberately killed or disturbed.[143]

However, a risk of an adverse effect on the conservation status of the animal species concerned by an activity is not a condition for the implementation of the protection system laid down in Article 12(1)(a) to (c) of the Habitats Directive.[144] Likewise, species protection measures apply irrespective of whether the species has attained a favourable conservation status.[145]

Thus, in order to maintain and restore the species at favourable conservation status measures appropriate must be chosen based on the particular circumstances of each situation and be specific to each species. This is because different types of measures may be required for different species, depending on their ecological requirements and the problems and threats they are facing.[146]

Article 12(1)(a)-(c) of the Habitats Directive all prohibits all forms of deliberate killing of specimens, deliberate disturbance of the species and deliberate destruction or taking eggs from the wild. The meaning of the term "deliberate" was clarified by the CJEU in saying that *"for the condition as to 'deliberate' action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing".*[147]

The term *'deliberate'* is wider than *'direct intention'* and signifies that a person who commits an offence, is not only someone who fully intends to capture or kill, disturb, or destroy, but also a person *"who might not intend to do so, but it is sufficiently informed and aware of the consequences his action will most likely have and nevertheless performs the action"*.[148] Therefore, the prohibitions listed in Article 12(1)(a) to (c) of the Habitats Directive are capable of applying to an activity, the purpose of which is manifestly different from the capture or killing, disturbance of animal species or the deliberate destruction or taking of eggs[149], such as for instance activities aimed at forestry management, agriculture, or energy industry.

The meaning of the term *'disturbance'* under Article 12(1)(b) is not defined in the Habitats Directive. However, contrary to Article 6(2), where the disturbance needs to be significant, this is not the case for Article 12(1). Nevertheless, assessment of the disturbance under Article 12(1)(b) must be considered with regards to the conservation status of the species, and it must be assessed on a case-by-case basis, in order to understand what is the harmful level of disturbance for the species concerned.[150]

139 See for example, C-103/00, *Caretta caretta*; C-518/04, *Cyclades blunt-nosed viper*; C-183/05, *Kerry slugs*; C-383/09, *Commission v France* (hamster); C-340/10, *Commission v Cyprus (Cypriot grass snake)*, where the CJEU stressed the importance of the preventive character of the measures taken.

140 C-383/09, *Commission v France*, paras. 19 to 21.

141 'Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC', February 2007, p. 27.

142 C-88/19, *Alianța pentru combaterea abuzurilor*, para. 23 and the case-law cited.

143 On the application of this system to the individual species regardless of population-level conservation status, see Joined Cases C-473/19 and C-474/19, Föreningen Skydda Skogen, paras. 54 – 57.

144 C-473/19, Föreningen Skydda Skogen, para. 57. The reason for this is that the assessment of the effect of an activity on the conservation status of the animal species concerned is, by contrast, relevant in connection with derogations adopted under Article 16 of the Habitats Directive. See also para. 58.

145 European Commission, Directorate-General for Environment, 'The strict protection of animal species of Community interest under the Habitats Directive – Guidance document,' a summary, Publications Office of the European Union, 2021, p. 5. See also C-473/19, *Föreningen Skydda Skogen*, para. 66, where the CJEU stated that it cannot be interpreted that the protection that Article 12(1) affords *"ceases to apply to species which have achieved a favourable conservation status."*

146 European Commission, Directorate-General for Environment, 'The strict protection of animal species of Community interest under the Habitats Directive – Guidance document' – A summary, Publications Office of the European Union, 2021, p. 5.

147 C-221/04, *Commission v Spain*.

148 'Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC', February 2007, p. 36.

149 C-473/19, *Föreningen Skydda Skogen*, para. 53.

150 'Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC', February 2007, p. 38.

Whilst point (a), (b) and (c) of Article 12(1) use the term "deliberate", Article 12(1)(d) requires all acts resulting in deterioration or destruction of breeding sites or resting places to be prohibited (avoided), regardless of whether they are deliberate or not.[151] Thus, Article 12(1)(d) sets a stricter protection regime than the one provided in points (a)-(c).

However, in line with the rest of Article 12(1), it would not be enough to simply prohibit such actions in a legal text. The measures taken to implement Article 12 need to be supported by an adequate enforcement mechanism, including preventive measures.[152]

Finally, it is necessary to further make a distinction between measures under Article 12(1)(d) and those that would fall under the Article 16 of the Habitats Directive that allows for derogation from species protection provisions. In cases where a project or activity may have a deteriorating or destructive (even if only temporary) impact on the breeding site/resting place, Article 16 needs to be applied. Only where a measure would ensure the continued ecological functionality of a breeding site/resting place, the measure in question complies with Article 12.[153]

As explained in the Guidance document on the strict protection of animal species[154], in order for measures to effectively implement Article 12, they must aim to minimise or even cancel out the negative impact of an activity (or even go beyond and improve a certain breeding site/resting place), through a range of preventive actions. Moreover, "*there must be a high degree of certainty that the measures are sufficient to avoid any deterioration or destruction*."[155]

This distinction is important because if a measure is independent of an activity/project and aims to compensate for or offset specific negative effects on a species, such as the destruction or deterioration of a breeding site or resting place, then these are compensatory measures that can only be considered under Article 16, and cannot be considered in compliance with Article 12, and therefore cannot be included in the RAA mitigation rulebooks. Therefore, whenever there is deterioration or destruction of a breeding site or resting place, Article 16 of the Habitats Directive needs to be applied.[156]

Article 5 of the Birds Directive establishes a similar system of protection as Article 12(1) of the Habitats Directive for bird species. In essence, the Birds Directive requires Member States to take all requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular:

a. all forms of deliberate capture or killing in the wild;

b. deliberate destruction of, or damage to, nests or eggs, or removal of nests;

c. taking their eggs in the wild and keeping them even if empty;

d. deliberate significant disturbance, particularly during breeding and rearing;

e. keeping birds of species the hunting and capture of which is prohibited.[157]

Therefore, similarly to Article 12(1), Article 5 of the Birds Directive requires the Member States to adopt a complete and effective legislative framework by the implementation, in the same manner as provided for by Article 12 of the Habitats Directive, of concrete and specific protection measures that must ensure effective compliance with the prohibitions set out in Article 5 of the Birds Directive, intended, in essence, to protect the species, breeding sites and resting places of the birds covered by that directive.[158]

In addition, in its earlier judgments, the CJEU has found that those prohibitions must apply without any limitation in time. This "*uninterrupted protection of the birds' habitat is necessary since many species re-use each year nests built in earlier years.*" Thus, suspending the protection throughout a particular period would go against the set prohibition under Article 5.[159]

151 See for example, C-6/04, *Commission v UK* and C-183/05, *Commission v Ireland*.

152 'Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC', February 2007, p. 40.

153 'Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC', February 2007, p. 47.

154 Ibid.

155 Ibid, p. 47.

156 Ibid, p. 48.

157 Article 5 Birds Directive. The Directive provides for exceptions to the general prohibitions set out in Articles 5 and 6. The trade in species listed in Annex III of the Directive is permitted, provided that the conditions and restrictions within Articles 6(2) and 6(3) are observed. In relation to hunting, species listed in Annex II may be hunted under Article 7 of the Directive owing "to their population level, geographical distribution level and reproductive rate throughout the Community ". Where a species is not listed in Annex II, an exception to the prohibitions in Article 5 is only possible where the strict requirements of Article 9 are fulfilled. See, 'GUIDE TO SUSTAINABLE HUNTING UNDER THE BIRDS DIRECTIVE', Council Directive 79/409/EEC on the conservation of wild birds, p. 11.

158 C-441/17, *Commission v Poland (Białowieża Forest)*, para. 252.

159 C-252/85, *Commission v France*, para. 9.

Considering, therefore, that Article 12(1) of the Habitats Directive and Article 5 of the Birds Directive establish a similar system of protection, requirements in terms of measures under Article 12(1) of the Habitats Directive discussed above, are relevant to the appropriate measures under the Article 5 of the Birds Directive.

To sum up, in terms of Article 12(1) of the Habitats Directive and Article 5 of the Birds Directive, appropriate measures must be:

- coherent and coordinated measures of a preventive nature;
- supported by an adequate enforcement mechanism;
- specific to the species concerned and assessed on a case-by-case basis;
- backed by a high degree of certainty of their sufficiency to avoid any deterioration or destruction (mitigation and not compensation measures);
- in terms of the protection of birds, not be limited by time.

2.4.3. Measures under the Article 4(1) of the Water Framework Directive

Article 15c(1) point (b) of the RED, obliges Member States to ensure that appropriate mitigation measures are applied in a proportionate and timely manner to ensure compliance with certain provisions of Article 4(1) of the WFD, such as to:

- prevent the deterioration of the status of all bodies of surface water and groundwater (Art. 4(1)(a)(i) and (b)(i) WFD); and
- achieve good status for surface waters and groundwater (Art. 4(1)(a)(ii) and (b)(ii) WFD).

In order to achieve these objectives, WFD obliges Member States to establish a Programme of measures (PoM), closely regulated under Article 11 of the WFD, and to produce river basin management plans (RBMPs) for each river basin district, as provided under Article 13 of the WFD.

Article 4(1) of the WFD lists legally binding[160] obligations, which are not solely management planning objectives, but also concern individual projects.[161]

Member States are obliged to achieve good status at the latest 15 years after the Directive entered into force. The deadline can only be extended under narrowly defined conditions listed under Article 4(4) of the WFD.[162] For surface waters, 'good status' encompasses both good ecological and good chemical status, whilst for groundwater, 'good status' refers to the chemical and the quantitative status, both of which must be good. For artificial or heavily modified bodies of surface water, a lower standard applies: they must achieve good ecological potential and good chemical status.[163]

In contrast to the obligation to achieve good status, the obligation to prevent deterioration must be complied with at all times. The CJEU has expressly held, on a number of occasions, *that "any deterioration of the status of a body of water must be prevented, irrespective of the longer-term planning provided for by management plans and programmes of measures"*[164], which implies that the obligation "*remains binding at each stage of implementation of that directive and is applicable to 'every surface water body type' and status for which a management plan has or ought to have been adopted"*.[165]

This means that Member States must always take the necessary measures to prevent any deterioration of the status of a water body.[166] Derogation is only possible under the narrowed conditions of Article 4(6) and 4(7) of the WFD. This leads to conclusion, already settled by the CJEU that, unless a derogation is granted, Member States are required *"to refuse to grant consent for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or*

160 C-461/13, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland*, para. 43; C-535/18, *IL and Others v Land Nordrhein-Westfalen*, para. 72; C-559/19, *Commission v Spain*, para. 43.

161 C-461/13, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland*, paras. 43 and 47.

162 The CJEU has stressed that Article 4(4) applies only to the enhancement obligation laid down in Article 4(1)(b)(ii), but not to the obligation to prevent deterioration referred to in Article 4(1)(b)(i). Case C-559/19, *Commission v Spain (Détérioration de l'espace naturel de Doñana)*, para. 45.

163 Good status should have been achieved at the latest 15 years after the date of entry into force of the WFD, i.e. by 22 December 2015. This deadline may be extended under certain, narrowly defined conditions listed in Art. 4(4) WFD. See 'Key deadlines under the Water Framework Directive', ClientEarth, October 2023, pp. 4-5.

164 C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, para. 50.

165 C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, para. 50; C-346/14, *Commission v Austria*, para. 64; C-525/20, *Association France Nature Environnement (Temporary impacts on surface water)*, para. 25.

166 'Key deadlines under the Water Framework Directive', ClientEarth, October 2023, p. 6.

of good ecological potential and good surface water chemical status by the date laid down by the directive."[167]

In practice, this means that to comply with Article 15c(1) point (b) of the RED, the competent authorities must, before approving a renewable energy project, check under Article 4 of the WFD whether the project may have adverse effects on water. These checks are necessary to ensure that the project does not contravene requirements to prevent deterioration and to improve the status of surface water and groundwater bodies.[168]

As regards the concept of *'deterioration of the status'* of a body of surface water, the CJEU has held that *"there is deterioration of the status of a body of surface water, within the meaning of Article 4(1)(a)(i) thereof, as soon as the status of at least one of the quality elements within the meaning of Annex V to the directive falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole. However, if the quality element concerned within the meaning of that annex is already in the lowest class, any deterioration of that element constitutes a 'deterioration of the status' of a body of surface water."*[169]

Although, as already explained above, recital 34 of the Directive (EU) 2023/2413 clarifies that installations for hydroelectric energy production area are still bound by the obligations set out in the WFD[170], similar obligations would apply to any other renewable energy project that may have adverse effects on water, which would be contrary to the requirements to prevent deterioration and to improve the status of bodies of surface water and groundwater, as prescribed under Article 15c(1) point (b) of the RED.

To conclude, it is clear that, especially in the context of the measures under the Habitats and Birds Directive, appropriate measures are required to be specific, focused on the species and habitats concerned and assessed on a case-by-case basis. Similarly, for the protection of water bodies, Member States must always take the necessary measures to prevent any deterioration of the status of a water body, unless the derogations under Article 4(6) and 4(7) of the WFD are granted, which, consequently, mandates for a case-specific approach.

It is again necessary to reiterate that during the preparation of designation plans and mitigation rulebooks, Member States will not have specific information on the characteristics of the specific project that would be installed and operated in the RAA, or the likelihood of impact on project level, given that such projects will have not yet been formulated and no permit applications will have been submitted for them. Still, Article 15c(1)(b) of the RED simultaneously requires that measures included in the rulebook are in compliance with the Birds and Habitats Directives and WFD, which – as analysed above – presupposes that such knowledge is available to the Member States. Therefore, it might be difficult for Member States to determine which mitigation measures would be *'appropriate'* in order to prevent and reduce significant impacts of a specific project, without first ascertaining the likelihood of significant effects that a specific project would have on the site, species or water body (either alone or in combination with other plans or projects).

General information on categories or types of mitigation measures that can be proposed at planning level may not be enough for Member States to comply with the present provision. The reason for including the mitigation rulebook in the RED was to reduce Member States' administrative obligations at later stages, rather than reducing the overall environmental protection afforded to areas potentially affected by the renewables energy transition.[171] It is only through the careful adherence to the criteria set out in the legislation that Member States will minimise the risk of administrative delays in the planning and permitting process.[172] With the above in mind, knowledge of impact at project level may, in many cases, be required in order to ensure compliance with this provision, as generic measures will not fulfil the criteria of Articles 6(2) and 12(1) of the Habitats Directive, Article 5 of the Birds Directive and Article 4(1)(a) of the WFD. When such knowledge is lacking at the mapping and RAA designation level, it is for Member States' authorities to include suitable measures in the *mitigation rulebook.* Therefore, in order to comply with the derogation provision of the RED, and presumption of compliance with wider EU environmental law, a sufficient knowledge of the likelihood of significant impact of specific projects that will be developed in each RAA is a prerequisite at the designation stage.

167 C-664/15, Protect Natur-, *Arten- und Landschaftsschutz Umweltorganisation*, para. 31 and the case-law cited.

168 C-535/18, *Land Nordrhein-Westfalen*, para. 76.

169 C-346/14, *Commission v Austria*, para. 59 and the case-law cited.

170 Directive (EU) 2023/2413, preamble, recital 34.

171 'Study on the designation of Renewables Acceleration Areas (RAAs) for onshore and offshore wind and solar photovoltaic energy', Final Report, Trinomics, June 2024, Chapter 4, p. 66.

172 Ibid, p. 71.

Compensation measures are not mitigation measures

An additional issue to be considered by Member States when establishing their *mitigation rulebook* is that *compensation* measures may not be included, because they do not constitute mitigation measures. The distinction between *mitigation* and *compensation* measures is not defined in the Habitats Directive,[173] but has been judicially defined through settled case law.

Mitigation measures, which can be included in the mitigation rulebook, are *"protective measures forming part of a project and intended avoid or reduce any direct adverse effects that may be caused by the project in order to ensure that the project does not adversely affect the integrity of the area, which are covered by Article 6(3)"*.[174] In the context of the RED Article 15c(1)(b) and as analyzed above, the threshold of protection is slightly higher, relating to measures that avoid or, if not possible, *significantly* reduce the potential adverse impact.

Compensation measures "*are aimed at compensating for the negative effects of the project on a protected area and cannot be taken into account in the assessment of the implications of the project*".[175]

While the above distinction is not always clear-cut, there are two main distinguishing factors in the two categories of measures mentioned above, that may help in their classification: Firstly, mitigation measures directly seek to minimise the impacts of the plan or project on the affected site, while compensation measures are aimed at future improvements not necessarily linked to the conservation objectives of the affected site. With this in mind, only the former seek to comply with Article 6(2) of the Habitats Directive, as it is only them that can lead to avoidance or significant reduction of the deterioration or disturbance that may occur.[176] Secondly, the degree of certainty in the effectiveness of the measures is also decisive when choosing what can be part of the appropriate assessment and, consequently, be considered a mitigation measure.

According to the CJEU, mitigation measures are those with "*effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area"*. This is not the case for compensation measures, which are *"aimed at compensating for the loss of area and quality of that habitat type in a protected area, [they] are highly difficult to forecast with any degree of certainty or will be visible only in the future".177*

Finally, compensatory measures adopted in line with Article 6(4) of the Habitats Directive can only be specified and implemented after the potential significant environmental impact has been identified, namely after the completion of the appropriate assessment.[178]

173 Joined Cases C-387/15, *Hilde Orleans, Rudi Van Buel, Marina Apers Vlaams Gewest (Orleans)*, and C-388/15, *Denis Malcorps, Myriam Rijssens, Guido Van De Walle v Vlaams Gewest (Orleans)*, para. 33.

174 C164/17, *Edel Grace, Peter Sweetman v An Bord Pleanála*, para. 47.

175 Ibid.

176 For a more detailed analysis on the nature of mitigation measures to be included in the appropriate assessment, their distinction to compensation measures and examples of both, please consult Chapter 4.6 of the European Commission, 'Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final.

177 C-164/17, *Grace and Sweetman*, paras. 51 – 52.

178 Joined Cases C-387/15, *Hilde Orleans, Rudi Van Buel, Marina Apers Vlaams Gewest (Orleans)*, and C-388/15, *Denis Malcorps, Myriam Rijssens, Guido Van De Walle v Vlaams Gewest (Orleans)*, paras. 60 – 61.

2.4.5. Adopting "novel mitigation measures"

In line with Article 15c(1)(b) of the RED, Member States *"may allow"* the use of *"novel mitigation measures to prevent, to the extent possible, the killing or disturbance of species protected under Directives 92/43/EEC and 2009/147/EC, or any other environmental impact"* which *"have not been widely tested as regards their effectiveness"*. This applies *"for one or several projects for a limited time period, provided that the effectiveness of such mitigation measures is closely monitored and appropriate steps are taken immediately if they prove not to be effective".* This arrangement allows the temporary use of mitigation measures under close monitoring even if they might ultimately violate species protection measures and subsequently temporary deterioration in the conservation status of species covered in Annexes IV and V of the Habitats Directive and all naturally occurring bird species in the European Union, in line with Article 1 of the Birds Directive.

Such an approach deviates from the CJEU's jurisprudence, whereby if Member States are not certain about the impact of certain novel mitigation measures on the conservation of a species, they should not adopt such measures.[179] Considering this and in line with the precautionary principle[180]. this provision must be interpreted and applied in a restrictive manner, given that it applies a derogation to general species protection measures[181] .

To ensure restrictive application, Member States should do the following:

- Prioritise already tested mitigation measures, only relying on novel mitigation measures in the absence of alternatives;[182]
- Ensure that there is adequate data available on the conservation status and trends of the species concerned, ensuring that no novel mitigation measures apply when species are in unfavourable conservation status or their condition is unknown;
- Define, prior to the commencement of the project, and on a species-by-species basis what would constitute a significant impact on the species likely affected;
- Define what type of outcome-based species recovery measures (as "appropriate steps) are to be adopted once the novel mitigation measures prove ineffective, as well as a clear timeline of their adoption;[183]
- Regularly monitor species' decline caused by killing or disturbance linked to the renewable project in question.[184]

→ RECOMMENDATION:

When compiling the "mitigation rulebook", Member States must be aware that general information on categories or types of mitigation measures that can be proposed at the planning level may not be compatible with what is legally required of them. This is why a comprehensive analysis on the environmental sensitivity of individual habitats and species occurring in the proposed RAA or potentially affected by it, should be undertaken, as it will, in most cases enable Member States to identify the species and habitat – specific and concrete measures that they will need to put in place.

When adopting novel mitigation measures, Member States should exercise increased caution and fully prioritise the monitoring of their effectiveness, in full alignment with the precautionary principle. Novel mitigation measures should be avoided when existing measures are more appropriate in mitigating the (risk of) environmental damage.

179 C-674/17 *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo – Kainuu ry v Risto Mustonen and Others*, para. 66.

180 Article 191(2) TFEU and further elaborated on in European Commission, 'Communication on the precautionary principle', COM/2000/1.

181 Habitats Directive, Articles 12 - 15 and Birds Directive, Article 5.

182 *Mutatis Mutandis* application of the *"no alternative solutions"* criterion of Article 16 of the Habitats Directive and Article 9 of the Birds Directive.

183 For the latter, Member States have no discretion, given that the obligation to take recovery measures need to be adopted *immediately* once the monitoring indicates ineffectiveness of mitigation measures.

184 All of the above suggestions have been inspired by: European Commission, 'Guidance document on the strict protection of animal species of Community interest under the Habitats Directive', Chapters 2.3 and 3.

Public participation in RAA designation

3.1. General considerations regarding public participation

The RED recognises that public support and acceptance are essential for a fast and effective renewable energy transition. It envisages multiple measures that can be taken to that end, such as promoting the participation of local communities in renewable energy projects,[185] repowering existing projects,[186] and inclusion of renewable energy in joint offshore renewable energy projects,[187] and others.[188] In addition, Article 15d(1) of the RED places a distinct obligation on the Member States to carry out public consultations in accordance with Article 6 of the SEA Directive with the *"public affected or likely to be affected"* by the RAAs. The obligation to carry out public consultations in the RAA designation stage also stems from Articles 6 and 7 of the Aarhus Convention.[189]

Like the wider SEA/EIA process for RAAs, the public consultations envisaged in the RAA designation process are unique to the RED. Normally in spatial planning and permitting processes, the public has the opportunity to express its views twice – firstly, during the development of larger special plans accompanied by a SEA and, secondly, in the permitting process of individual projects based on a project-specific EIA. Under the RED the first step – the SEA and the subsequent draft plans on the designation of an RAA – should provide a level of detail capable of replacing subsequent environmental assessments of individual projects that may be exempt from the EIA. This is also evidenced by the Commission Guidance on permitting renewable energy projects which endorses a more integrated approach between the SEA and subsequent projects whereby the outcomes of the SEA would be "*taken into account in the subsequent project development, in particular identifying reasonable alternatives in the context of the nature conservation and preservation objectives*."[190] This, according to the Commission, "*would allow Member States to harness the energy potential from different renewable energy sources while mitigating the negative environmental impacts from energy projects. It would also translate into fewer conflicts at the individual project level, both in substance and in terms of public acceptance*."[191] Therefore, conducting proper public consultations in the designation stage of the RAAs is particularly important.

Before providing practical step-by-step recommendations on how to conduct each step of the public consultations, several general considerations should be kept in mind:

- **Public participation is essential to accelerate the permitting process.** The RED makes it clear that "*broad public acceptance of the deployment of renewable energy*"[192] is key to a successful energy transition. The RED promotes public participation as a key means to achieve that objective.[193] Early involvement of the public in the development of strategic plans reduces the risk of errors and delays in the permitting process due to subsequent legal challenges. It is important to 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 on draft plans through public consultations.[194]
- **Stakeholder involvement in the mapping or designation process does not replace public consultations.** Close early cooperation with relevant stakeholders, such as environmental NGOs, is highly beneficial in sensitivity mapping and other stages of the designation process of the RAAs. However, conducting public consultations at the RAAs designation process is a distinct obligation of the competent authorities under Articles 6 and 7 of the Aarhus Convention, Article 15d of the RED and Article 6 of the SEA Directive. Public consultations target not only civil society with specialized expertise in the environment but also members of the public affected or likely to be affected by the projects (and connected infrastructure) in the envisaged RAA, or otherwise having an interest in the decision-making regarding the relevant RAA.

185 Directive (EU) 2023/2413, preamble, recital 20.

186 Directive (EU) 2023/2413, preamble, recital 34.

187 Directive (EU) 2023/2413, Article 1(4)(b).

188 See Commission Staff Document "Guidance to Member States on good practices to speed up permit-granting procedures for renewable energy and related infrastructure projects accompanying the document Commission Recommendation on speeding up permit-granting procedures for renewable energy and related infrastructure projects", SWD(2024) 124 final, 13 May 2024, p. 25.

189 Articles 6 and 7 of the Aarhus Convention.

190 Commission Staff Document "Guidance to Member States on good practices to speed up permit-granting procedures for renewable energy and related infrastructure projects accompanying the document Commission Recommendation on speeding up permit-granting procedures for renewable energy and related infrastructure projects", SWD(2024) 124 final, 13 May 2024, , SWD(2024) 124 final, 13 May 2024, p. 29.

191 Ibid, p. 29.

192 Directive (EU) 2023/2413, preamble, recital 20.

193 Directive (EU) 2023/2413, preamble, recital 30.

194 See Commission Recommendation of 13.5.2024 on speeding up permit-granting procedures for renewable energy and related infrastructure projects, para.10, p.6.

- P**ublic consultations must reach local communities in and around the acceleration areas.** Support and acceptance by local communities in the direct vicinity of the planned RAAs and subsequent renewable energy projects is of utmost importance. According to the RED "*Member States should take appropriate measures to promote the participation of local communities in renewable energy projects*."[195] Although normally - depending on existing state practice - consultations following an SEA may be organised on a national or regional level, local authorities should be involved in planning public consultations in the RAA designation process. The Commission Recommendation on permitting procedures encourages Member States to "*ensure that permit-granting authorities for renewable energy and related infrastructure projects hold bilateral discussions [..] with local authorities early in the planning process to assess the project permitting and public consultation needs (..)*."[196]Local authorities should provide the necessary assistance in identifying the communities and other local stakeholders concerned and the best communication channels to reach them.
- **Conducting public consultations is the responsibility of competent state authorities.** Sensitivity mapping is a complex exercise that requires specific expertise. Therefore, in practice, certain parts of the mapping process and SEA may be outsourced to specialized institutions or NGOs. However, public consultations are designed to contribute directly to the decision-making process on the relevant RAA. Therefore, the public opinion expressed through these consultations must directly reach the authority which is competent to make the final decision on the designation of the RAA, its borders, types of technology used, mitigation measures and other relevant aspects. Responsibility for compliance of the consultations with EU law and the Aarhus Convention rests with the Member State rather than any of the private parties involved.[197]

→ **RECOMMENDATION:**

Public consultations are essential to accelerate the permitting process. While early stakeholder involvement is important, Member States must ensure it does not replace proper public consultations conducted by the competent authorities with local communities affected by the RAAs.

3.2. Legal basis

In addition to other forms of direct or indirect involvement in renewable energy projects, paragraph 1 of Article 15d of the RED obliges Member States to "*ensure public participation regarding the plans designating renewables acceleration areas referred to in Article 15c(1), first subparagraph, in accordance with Article 6 of Directive 2001/42/EC, including identifying the public affected or likely to be affected*." Recital 30 of the Directive (EU) 2023/2413 notes that the Aarhus Convention, particularly the provisions on public participation and access to justice, remains applicable to the processes under the RED.

Article 6 of the SEA Directive lists a number of specific obligations when organising and conducting public consultations on draft plans or programmes and the accompanying environmental report,[198] notably an obligation to give the public affected or likely to be affected an "*early and effective opportunity within the appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report.*"[199]

Public consultations under the SEA Directive correspond to Member States' obligations under Article 7 of the Aarhus Convention concerning public participation in plans, programmes and policies related to the environment. It envisages public participation within a transparent and fair framework based on the necessary information provided to the public. Article 7 incorporates certain elements of Article 6 (on public participation concerning specific activities such as issuing of permits), specifically concerning the timeframe for public consultations (paragraph 3), early participation (paragraph 4) and an obligation to take due account of the opinions expressed (paragraph 8).

195 Directive (EU) 2023/2413, preamble, recital 30.

196 Commission Recommendation of 13.5.2024 on speeding up permit-granting procedures for renewable energy and related infrastructure projects, para.23, p.8.

197 See UNECE Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (Maastricht Recommendations), I. General Recommendations, Section L, pp.19-21 and Annex to the Maastricht Recommendations prepared under the Aarhus Convention, p.58-59.

198 Detailed obligations in planning and conducting the public consultations will be discussed further in this chapter.

199 SEA Directive, Article 6(2).

However, the unique permit acceleration process under the RED entails additional obligations with regard to public participation in the RAA mapping and designation stage. While normally the SEAs and the adoption of subsequent spatial plans is a separate process and can be of relatively high level, the RED establishes the designation of RAAs as the first stage of the permitting process. Draft RAA plans, the accompanying SEA and rules applicable to each RAA[200] should reach a level of detail capable of replacing subsequent environmental (or appropriate)[201] assessments and avoid the need for public participation in the permitting stage of individual projects. Concretely, a decision to designate an RAA should contain detailed environmental considerations regarding the types of energy produced, types of technology used, as well as detailed rules for mitigation measures required for projects deployed in the relevant RAA.[202]

Therefore, in practice, the public consultations must be quite detailed, covering certain aspects of Article 6 of the Aarhus Convention (concerning specific activities). In particular there is an obligation to publish detailed information about the envisaged projects (technologies) and their environmental impacts (paragraphs 2 and 6)[203] and there must be an opportunity to submit any comments, information, analyses or opinions relevant to any aspects of the envisaged RAA (paragraph 7). The Aarhus Convention Compliance Committee has also found that a continuous process involving both an SEA and EIA and resulting in issuing a permit for a large-scale project must be examined by applying the standards of Article 6 of the Aarhus Convention. The Aarhus Convention Compliance Committee (ACCC) stated: "*Due to the project-specific nature and temporal proximity of these procedures, rather than considering them as parallel decision-making procedures, the Committee examines them as one complex decision-making procedure to permit a project subject to Article 6.*"[204]

3.3. Planning and organising

The following sections lay out the detailed steps that need to be taken into account in planning, conducting and providing feedback to public consultations. It is important to note that the first steps should be taken early in the mapping process, contacting the relevant local authorities and setting up channels for public access to information. According to the European Commission Guidance on permitting renewable energy projects, the competent authorities should work closely with "*the local authorities early in the planning process to assess the permitting and public consultation needs(..).*"[205]

According to Aarhus compliance committee these are the steps you need to take:

Step 1 – Ensure transparency and early access to background information.

The Court of Justice of the European Union (CJEU) has recognised 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 procedure envisaged, and the right of access to information documents.*"[206] Therefore, public involvement should start by continuously providing comprehensive information about the process from the early stages. This means that detailed information about mapping, designation, and public consultation processes should be proactively published and accessible to local communities and other interested stakeholders.

The draft SEA and plans for the RAA may contain large volumes of technical information therefore they should be accompanied by written explanations in simple, non-technical language. A good practice are public information sessions where the public has the opportunity to meet the representatives of local authorities and ask questions before submitting their opinions. This is also recommended by the Commission, namely that Member States ensure that "*public hearings and other stakeholder engagement initiatives are inclusive and accessible, allowing the public to interact with the project promoters and decision-makers in a timely manner,*

200 RED, Article 15c(1)(b).

201 Habitats Directive, Article 6(3).

202 RED, Article 15c(1)(b).

203 The ACCC has concluded that plans and programmes *"which may have a significant effect on the environment"* would normally be required under national law to undergo some form of strategic environmental assessment and for these plans and programmes the requirements of Article 6(6) could be applied mutatis mutandis, see ACCC/C/2014/100 (United Kingdom), para. 92.

204 ACCC/C/2013/98 (Lithuania), para. 95.

205 Commission Recommendation of 13.5.2024 on speeding up permit-granting procedures for renewable energy and related infrastructure projects, para.23, p.8.

206 CJEU, Case C–826/18, LB and Others, para. 43 and Case C280/18, Flausch and Others, paras 45.-54.

and encouraging active participation in all stages of project development, deployment and operation."[207]

It is important to note that public consultations are held about the proposed plan and adoption of the relevant RAA and not only about the SEA conducted in this process. The ACCC has explained that *"Article 6 requires public participation on decisions to permit proposed activities, not just EIA reports; similarly, article 7 requires public participation on draft plans themselves, not just SEA reports."208*

Therefore, the information available to the public should extend beyond the draft SEA and cover all relevant aspects of the decision making. It should include, for example:

- 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[209] (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;[210]
- An outline of the main alternatives studied by the competent authority (see point 3 below);[211]
- Simplified summaries of complex/technical or long documents;[212]
- 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.

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

Who to involve in the planning?

To inform the public, Member States should first identify the relevant public and second identify the most effective communication channels to reach the identified public.

Article 15d of the RED emphasizes Member States' obligation to identify the public affected or likely to be affected in the process of organising public consultations in accordance with the SEA Directive. Article 6(4) of the SEA Directive elaborates further on the obligation requiring 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 organisations, such as those promoting environmental protection and other organisations concerned.*"

To fulfil these obligations, it is crucial to ensure that the local authorities of the areas surrounding the RAAs are involved in planning and organising public participation to identify and reach the local communities and other local stakeholders that should be involved in the consultations. In this regard, planning and conducting public consultations for RAA plans is a more detailed exercise than a normal SEA as it needs to involve the public on a local level. The Commission Guidelines endorse this by stating: "*Member States should ensure that permit-granting authorities for renewable energy and related infrastructure projects hold bilateral discussions with developers and, where relevant, local authorities early in the planning process to assess the project permitting and public consultation needs (..).*"[213]

207 Commission Recommendation of 13.5.2024 on speeding up permit-granting procedures for renewable energy and related infrastructure projectshttps://energy.ec.europa.eu/document/download/3a4d1a46-3392-4a6d-b3f9-09831a8a8696_en?filename=C_2024_2660_1_EN_ACT_part1_v4.pdf, para.10, p.6.

208 ACCC/C/2013/98 (Lithuania), para. 92.

209 See ACCC/C/2014/100 (United Kingdom), para.94.

210 See ACCC/C/2014/100 (United Kingdom), para.94

211 Ibid.

212 Maastricht Recommendations, II. Public participation in decision-making on specific activities (Article 6), Section H, p.34.

213 Commission Recommendation of 13.5.2024 on speeding up permit-granting procedures for renewable energy and related infrastructure projects, para.23, p.8.

Who to invite?

While the consultation should be open to anyone, the public affected or likely to be affected or otherwise interested in the decision-making should go beyond the members of the general public who reside, work or own property in the relevant area. The public to be consulted depending on the specific area where an RAA is planned may include:

- Community groups;
- Residents' organisations;
- NGOs specialized in environmental protection, heritage protection, social welfare etc.;
- Local business and industry organisations (other than the future project promoters);
- Universities and research organisations;
- Other relevant associations (e.g., users of given waters) etc.[214]

How to communicate?

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, Article 15d of RED and Article 6 of the SEA Directive. The ACCC has found that "*[t]he requirement for the public to be informed in an "effective manner" means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate.*"[215]

Section II of the Maastricht Recommendations on the methods of notifying the public can be helpful in this regard.[216] Authorities should as much as possible tailor notification channels to the public concerned and use multiple channels of communication, especially those proven to be effective previously.

Advocate-General Kokott noted in *Flausch* regarding the notification requirements under Article 6 of the EIA Directive that "*it cannot [..] be sufficient to employ any means of information if it 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.*"[217] Communication with the public needs to be effective regardless of the decision it is consulted for, therefore this assessment is equally applicable to public consultations regarding plans and programmes such as the RAAs. Member States must 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.

In addition, where the plans involve their administrative area, the local authorities[218] 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.*"[219] Methods of communication could also involve bill posting notices in the 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[220] or where appropriate also individual notices.[221]

214 See also Maastricht Recommendations, Section III Public participation concerning plans, programmes and policies (article 7), para. 164.

215 ACCC/C/2006/17 (Lithuania), para. 67.

216 Maastricht Recommendations, Section II public participation in decision-making on specific activities (article 6), paras. 63-70.

217 C-280/18, *Flausch and Others*, Opinion of the Advocate-General, para.53.; see also the C-280/18, *Flausch and Others*, para. 32.

218 *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 C-280/18, Flausch and Others, para. 34.

219 C-280/18, *Flausch and Others*, Opinion of the Advocate-General, para.54.; see also C-280/18, Flausch and Others, para. 32.

220 See C-280/18, Flausch and Others, para. 34.

221 Maastricht Recommendations, General Recommendations, Section I.

The possibility to comment should be open to anyone expressing an interest and not limited to those persons who were informed/notified.[222]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.

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

Article 6(4) of the Aarhus Convention requires states to provide opportunities for "*early public participation, when all options are open and effective public participation can take place*". This means that 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), can still be chosen. The Commission Recommendation stresses that "*Member States should ensure that public hearings, or other stakeholder engagement opportunities, are organised early and regularly in the design and planning procedure when they can still influence the location, routing or technology of network assets."223*

At this stage, all these options must still practically and legally be open, meaning that the competent authority must neither be formally nor informally prevented from choosing any of the options.[224] The 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).

This means that members of the public should be able, in their comments, to challenge any of the options put forward in the draft plan and to propose other options, including the zero option.[225]

Step 4 – 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, financial means and other factors. This means that the competent authorities may need to make more than xone communication channel available for the public to submit their contributions. The Commission Recommendation also stresses that "*Member States should ensure that public hearings and other stakeholder engagement initiatives are inclusive and accessible, allowing the public to interact with the project promoters and decision-makers in a timely manner, and encouraging active participation in all stages of project development, deployment and operation."*[226]

Concerning physical meetings, the CJEU has stressed the need to take into account the special situation of residents.[227] This includes the accessibility of the location for the public concerned, travel needs and costs for different members of the public and other factors.

Step 5 - 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 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*."[228]

In allocating the time to the preparation and consultation process, Member States should take into account factors such

222 ACCC/C/2006/16 (Lithuania), para. 80.

223 Commission Recommendation of 13.5.2024 on speeding up permit-granting procedures for renewable energy and related infrastructure projects, para. 10, p. 6.

224 ACCC/C/2007/22 (France), para. 38 and ACCCC/C/2009/41 (Slovakia), para. 63.

225 ACCC/C/2014/100 (United Kingdom), para.84.

226 Commission Recommendation of 13.5.2024 on speeding up permit-granting procedures for renewable energy and related infrastructure projects, para. 10, p. 6.

227 C-280/18, *Flausch and Others*, paras. 40 and 44.

228 C-474/10, *Department of the Environment for Northern Ireland v Seaport (NI) Ltd and Others*, para.46.

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, attend Q&A sessions where they are organised, consult experts and fully participate in the public consultation. As a good practice example, the public authorities may also consider organising 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.[229]

What constitutes sufficient time should be evaluated on a case-by-case basis. The CJEU has recognised in this regard, that the timeframe for public participation must "*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.*"[230]

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.[231] This may not be sufficient time in all cases but gives an indication as to the minimum appropriate period.

Member States should also ensure some consistency in setting the timeframes for public consultations. Citizens and organisations willing to participate in public consultations on more than one RAA should be able to rely on a set minimum time to be allocated for participation in those consultations.

Step 6 – Take comments into account and provide detailed feedback.

Article 6(8) of the Aarhus Convention obliges the competent authorities to "*ensure that in the decision due account is taken of the outcome of the public participation.*" The obligation to take due account of the opinions expressed during public consultations arises also from Article 8 of the SEA Directive which states that "t*he environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.*"

It is crucial that the competent authority "*seriously consider[s] all the comments received*".[232] Opinions expressed in public consultations must be taken into due account in the designation of RAAs, including the determination of their borders, infrastructure layout or 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 plan/program as adopted;
- A 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;
- 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.

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.

229 ACCC/C/2014/100 (United Kingdom), para.32.

230 C-474/10, *Department of the Environment for Northern Ireland v Seaport (NI) Ltd and Others*, paras.49-50.

231 Maastricht Recommendations, II. Public participation in decision-making on specific activities (article 6), Section E, p.31.

232 ACCC/C/2008/24 (Spain), para. 99 and ACCC/C/ 2012/70 (Czechia), para. 61.

→ RECOMMENDATION:

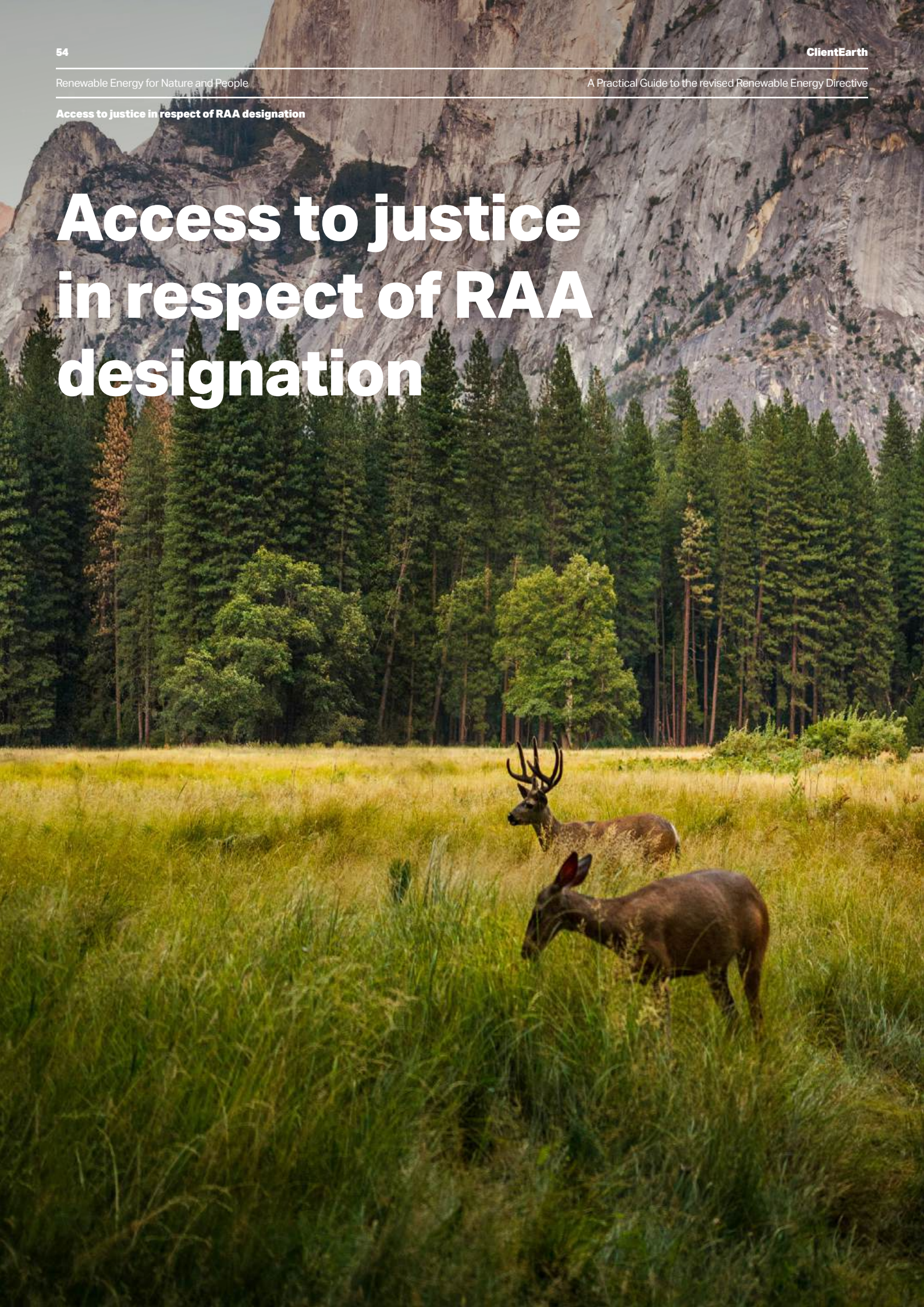
The public concerned should have early access to all relevant information, including the draft maps, assessments, timeline of the mapping and designation process and the provisional consultation schedule.

Local authorities should be involved in the planning and organising of the consultation process as they are best placed to identify the public concerned, as well as effective communication channels to reach them.

Consultations should be organised early in the process when all options are still open. The public should be granted enough time to familiarize itself with the relevant information and express its opinion effectively.

Competent authorities must seriously consider the opinions received and provide the public concerned with feedback. It should include a summary of the outcome of the consultations, how the opinions have been taken into account in the decision-making or why they have been rejected.

Access to justice in respect of RAA designation



Recital 30 of the RED stresses that provisions of the Aarhus Convention, in particular, the provisions relating to public participation and access to justice remain applicable to the procedures under the RED. Accordingly, the RED is not meant to reduce in any way existing access to justice rights.

Article 16(5) of the RED also places an obligation on Member States to ensure that the applicants and the "*general public have easy access to simple procedures for the settlement of disputes concerning the permit-granting procedures and the issuance of permits to build and operate renewable energy plants, including, where applicable, alternative dispute resolution mechanisms*." Although Article 16(5) places a particular focus on the permitting procedures, the public must be granted access to justice throughout the planning and designation stage of the RAAs.

The legal basis for access to justice at this stage is Article 9(3) of the Aarhus Convention, which states: "*[...] each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*."

This, as clarified by the ACCC, means that members of the public who meet any formal criteria under national law must have "*access to administrative or judicial procedures to directly challenge acts or omissions by private persons or public authorities*" that they allege contravene national environmental law.[233]

4.1. Legal basis

Since the mapping and designation of RAAs involves decision-making on plans and programmes as opposed to specific projects, Article 9(3) of the Aarhus Convention applies in this stage and allows the public to challenge acts and omissions that fail to comply with national environmental law in the mapping and designation process.[234] National law in this context includes applicable EU law.[235]

The ACCC has held that plans and programmes fall within the meaning of "acts" under Article 9(3) of the Aarhus Convention.[236] It stated in particular that the "*SEA procedure forms a part of the process for the preparation of a plan relating to the environment according to article 7 of the Convention. The possibility of members of the public to challenge the SEA statement should then be ensured in accordance with article 9, paragraph 3, of the Convention*."[237] This means that where a SEA forms a part of a plan, [238] the public should have access to courts to challenge any acts or omissions that violate environmental law in the process of adoption of SEA or the resulting plan.

→ **RECOMMENDATION**

The national law must grant access to the public to challenge violations of environmental law in the mapping and designation process in line with Article 9(3) of the Aarhus Convention.

4.2. Who can bring a challenge?

In principle, to ensure broad access to justice, members of the public who can challenge breaches of environmental law in the RAA designation process should also be determined broadly. Article 9(3) of the Aarhus Convention states that "*members of the public*" should have access to justice under that provision. [239] This includes members of "the public concerned". [240]

This was confirmed by the CJEU which concluded that "*Article 9(3) of the Aarhus Convention would be deprived of all useful*

233 ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom), para. 83.

234 See, for example ACCC/C/2011/58 (Bulgaria), in which the Committee found that General Spatial Plans requiring a Strategic Environmental Assessment do not have such legal functions or effects so as to qualify as 'decisions on whether to permit a specific activity' in the sense of Article 6, and thus are not subject to Article 9, para. 2, of the Aarhus Convention.

235 ACCC/C/2006/18 (Denmark), para. 27, see also C-873/19, *Deutsche Umwelthilfe eV*, para. 58.;

236 ACCC/C/2005/11 (Belgium), para. 31 and ACCC/C/2011/58 (Bulgaria), para. 58.

237 See e.g., with regard to spatial plans and detailed spatial plans, ACCC/C/2011/58 (Bulgaria), para. 58.

238 ACCC/C/2011/58 (Bulgaria), para. 64.

239 ACCC/C/2005/11 (Belgium), para. 28.

240 C-873/19, *Deutsche Umwelthilfe eV*, paras 67-68.; see also Access to Justice in European Union Law: A Legal guide on Access to Justice in Environmental matters, 2021 edition, pp. 40-42.

effect, and even of its very substance, if it had to be conceded that, by imposing those conditions, certain categories of 'members of the public', a fortiori 'the public concerned', such as environmental organisations that satisfy the requirements laid down in Article 2(5) AC, were to be denied of any right to bring proceedings."[241] Member States may set some reasonable restrictions on access to justice, such as registration requirements for NGOs, time limits or prior participation requirements. However, any restrictions imposed that affect access to justice must be established by law and be necessary and proportional.[242]

The right to have access to judicial review in the RAA designation process equally applies to private persons.[243] They should at a minimum include those members of the public whose interests are sufficiently affected by the designation of the RAA[244] or who are directly concerned by the potential negative effects stemming from alleged breaches of environmental law in the RAA designation process.[245]

4.3. What breaches of environmental law can be challenged?

Article 9(3) of the Aarhus Convention gives the public the right to challenge actions or omissions which breach environmental law. Breaches of environmental law in this context must be interpreted broadly. The CJEU has explained that Article 9(3) of the Aarhus Convention, does not place limitations on the subject matter of the challenge insofar as it relates to an infringement of provisions of national environmental law.*246* This includes EU law applicable in the Member State.[247] Member States are also prohibited from excluding any categories of provisions of national environmental law from the subject matter of potential challenges.

Any provision that somehow relates to the environment is considered to form part of "national law related to the environment". As the CJEU has stated: "*[N]ational laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment. Thus, also acts and omissions that may contravene provisions on, among other things, city planning, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships are covered by paragraph 3, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws*."[248]

In the context of the designation of RAAs, this means that members of the public have a right to access courts to challenge any breaches of the applicable EU environmental law in the mapping and designation process of the RAAs. This includes all applicable environmental laws,[249] including on the protection of biodiversity and habitats of birds, wild flora and fauna, marine ecosystems, river basins and other protected inland or coastal waters, nature restoration, etc. (see Section 2.3). Member States must therefore ensure that judicial processes are available to the public to challenge potential breaches of these laws.

Importantly, the public also has the right to challenge any breaches of its public participation rights and other procedural violations under the SEA Directive as part of the RAA designation process. The SEA Directive and Directive 2003/35[250] (Public Participation Directive) implement Article 7 of the Aarhus Convention, which lays out detailed requirements for public participation in decision-making concerning plans, programmes and policies relating to the environment. According to the CJEU, "*[i]n the absence of provisions in [the SEA Directive] on the consequences of infringing the procedural provisions which it lays down, it is for the Member States to take, within the sphere of their competence, all the general or particular measures necessary to ensure that all 'plans' or 'programmes' likely to have 'significant environmental effects' are subject to an environmental assessment prior to their adoption in accordance with the procedural requirements and the criteria laid down by that directive*".[251] This in principle includes any breaches of national law that provide for the public's right to access information and participate in the decision-making

241 C-664/15, *Protect*, para. 46.

242 See e.g., C-664/15, *Protect*, para. 90.

243 C-197/18, *Burgenland*, paras 33-34.

244 See e.g., ACCC/C/2005/11 (Belgium), para. 40, ACCC/C/2006/18 (Denmark), para. 31, ACCC/C/2013/81 (Sweden), para. 85.

245 See C-404/13 ClientEarth, para. 56.

246 *Case C-873/19, Deutsche Umwelthilfe eV*, 8 November 2022, paras 67-68.

247 *Case C-873/19 Deutsche Umwelthilfe eV*, 8 November 2022, para. 58.

248 *Case C-873/19 Deutsche Umwelthilfe eV*, 8 November 2022, para. 56.

249 RED Article 15(c) and preamble, recitals 26 and 27.

250 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

251 C-41/11, *Inter-Environnement Wallonie and Terre wallonne*, para. 42.

process concerning the environment.[252] The Commission Notice on access to justice in environmental matters also states that procedural provisions such as the ones laid out in the SEA Directive should be enforceable in courts similarly to those under the EIA Directive.[253]

→ **RECOMMENDATION**

Access to justice should be granted as a minimum to the public concerned, including those members of the public whose interests are sufficiently affected by the designation of the RAA or who are directly concerned by the potential negative effects stemming from alleged breaches of environmental law in the RAA designation process.

The members of the public should be able to rely on any applicable national environmental law, including the EU law, to challenge breaches of that law in the mapping and designation process.

4.4. Procedure

Article 9(3) of the Aarhus Convention requires that members of the public be granted access to administrative or judicial procedures. While this provision seemingly leaves the Member States a choice between administrative or judicial complaint mechanisms, it is unlikely that in the context of the designation of RAAs administrative proceedings alone would satisfy the requirements to provide an effective remedy under the Aarhus Convention and EU law.

Where Member States adopt procedural law for complaints relating to the compatibility of the state authorities' actions with EU law, they are also bound by Article 47 of the Charter of Fundamental Rights.[254] In this regard the CJEU has stated that Article 9(3) of the Aarhus Convention "*read in conjunction with Article 47 of the Charter, imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law.*"[255] This means that Member States may use administrative proceedings as the first step in identifying and potentially solving any incompatibilities with environmental law based on a complaint by a member of the public. However, where a solution is not found in the administrative stage members of the public must ultimately have access to a court.

Article 9(4) of the Aarhus Convention lists additional criteria for the review mechanism, namely that it must provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Its decisions must be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, must be publicly accessible. In principle, according to the CJEU, any procedural limitations on the right to an effective remedy within the meaning of Article 47 of the Charter of Fundamental Rights must be justified, provided by law and respect the essence of that law, be necessary, subject to the principle of proportionality and genuinely meet the objectives of the public interest recognised by the EU, or the need to protect the rights and freedoms of others.[256]

This is especially important in choosing whether and which types of complaints will be subject to urgent procedures under national law. While expeditious dispute settlement in itself is welcome, any limitations designed to shorten the proceedings, such as shorter time limits or reduced scope of review, cannot fall short of the minimum requirements of accessibility and effectiveness.

→ **RECOMMENDATION**

The members of the public concerned should have access to Member States' courts. They should provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. The courts' decisions must be given or recorded in writing.

252 Case C-873/19, *Deutsche Umwelthilfe eV*, para. 56.

253 Commission Notice on access to justice in environmental matters, C/2017/2616, 18 August 2017, para. 47.

254 Case C-873/19, *Deutsche Umwelthilfe eV*, para. 65 and C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, pars. 44 and 87.

255 C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, paras. 44 and 87.

256 C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, para. 90.

4.5. Information about the right to bring legal challenges

Article 9(5) requires that "each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures". This is crucial to ensure full transparency of the process, in particular detailed information about the designation process, opportunities to participate and access to justice to increase public acceptance of the RAA designation processes and subsequently the renewable energy projects.

Throughout the designation process, the competent authorities should ensure regular channels of communication to provide the information the public will need for meaningful participation. These same information channels, as well as meetings or other interactions with the public concerned, should be used to inform the public concerned about their rights to access justice. This information should be provided in a simple and understandable format, especially if different mechanisms apply to different decisions or stages of the process.

→ RECOMMENDATION

Information about access to justice, including applicable procedures, timelines, and practical details of filing a complaint should be included in all communications with the members of the public concerned. The information channels used to communicate information about public participation, as well as meetings or other interactions with the public concerned, should be used to inform the public concerned about their rights to access justice.

Permitting inside RAAs

5.1. Derogations

As outlined briefly above, in seeking to accelerate permitting procedures for renewable energy sources inside RAAs, Article 16a(3) of the RED prescribes certain derogations from carrying out environmental assessments at the project level, for renewable energy projects developed within the RAAs. In particular, *"new applications for renewable energy plants, including plants combining different types of renewable energy technology and the repowering of renewable energy power plants in designated renewables acceleration areas for the relevant technology and co-located energy storage, as well as the connection of such plants and storage to the grid"* are exempt from the requirement to carry out the EIA prescribed in Article 2(1) of the EIA Directive, and can derogate from Article 4(2) of and Annex II, points 3(a), (b), (d), (h), (i), and 6(c), alone or in conjunction with point 13(a) of the EIA Directive, provided that those projects comply with Article 15c(1), point (b) of the RED.

The derogation is, however, excluded in cases where Article 7 of the EIA Directive applies, meaning that for projects that are likely to have significant effects on the environment in another Member State or where a Member State that is likely to be significantly affected so requests, the EIA needs to be carried out.

Similarly, by way of derogation from Article 6(3) of the Habitats Directive, the renewable energy projects mentioned above, are exempt also from the assessment of their implications for Natura 2000 sites (appropriate assessment), provided that those projects comply with Article 15c(1), point (b) of the RED.

As a general rule, the EIA Directive, which applies to the assessment of the effects of certain public and private projects on the environment,[257] obliges Member States to adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment, by virtue, of their nature, size or location, are made subject to environmental impact assessment.[258]

Projects regulated under the EIA Directive are defined in Article 4. According to Article 4(1) of the EIA Directive, projects listed in Annex I of the EIA Directive shall always be subject to the EIA,[259] whilst Article 4(2) ensures that projects listed in Annex II of the EIA Directive shall be made subject to determination by the competent authority on whether the project shall be made subject to the EIA[260] (screening procedure). During the screening procedure, the relevant selection criteria set out in Annex III of the EIA Directive, shall be taken into account.[261]

Article 7 of the EIA Directive further obliges Member States to carry out a transboundary EIA in cases where a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, and to include the affected Member State and its public into the environmental decision-making procedure.[262]

As well as the EIA procedure, the permitting regime relevant to the protection of Natura 2000 sites, under the Habitats Directive, also applies to plans and projects that may have significant effects on a Natura 2000 site. Article 6(3) of the Habitats Directive sets out a step-wise procedure for considering plans and projects that may have significant effects on a Natura 2000 site and, therefore, may or may not be allowed ("appropriate assessment").[263]

Where a project would likely have an impact on animal species listed under Annex IV of the Habitats Directive, or protected birds species protected under the Birds Directive, then Article 12 of the Habitats Directive and Article 5 of the Birds Directive are also applicable as provisions ensuring strict protection regime of animal and birds species.

Finally, where a project would have an impact on water bodies, Article 4(1) of the WFD, that lists binding environmental objectives, is applicable as part of the general permitting procedure, and can only be derogated from as a part of strict Article 4(7) exemptions in case of new modifications and new sustainable human development activities.

The permitting procedure envisaged in the RAAs is, however, unique to the RED. Under the RED, in the RAAs, renewable energy projects that comply with the rules and measures identified in the plans prepared by Member States under Article 15c, should benefit from a presumption of not having likely significant effects on the environment, and therefore should be exempt from the obligation to carry out a specific EIA at project level, as regulated by the EIA Directive, and appropriate

257 EIA Directive, Article 1(1).

258 EIA Directive, Article 2(1).

259 EIA Directive, Article 4(1).

260 EIA Directive, Article 4(2).

261 EIA Directive, Article 4(3).

262 EIA Directive, Article 7.

263 'Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Commission Notice C(2018) 7621 final, Brussels, 21.11.2018, p. 33.

assessment as regulated under the Habitats Directive.[264] Such projects will, instead, only need to undergo a novel *screening* of their high likelihood to produce previously unidentified and significant adverse environmental effects.[265]

This derogation only applies to projects defined under Article 4(2) of the EIA Directive and listed under Annex II (i.e. projects that are subject to the screening procedure), but not to projects defined under Article 4(1) of the Directive and provided in the mandatory list of project that always require the EIA, listed under Annex I of the EIA Directive.[266]

Therefore, EIA Directive Annex I projects still need to go through the general EIA procedure set under the EIA Directive. These are, for instance:

- Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres;[267]
- Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km;[268] and
- Any change to or extension of the above projects where such a change or extension in itself meets the thresholds set out above.[269]

Similarly, in addition to the mandatory EIA, Annex I projects must undergo an appropriate assessment under Article 6(3) of the Habitats Directive if they are likely to significantly affect a Natura 2000 site. If these projects impact protected species, Articles 12(1) of the Habitats Directive and Article 5 of the Birds Directive will apply. Furthermore, if a project under Annex I of the EIA Directive (i.e. a project under a mandatory EIA requirement) affects water bodies, Articles 4(1) and 4(7) of the WFD must also be included in the assessment procedure.

Contrary to the Annex I projects, Article 16a(3) of the RED clearly states that the derogation applies to the Annex II projects, more precisely:

- Industrial installations for the production of electricity, steam and hot water (projects not included in Annex I)[270];
- Industrial installations for carrying gas, steam and hot water; transmission of electrical energy by overhead cables (projects not included in Annex I);[271]
- Underground storage of combustible gases;[272]
- Installations for hydroelectric energy production;[273]
- Installations for the harnessing of wind power for energy production (wind farms);[274]
- Storage facilities for petroleum, petrochemical and chemical products (chemical industry (projects not included in Annex I).[275]

The projects listed above are to be considered alone, or in conjunction with Annex II, point 13(a) of the EIA Directive, which regulates "*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)*".[276]

As described above, no derogation is, however, allowed for projects that are likely to have significant effects on the environment in another Member State or where a Member State that is likely to be significantly affected so requests, as regulated under Article 7 of the EIA Directive. Moreover, the transboundary environmental impact applies not only in circumstances where another EU Member State is likely to be affected, but it also in cases of transboundary environmental effects on a third country, as per the obligations under the Convention on environmental impact assessment in a transboundary context ("Espoo Convention").[277] In all these circumstances, the provisions on EIA still apply, as well as the relevant assessments under the Birds and Habitats Directives and WFD, where such a project would also have an impact on Natura 2000 sites, species, or water bodies of other countries.

Concerning installations for hydroelectric energy production, recital 34 of Directive (EU) 2023/2413 clearly states that the obligations set out in the WFD remain applicable for hydropower plants, *"including where a Member State decides to designate renewables acceleration areas related to hydropower, with a view to ensuring that a potential adverse impact*

264 Directive (EU) 2023/2413, preamble, recital 33.
265 In line with RED Article 16a(4)) and as analysed below, Chapter 5.2.
266 Directive (EU) 2023/2413, preamble, recital 33.
267 EIA Directive, Annex I, point 15.
268 EIA Directive, Annex I, point 20.
269 EIA Directive, Annex I, point 24.
270 EIA Directive, Annex II, point 3(a).
271 EIA Directive, Annex II, point 3(b).
272 EIA Directive, Annex II, point 3(d).
273 EIA Directive, Annex II, point 3(h).
274 EIA Directive, Annex II, point 3(i).
275 EIA Directive, Annex II, point 6(c).
276 EIA Directive, Annex II, point 13(a).
277 Directive (EU) 2023/2413, preamble, recital 33.

on the water body or water bodies concerned is justified and that all relevant mitigation measures are implemented".[278]

In order for the derogation from carrying out the EIA and the appropriate assessment on a project level to be valid, and for projects to benefit from the presumption of not having significant effects on the environment, Article 16a(3) of the RED provides an additional requirement for projects to comply with Article 15c(1), point (b) of the RED.

As explained in Chapter 2.4, Article 15c(1)(b) of the RED requires Member States to develop a "mitigation rulebook" as part of their plans for RAAs, which outlines clear guidelines for effectively mitigating environmental impacts related to specific renewable energy technologies within each RAA.

These measures need to, on one hand, be targeted to the specificities of the designated area, selected renewable energy technologies and identified environmental impacts, and on the other, ensure that appropriate mitigation measures are applied in a proportionate and timely manner that would comply with:

- Article 6(2) and Article 12(1) of the Habitats Directive;
- Article 5 of the Birds Directive;
- Article 4(1), point (a) of the WFD.

The mitigation rulebook should account for the impact of all projects in an RAA and establish mitigation measures for them, applying these rules to all projects and related equipment. The measures included in the rulebook need to simultaneously be in compliance with the Birds, Habitats Directives and WFD, which – as analysed above – are required to be specific, focused on the species and habitats (or water bodies) concerned and assessed on a case-by-case basis.

The idea is that by addressing mitigation at the planning stage, project-level impacts can be anticipated and minimised, and consequently accelerated and streamlined, which in turn allows them to derogate from the obligation to carry out dedicated EIA according to the EIA Directive, and if applicable, appropriate assessment under the Habitats Directive at the permitting stage. As already explained in Chapter 2.4, this presupposes a sufficient knowledge at the designation stage of the likelihood of significant impact of projects that will be developed in each RAA, in order to adopt appropriate measures, and comply with the derogation provisions.

For reasons of clarity, it needs to be underscored that for the derogation to apply, the following conditions need to be met cumulatively (prerequisites):

- Member States need to comply with the rules adopted in the mitigation rulebook;
- The rules included in the mitigation rulebook need to be aligned with Articles 6(2) and 12(1) of the Habitats Directive, Article 5 of the Birds Directive and Article 4(1)(a) of the WFD;
- Member States need to implement the rules (mere listing of the measures in the rulebook without their full implementation is not enough).

Therefore, projects located inside RAAs that adopt the mitigation measures included in the plans designating RAAs are practically, by means of a legal fiction, presumed not to be likely to have significant environmental impact.[279] The presumption established in this provision is legally *rebuttable* meaning that it can be overturned for two main reasons:

- if the mitigation measures are not aligned with Articles 6(2) and 12(1) of the Habitats Directive, Article 5 of the Birds Directive and Article 4(1)(a) of the WFD;[280] and
- if the outcome of the screening as per Article 16a(4) of the RED indicates high likelihood of previously unidentified significant environmental impacts.

The following section will examine the new screening procedure in greater detail.

→ RECOMMENDATION

When planning renewable energy projects within RAAs, Member States must ensure that any derogation from EIA and appropriate assessment obligations under the RED is contingent upon implementing targeted mitigation measures. These measures must be based on sufficient knowledge of project-level impacts at the RAA designation stage, ensuring they are specifically designed to address and effectively mitigate the environmental impacts of each project within the RAA.

278 Directive (EU) 2023/2413, preamble, recital 34 .

279 Directive (EU) 2023/2413, preamble, recital 33.

280 The burden of proof in such a case would be inverted, which is contrary to the usually applicable burden of proof in the context of the appropriate assessment under Habitats Directive Article 6(3), whereby *"the onus is on demonstrating the absence (rather than the presence) of negative impacts"*. European Commission notice, "Guidance document on the requirements for hydropower in relation to EU nature legislation", 2018/C 213/01, Chapter 5.3.3.

5.2. Screening

Instead of the screening procedure regulated under Article 2(1) and 4(2) of the EIA Directive and Article 6(3) of the Habitats Directive, Article 16a(4) of the RED mandates that competent authorities conduct a distinctive screening procedure, in order to identify any *"highly likely significant unforeseen adverse effects"* that could arise from these projects.[281]

This is a very different test from the one provided under the Habitats Directive and EIA Directive, whereby assessments are required for projects *"likely to have a significant effect"* on the environment or site integrity. As established by the CJEU, this is actually a low threshold which calls for an assessment (in the context of the Habitats Directive), whenever there is a *"probability or a risk"* that a project will have significant effects on a protected area.[282] Moreover, this new test also diverges from the precautionary principle and the need for EU policy on the environment to aim at a high level of protection, which are both expressly guaranteed under Article 191 TFEU.

Furthermore, Article 16a(4) of the RED does not define what the term *"highly likely"* means in the context of such screening, or under which criteria the competent authorities would be able to assess such impact.

Instead, the RED introduces a unique screening procedure inside RAAs, that must take into account the environmental sensitivity of the geographical areas where the projects are located, particularly those projects not identified during the SEA procedure of plans designating RAAs, and whether the project is likely to have significant effects on the environment in another Member State, or a Member State, which is likely to be significantly affected so requests.[283]

During the screening procedure, the project developer is obliged to provide information on:

- characteristics of the renewable energy project;
- compliance of the project with requirements and measures identified under Article 15c(1) point (b) of the RED;
- any additional measures adopted; and
- how those measures address environmental impact.[284]

For such a screening process, the competent authority can request that the applicant provide additional available information, however according to the Recital 35 of the Directive (EU) 2023/2413, such a request should not mean a new assessment or data collection.[285]

Given the lack of more concrete information on the screening procedure under the RED, particularly regarding the criteria for assessing such impact, it is necessary to refer to the general procedures specified in the EIA Directive and the Habitats Directive.

Under the general procedure prescribed in the EIA Directive, Annex III includes information concerning the issues that should be considered when determining whether significant environmental effects are likely to result from a Project (screening criteria).[286] The screening criteria listed under Annex III of the EIA Directive concern:

- characteristics of projects;
- location of the projects, or the environmental sensitivity of geographical areas; and
- type and characteristics of the potential impact.

For that screening procedure, the developer must provide information on the characteristics of the project and its likely significant effects on the environment, which is specified in Annex IIA of the EIA Directive.

Article 16a(4) of the RED provides limited guidance on the issues that should be considered when assessing *"highly likely significant unforeseen adverse effects"*, such as the environmental sensitivity of the geographical areas or significant effects on the environment in another Member State. It describes information that should be provided by the developer, such as the characteristics of the renewable energy project. This means that Member States' reliance on the same criteria for all individual assessments is an imperative, both for reasons of investors' certainty, legal certainty and legitimacy of expectations, but it is also crucial in ensuring

281 RED, Article 16a(4).

282 C-127/02, *Waddenvereniging and Vogelsbeschermingvereniging (Waddenzee)*, para. 43.

283 RED, Article 16a(4). As explained in the previous section, the transboundary environmental impact does not apply only to the circumstances where another EU Member State is likely to be affected, but it is also relevant in cases of transboundary environmental effects on a third country, as per the obligations under the Convention on environmental impact assessment in a transboundary context ("Espoo Convention").

284 RED, Article 16a(4).

285 Directive (EU) 2023/2413, preamble, recital 35.

286 Case C-87/02, *Commission v Italy*.

the justiciability of decisions rejecting permit applications.[287] In the absence of a specific definition of the criteria mentioned therein, the interpretation of RED Article 16a(4) by competent authorities will need to follow the criteria listed under Annex III of the EIA Directive.

For instance, Annex III(1) of the EIA Directive provides that:

"The characteristics of projects must be considered, with particular regard to:

(a) the size and design of the whole project; (b) cumulation with other existing and/or approved projects; (c) the use of natural resources, in particular land, soil, water and biodiversity; (d) the production of waste; (e) pollution and nuisances; (f) the risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change, in accordance with scientific knowledge; (g) the risks to human health (for example due to water contamination or air pollution)."

Further down, point 2 of Annex III, provides that:

"The environmental sensitivity of geographical areas likely to be affected by projects must be considered, with particular regard to:

(a) the existing and approved land use; (b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water and biodiversity) in the area and its underground; (c) the absorption capacity of the natural environment, paying particular attention to the following areas: (i) wetlands, riparian areas, river mouths; (ii) coastal zones and the marine environment; (iii) mountain and forest areas; (iv) nature reserves and parks; (v) areas classified or protected under national legislation; Natura 2000 areas designated by Member States pursuant to Directive 92/43/EEC and Directive 2009/147/EC; (vi) areas in which there has already been a failure to meet the environmental quality standards, laid down in Union legislation and relevant to the project, or in which it is considered that there is such a failure; (vii) densely populated areas; (viii) landscapes and sites of historical, cultural or archaeological significance."

Similarly, Annex IIA of the EIA Directive can be used as interpretative guidance for the information that the developer will be required to provide, which again, as stated above is aligned with the principle of legal certainty and legitimate expectations.

Thus, the difference between the two processes, the general procedure regulated under the EIA Directive and the amended one provided in the RED, will primarily lie in the threshold that the competent authority must apply in assessing the significance of the impact (e.g. *'likely'*, vs. *'highly likely'* impact).

In reference to the screening procedure under the Habitats Directive, Article 6(3) defines a step-wise procedure for considering plans and projects, where the first part of this procedure, governed by Article 6(3), first sentence, consists of a pre-assessment stage ('screening') to determine whether, firstly, the plan or project is directly connected with or necessary to the management of the site, and secondly, whether it is likely to have a significant effect on the site.[288]

Although, as explained above, the RED provides for a higher threshold for assessing the significance of impact than the one regulated under the Habitats Directive, it will still be important to understand which criteria need to be considered when screening such an impact on the Natura 2000 site.

As explained above, the provisions of Article 6(3) of the Habitats Directive are not restricted to plans and projects that 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.[289] 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.[290]

This includes the consideration of any potential transboundary effects. If a plan or project in one country is likely to have a significant effect on a Natura 2000 site in a second country, either individually or in combination with other plans or projects, then an appropriate assessment must be undertaken which addresses *inter alia* the potential effects on the integrity

287 General principles of European law have "constitutional status", which means that they have the same rank as the founding Treaties (which form the EU's "primary law"). This status gives them a (potentially) far-reaching impact, as they can be used to interpret or annul secondary law (legal instruments based on the Treaties, inter alia regulations, directives, decisions, conventions, etc.). See for that, Van Meerbeeck, Jérémie. The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust. In: European Law Review, Vol. 41, no.41, p. 275-288 (NaN) http://hdl.handle.net/2078.3/177694 p. 280.
CJEU has also established several rules of interpretation grounded on the principle of legal certainty. According to the CJEU, *"where it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent … with the principle of legal certainty."* Borgmann GmbH & Co KG v Hauptzollamt Dortmund (C-1/02) [2004] E.C.R. I-3219 at [30].

288 European Commission, 'Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final, p. 33.

289 C-98/03, *Commission v Germany*, para. 51 and C-418/04, *Commission v Ireland*, paras. 232, 233.

290 C-142/16, *Commission v Germany*, para. 29.

of respective Natura 2000 sites in that second country as well.[291] However, in the context of the RED, considering that the derogations from carrying out the EIA and appropriate assessment are excluded in cases where Article 7 of the EIA Directive applies (i.e. in case of transboundary impact), the level of threshold of assessment will be low, meaning that in those cases, the competent authorities need to screen the project against any *'likely significant effects'*, rather than *'highly likely'*. Thus, if a project falls under Article 7 of the EIA Directive, a likelihood of such effect will trigger the need for appropriate assessment in the same way as the EIA assessment.

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 during the screening procedure[292], meaning 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 CJEU in its ruling in case C-323/17, where the CJEU 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'*.

Therefore, although the project developer is obliged to provide information on, among others, compliance of the project with requirements and measures identified under Article 15c(1) point (b) of the RED, any additional measures adopted, and how those measures address environmental impact, these cannot be used as a determining factor on whether to carry out the appropriate assessment or not. Such measures can only be considered during the appropriate assessment.

The notion of what is 'significant' under Article 6(3) of the Habitats Directive needs to be interpreted objectively. The significance of effects should be determined in relation to the specific features and environmental conditions of the protected site affected by the plan or project, taking particular account of the site's conservation objectives and ecological characteristics.[293]

Furthermore, as explained in Chapter 2.3.3 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, 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.[294]

Since the cumulative impacts often 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,[295] 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.[296] 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, are approved.

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).[297]

Finally, concerning access to justice, the public concerned has a right to challenge negative screening decisions (decisions not to submit a particular project to an EIA) or an omission having this effect[298] in court. To avoid delays, all screening decisions, including negative ones, should be fully reasoned and published. See more on access to justice in Chapter 8.

291 European Commission, 'Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final, p. 40.

292 In cases C-293/17 and C-294/17, paras 130 and 132 the CJEU has also confirmed that the assessment may not take into account the existence of 'conservation measures' under Article 6(1), or 'preventive measures' under Article 6(2), or 'autonomous measures' if the expected benefits of those measures are not certain at the time of that assessment.

293 European Commission, 'Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final. p. 41.

294 C-418/04, *Commission v Ireland* andC-392/96, *Commission v Ireland*, paras. 76, 82.

295 See, for example, C-142/16, *Commission v Germany*, paras. 61 and 63.

296 https://ec.europa.eu/environment/eia/pdf/EIA%20Guidance.pdf, p. 17.

297 European Commission, 'Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final, p. 42.

298 C-137/14, *European Commission v Germany*, para. 48. See also cases C-570/13, *Gruber*, para. 44, and C-75/08, *Mellor*, para. 59 and ACCC/C/2010/50 (Czech Republic), para. 82.

Streamlined procedure

The RED further sets deadlines for screening energy projects inside RAAs. The competent authorities have 45 days from the date of submission of sufficient information, to assess if there is clear evidence that it is highly likely for project to give rise to significant unforeseen adverse effects. In the case of applications for installations with an electrical capacity of less than 150 kW and new applications for the repowering of renewable energy power plants, the screening process must be finalised within 30 days.[299] In the event that Member States have clear evidence that a specific project is highly likely to give rise to such significant unforeseen adverse effects, they are obliged to subject the project to an EIA according to the EIA Directive and, where relevant, an appropriate assessment pursuant to Habitats Directive.[300]
However, Member States can even then allow for derogations from the EIA and appropriate assessment for wind and solar photovoltaic projects in justified circumstances. In such cases, the project developers are obliged to adopt proportionate mitigation measures or, if not available, compensatory measures, that may take form of monetary compensation if other proportionate compensatory measures are not available. That would mean that where those adverse effects have an impact on species protection, the operator must pay a monetary compensation for species protection programme for the duration of the renewable energy plant's operation to ensure or improve the conservation status of the species affected. [301] The inclusion of the term "proportionate" here is key and it should serve as the predominant criterion in determining which of the mitigation, compensation or monetary compensation suffice for the operator to meet the requirements of this provision. What would constitute "proportionate" is to be assessed on a case-by-case basis, taking into account the type and duration of adverse effects, as well as the conservation status of the species and their habitats adversely affected by the project, in line with Habitats Directive Article 1(e) – (i).[302]

→ RECOMMENDATION

To ensure legal certainty, investor confidence, and clear accountability in permit decisions, Member States should use the screening criteria set out in Annex III of the EIA Directive when assessing "highly likely significant unforeseen adverse effects" under the RED in RAAs. This approach will provide a structured, reliable basis for evaluating impacts, ensuring consistency and supporting transparent decision-making processes.

Member States must screen all projects with potential transboundary environmental impacts for "likely significant effects" rather than "highly likely" effects, as projects under Article 7 of the EIA Directive must adhere to the standard assessment procedures without derogation.

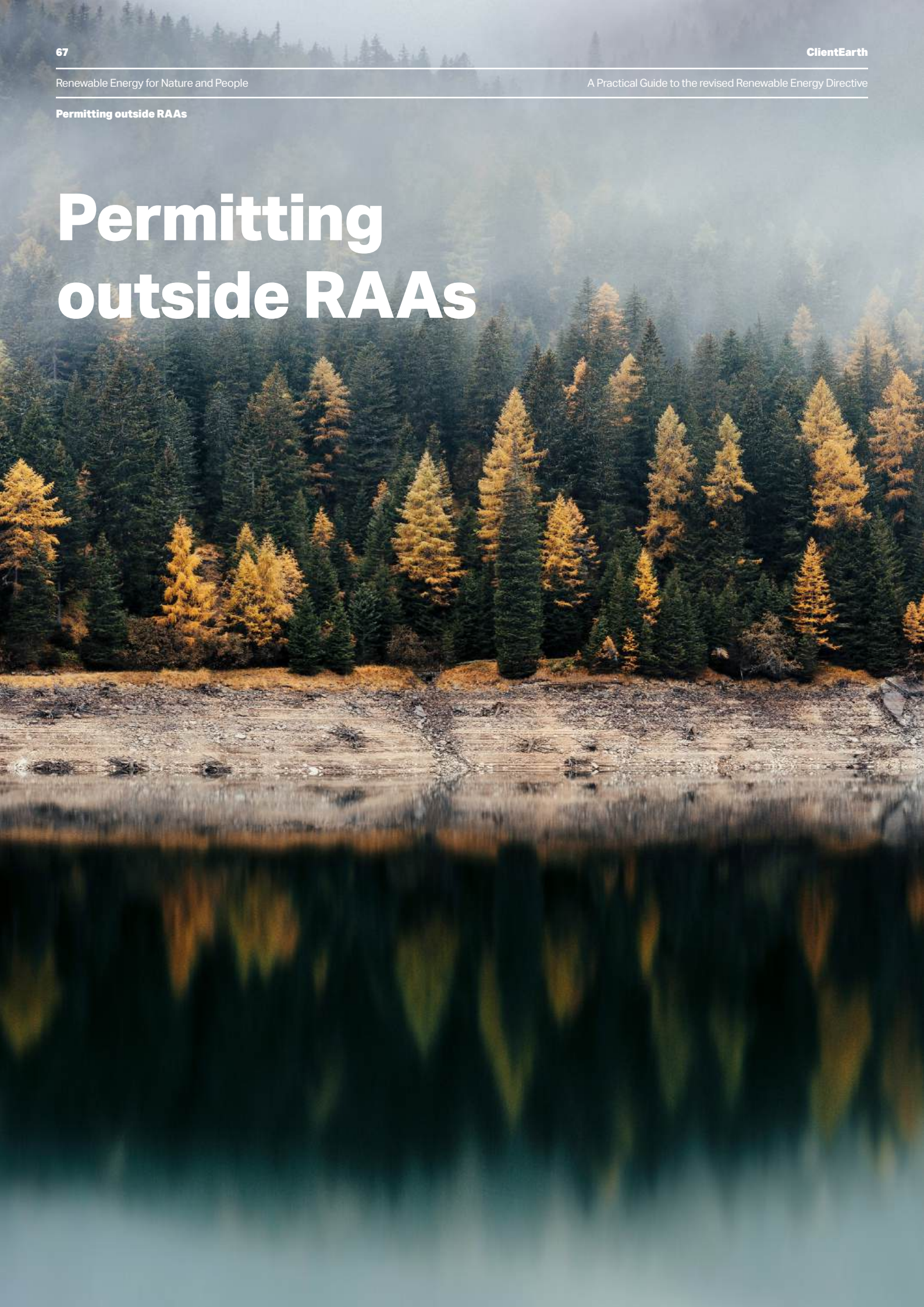
299 RED, Article 16a(4).

300 Directive (EU) 2023/2413, Recital 35.

301 RED, Article 16a(5).

302 See, Article 1 of the Habitats Directive defining the terms: (e) conservation status of a natural habitat; (f) habitat of a species; (g) species of Community interest; (h) priority species; and (i) conservation status of a species.

Permitting outside RAAs



Permitting outside RAAs

Article 16b(2) of the RED mandates that projects located outside of the RAAs remain subject to the EIA procedure in accordance with the EIA Directive and appropriate assessment, according to the Habitats Directive.[303] This means that projects located outside of the RAAs are subject to Article 2(1) of the EIA Directive and are required to go through the general screening procedure under Article 4(2) and Annex II of the EIA Directive, as well as Article 6(3) of the Habitats Directive.

To simplify the permitting procedure in these areas, Article 16b(2) of the RED requires a single procedure that combines all relevant assessments for a given renewable energy project. In many Member States, however, this is already a common practice, and in that context, the appropriate assessment and the EIA procedure are usually coordinated. However, it is important to stress that the appropriate assessment carried out under Article 6(3) of the Habitats Directive, despite having many similarities, is distinct from the EIA required under the EIA and SEA Directives. So even in cases where they are carried out together, information and conclusions of the appropriate assessment need to remain clearly distinguishable and identifiable in the EIA report.[304] This is also important due to the outcome of each assessment procedure, which is also different. In the case of the EIA or SEA assessments, the authorities have to take the impacts into account, whilst for the appropriate assessment, the outcome is legally binding for the competent national authority and conditions its final decision.[305]

Apart from the simplification, the RED also streamlines the permitting procedure for renewable energy projects and for repowering outside of the RAAs, by setting clear maximum deadlines for all steps of the permitting procedure, including dedicated environmental assessments at project level. For instance, a permitting procedure for projects outside RAAs is supposed to be finalised within two years, and in the case of offshore renewable energy projects, within three years.[306] However, these deadlines can be extended by up to six months in case of '*extraordinary circumstances*' including where they require extended periods for environmental assessments. Nevertheless, the Directive does not further define the term '*extraordinary circumstances*', which suggests that it is up to the Member States to decide it in each individual case.

Article 16b(2) of the RED contains an obligation for the competent national authority to issue an opinion on the scope and level of detail of the information to be included in the EIA report by the developer. Under the RED, such a scope, however, must not be extended subsequently.

Scoping in the context of the EIA Directive is defined as the process of identifying the content and extent of the information to be submitted to the Competent Authority under the EIA process (preparation of the EIA report), whilst the scoping opinion is defined as the Competent Authority's decision on the Scoping process.[307] Scoping defines the EIA Report's content and ensures that the environmental assessment is focused on the Project's most significant effects on the factors listed in Article 3 of the Directive. The EIA Directive specifies the most important contents of the EIA report, so it is important to stress that the Directive's requirements regarding the information to be provided by the Developer in the EIA Report, as set out by Article 5(1) and Annex IV of the Directive, must be considered.[308]

However, this limitation of the possibility of extending the scope of an EIA, included in the RED creates several issues. Firstly, EIAs are often significantly revised during the consultation phase of the permit process. Valuable feedback from other administrative branches and the public, including on other applicable obligations, frequently influences the necessary investigations and assessments. If the scoping decision has to be made before this phase, and potentially even without a draft report, the outcome may be numerous poor quality EIAs. Ultimately, since permit decisions[309] on renewable projects, as well as erroneous EIAs[310] can be challenged in court, this provision could eventually lead to delays and prolonged permit procedures, which is contrary to the reform's goals.

In respect of Article 12(1) of the Habitats Directive, and Article 5 of the Birds Directive, Article 16b(2) of the RED provides that where a renewable energy project has adopted necessary mitigation measures, any killing or disturbance of the species protected under the two articles mentioned above shall not be considered to be deliberate.

303 RED, Article 16b.

304 European Commission, 'Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final, p. 44.

305 Kerstin Sundseth and Petr Roth, "Article 6 of the Habitats Directive, Rulings of the European Court of Justice", September 2014, p. 7.

306 RED, Article 16b(1).

307 Environmental Impact Assessment of Projects Guidance on Scoping (Directive 2011/92/EU as amended by 2014/52/EU), European Union, 2017, p. 8.

308 Environmental Impact Assessment of Projects Guidance on Scoping (Directive 2011/92/EU as amended by 2014/52/EU), European Union, 2017, p. 23.

309 C- 72/95, *Kraaijeveld*; C-435/97, *WWF and others*; C-201/02, *Wells*; C-263/08, *Djurgarden*,paras. 37-39; C-115/09, *Trianel*, para. 59, C-72/12, *Gemeinde Altrip*.

310 C-137/14, *European Commission v Germany*, paras. 47 - 51.

Permitting outside RAAs

Recital 37 of the Directive (EU) 2023/2413 further explains that such killing and disturbance should not be considered deliberate if the project:

- provides for the appropriate mitigation measures to avoid killing and prevent disturbance;
- assesses the effectiveness of such measures through appropriate monitoring; and
- takes further measures as required to ensure that there are no significant adverse impact on the population of the species concerned, in the light of the information gathered.

Although Article 16b(2) of the RED is trying to pre-empt the circumstances in which Article 12(1) points (a)-(c) would be applicable, it is important to remember that Article 12(1)(d), on the other hand, sets a stricter protection regime than the one provided in Article 12(1) points (a)-(c). This means that Article 12(1)(d) of the Habitats Directive still applies for projects planned outside of the RAAs.

As explained in the previous section, Article 12(1)(d) requires all acts resulting in the deterioration or destruction of breeding sites or resting places to be prohibited (avoided), regardless of whether they are deliberate or not.[311]

Furthermore, it is necessary to stress again the quality of the measures that are relevant in the case of Article 12(1)(d). In cases where a project or activity may have a deteriorating or destructive (even if only temporary) impact on the breeding site/resting place, Article 16 needs to be applied before approving renewable energy projects in the RAAs. Only where a measure would ensure the continued ecological functionality of a breeding site/resting place, the measure in question complies with Article 12.[312]

This distinction is important because if a measure is independent of an activity/project and aims to compensate for or offset specific negative effects on a species, such as the destruction or deterioration of a breeding site or resting place, then these are compensatory measures that can only be considered under Article 16. Therefore, whenever there is deterioration or destruction of a breeding site or resting place, a derogation under Article 16 is always necessary.[313]

Finally, Article 16b(2) of the RED supports the use of novel mitigation measures, that have not been widely tested as regards their effectiveness, to prevent as much as possible the killing or disturbance of species protected under the Habitats and Birds Directive, or any other environmental impact, which may be allowed for one or several pilot projects for a limited time period, provided that the effectiveness of such mitigation measures is closely monitored and appropriate steps are taken immediately if they do not prove to be effective.

According to the settled case law of the CJEU, the use of novel mitigation measures is not to be taken into account in the assessment of the implications of a plan or project for the sites concerned. [314] In the context of the unique procedure prescribed in the RED, it is important to reiterate that the use of mitigation measures, even those of novel nature, cannot play a role 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. Thus, at the screening stage, measures intended to avoid or reduce the harmful effects of the plan or project on that site cannot be taken into account. Such measures can only be considered during the appropriate assessment.[315]

→ **RECOMMENDATIONS:**

Projects located outside of the RAAs must remain subject to the EIA procedure in accordance with the EIA Directive and must undergo appropriate assessment, according to the Habitats Directive. Although the RED mandates a streamlined, single procedure integrating all relevant assessments for renewable energy projects, it is essential to maintain clear distinction and identifiability of each assessment within the EIA report.

The prohibition on the deterioration or destruction of breeding or resting sites—whether deliberate or incidental—must be enforced for renewable energy projects outside of RAAs. Member States should ensure rigorous compliance with relevant species protection provisions to uphold robust species and habitat protections in areas beyond RAAs.

311 See for example,C-6/04, *Commission v UK*, and C-183/05, *Commission v Ireland*.

312 Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, February, 2007, p. 47.

313 Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, February, 2007, p. 48.

314 See C-293/17 and C-294/17, paras. 130 and 132.

315 This is confirmed by the CJEU in its ruling in C-323/17, where the CJEU 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'*.

6.1. Overriding public interest

According to Article 16f of the RED, by 21 February 2024, until climate neutrality is achieved, Member States shall ensure that, in the permitting procedure, the planning, construction and operation of renewable energy plants, the connection of such plants to the grid, the related grid itself, and storage assets are presumed as being in the overriding public interest and serving public health and safety.[316]

As stated by the Recital 44 of the Directive (EU) 2023/2413, Member States should presume those renewable energy plants and their related infrastructure to be of overriding public interest and serving public health and safety, except where there is clear evidence that those projects have significant adverse effects on the environment which cannot be mitigated or compensated for, or where Member States decide to restrict the application of that presumption in duly justified and specific circumstances, such as reasons related to national defence. The idea behind this presumption is that it would allow such projects to benefit from a simplified assessment.[317]

Member States may, in duly justified and specific circumstances, restrict the application of this Article to certain parts of their territory, to certain types of technology or to projects with certain technical characteristics in accordance with the priorities set out in their integrated national energy and climate plans, and must inform the Commission of such restrictions, together with the reasons for such restrictions.[318]

Article 16f, therefore, introduces a rebuttable presumption of renewable energy projects being in the overriding public interest and serving public health and safety, which refers to instances where exceptional derogations may be allowed on a case-by-case basis, from the obligation to protect the integrity of the Natura 2000 site and the species protection obligation, as outlined in Article 6(4) and Article 16(1), point (c) of the Habitats Directive, water bodies stemming from the Article 4(7) of the WFD, and birds protection provisions under Article 9(1), point (a), of the Birds Directive.

The above nature and water protection provisions contain unique tests for determining whether these derogations are warranted (due to, e.g., being in the overriding public interest). These differing approaches arise, at least in part, from the unique circumstances, priorities, and risks to nature that each piece of legislation addresses. In other words, there are legally valid reasons, supported by decades of precedent, to conduct specific assessments tailored to the distinct environmental challenges and priorities outlined in each nature protection law.

However, before exploring closer the meaning of each of these derogation tests, it is important to note that under the Habitats Directive, before authorities can allow the relaxation of rules and carry out the derogation test, they must first complete an appropriate assessment under Article 6(3). This is because the derogations can only apply after the consequences of a plan or project have been studied within the appropriate assessment procedure. If there is no knowledge of those effects on conservation objectives relating to the site, conditions for applying that exception cannot be evaluated. For instance, assessing whether there are imperative reasons for overriding public interest or less harmful alternatives, requires carefully weighing them against the damage caused to the site by the proposed plan or project. Additionally, to determine the appropriate compensatory measures, the exact nature of the damage to the site must be clearly identified.[319]

Therefore, to be able to discuss whether a project is of overriding public interest, an appropriate assessment is a prerequisite. Only then can the authorities refer to the derogation provision under the Habitats Directive, which in Article 6(4) outlines three main conditions that need to be met. These are:

1. the alternative put forward for approval is the least damaging for habitats, for species and the integrity of the Natura 2000 site(s);
2. there are imperative reasons for overriding public interest, including 'those of a social or economic nature';
3. all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected are taken.

These conditions apply in a sequential order,[320] must be interpreted strictly,[321] and can only be satisfied in exceptional circumstances.[322]

316 RED, Article 16f.

317 Directive (EU) 2023/2413, preamble, recital 44.

318 RED, Article 16f.

319 C-304/05, *Commission v. Italian Republic*, para. 83.

320 C-209/02, *Commission v. Austria*; C-239/04, *Commission v. Portugal*; C-304/05, *Commission v. Italy* ; C-560/08, *Commission v. Spain* ; C-404/09, *Commission v. Spain*.

321 C-239/04, *Commission v. Portugal*, paras. 25–39.

322 Case C-182/10, *Solvay and Others*, para. 75 and 76. See also, Melina Malafry, 'Renewable Energy Activities – Overriding the Interest of Biodiversity?', p. 180. In: De Lege:

This means that, once the assessment of the lack of suitable alternatives and the acceptance of imperative reasons of overriding public interest are fully ascertained and documented, all compensatory measures that are needed to ensure the protection of the overall coherence of the Natura 2000 network have to be taken.[323]

As cited above, this consideration by the authorities needs to be done on the basis of a case-by-case assessment, in which the authorities *may* conclude that a renewable energy project is of overriding public interest. Thus, such a status does not come automatically, but only after a careful and strict assessment of all conditions under Article 6(4) of the Habitats Directive.

Concerning species protection, if a project would be likely to have an impact on animal species listed under Annex IV of the Habitats Directive, then Article 12 of the Habitats Directive also applies, and such a project can only be allowed in limited situations that are prescribed under Article 16 of the Habitats Directive.

Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate:

a. in the interest of protecting wild fauna and flora and conserving natural habitats;

b. to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

c. in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

d. for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;

e. to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

The failure to respect relevant conditions may render a derogation invalid. The competent national and other authorities or conservation bodies must therefore carefully examine all those general and specific requirements before granting a derogation from species protection provisions.[324]

Article 4(7) of the WFD also includes instances where exceptional relaxation of rules for the protection of water bodies may be allowed in cases of new modifications and new sustainable human development activities (for example, hydropower projects). This can happen if:

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;

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 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.

However, Article 4(7) of the WFD cannot be applied if it cannot be guaranteed that the project would not permanently exclude or compromise the achievement of the wider objectives of the WFD in other bodies of water within the same river basin district, and if at least the same level of protection as existing EU legislation is not ensured by those derogations.[325] This means that the authorities cannot approve the project under the WFD if it would not fulfil the conditions of other applicable Directives (e.g. Habitats Directive or Birds Directive), in which case amendments to the project should be examined to see if it can satisfy the requirements of those other relevant directives.[326]

Hållbarhet ur ett rättsligt perspektiv,[ed] Mattias Dahlberg, Therése Fridström Montoya, Mikael Hansson och Charlotta Zetterberg, Uppsala: Iustus förlag, 2022, pp. 159-194.

323 For better understanding of Article 6(4) of the Habitats Directive, see European Commission, 'Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Notice 2018/C 7621 final.

324 Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, Final version, February 2007, p. 51.

325 This is regulated under the Article 4(8) and 4(9) of the WFD. For more detail, see Common Implementation Strategy for the Water Framework Directive and the Floods Directive, Guidance Document No. 36, Exemptions to the Environmental Objectives according to Article 4(7), p. 54.

326 Common Implementation Strategy for the Water Framework Directive and the Floods Directive, Guidance Document No. 36, Exemptions to the Environmental Objectives according to Article 4(7), p. 49.

Also, Article 9(1)(a) of the Birds Directive lists reasons for which Member States may derogate from key substantive requirements of the Directive, such as the need to establish a bird species protection system.

Provided there "is no other satisfactory solution" enabling compliance with these requirements, derogations are allowed for specific reasons, such as:

- 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; and
- for the protection of flora and fauna.

Therefore, any assessment by the authorities of whether a project is in overriding public interest can only happen after the appropriate assessment under Article 6(3) of the Habitats Directive has been carried out. Only after that step will the authorities be able to carry out the derogation procedure and determine if all the conditions have been met. This will have to be done on a case-by-case basis.

Thus, the status of a project as being in overriding public interest and serving public health and safety (and the application of Article 16f of RED), does not come automatically, but only after a careful and strict assessment that all the conditions under Articles 6(4) and 16 of the Habitats Directive, Article 4(7) of the WFD and Article 9(1) of the Birds Directive are satisfied. Only then can a renewable energy project be considered as being in overriding public interest and serving public health and safety and Article 16f of RED applied.

Finally, regarding the rebuttable presumption that renewable energy projects and their related infrastructure serve the overriding public interest and public health and safety, it is crucial to emphasize that this presumption is not conclusive. If clear evidence shows these projects have significant adverse environmental effects that cannot be mitigated or compensated for, the presumption is overturned.

In such cases, the projects cannot benefit from this status or be deemed compliant with Article 16f of the RED. Overturning the presumption hinges on the ability to demonstrate that a project will cause significant, unmitigable harm to the environment. However, the criteria for what constitutes "significant" and "unmitigable" effects need to be consistently applied, which includes assessing the project's impact on protected areas, such as Natura 2000 sites, as well as its effects on endangered species, water quality, and other critical environmental factors explained in the Chapter 2.2.2 above. The assessment process must be robust, transparent, and based on the best available scientific evidence in order to ensure that the economic and energy policy objectives do not override fundamental environmental safeguards, or cause a potential erosion of the precautionary principle.

→ RECOMMENDATIONS:

While Article 16f of the RED allows Member States to presume that renewable energy projects, including their construction, operation, grid connection, and storage assets, are in the overriding public interest and serve public health and safety, this presumption must be applied with caution and restricted in cases where there is clear evidence of significant adverse environmental impacts that cannot be mitigated or compensated.

Member States must ensure that an appropriate assessment is conducted as a prerequisite under the Habitats Directive before discussing whether a project qualifies as being of overriding public interest.

Member States must ensure that a project's status as being in the overriding public interest and serving public health and safety is only granted after a thorough and strict assessment confirming that all conditions under Articles 6(4) and 16 of the Habitats Directive, Article 4(7) of the WFD, and Article 9(1) of the Birds Directive have been fully satisfied.

Deeming renewable energy projects as "overriding public interest" in the context of the Nature Restoration Regulation

The NRL expects Member States to put in place measures to restore habitats which are not in good condition,[327] including such measures in National Restoration Plans. [328] Their obligations are not exhausted once they put in place such measures. In most cases, they are under an additional obligation to take measures that aim at ensuring the *continuous improvement* in the ecological condition of the habitat types covered by the Regulation, as well as their *non-deterioration*, once good condition has been reached.[329] The NRL requires as follows:

– For areas subject to restoration measures in accordance with NRL Articles 4(1), 4(4), 4(7) (for terrestrial habitats) and NRL Articles 5(1), 5(2) and 5(5) (for marine habitats), Member States need to *put in place* such "continuous improvement" and non-deterioration measures;[330] while,

– for areas of occurrence of Annex I[331] and Annex II[332] habitats, their obligation only consists in "*endeavouring* to put in place" such measures (pure efforts-based obligation.

Both such obligations are *without prejudice* to the Habitats Directive, meaning that, for those areas falling under the above categories that are part of the Natura 2000 network, Article 6(2) of the Habitats Directive will apply instead.

The Regulation introduces derogations from the above "non-deterioration obligations" for a series of cases, including *"plans or projects of overriding public interest for which no less damaging alternative solutions are available".* The derogations apply to plans or projects located inside[333] or outside Natura 2000 sites.[334]

Firstly, it should be noted that these derogations *only* apply to Member States' non-deterioration obligations and not to their obligations to put in place restoration measures. These obligations remain unchanged, even if a plan or project taking place in the areas subject to restoration measures is considered as falling under *overriding public interest.*

While the presumption that renewable energy projects constitute projects pursuing *imperative reasons of overriding public interest* applies to all such projects (pursuant to RED Article 16f), applying the derogation from the non-deterioration requirements differs on the basis of the location of the project.

For plans or projects located inside Natura 2000 sites where restoration measures take place in accordance with the NRL, the process to determine whether such a plan or project falls under *overriding public interest* is identical to the analysis provided above (main body of the text).

For plans or projects located outside Natura 2000 site the NRL takes a different approach. According to Article 6 of the NRL, *"the planning, construction and operation of plants for the production of energy from renewable sources, their connection to the grid and the related grid itself, and storage assets shall be presumed to be in the overriding public interest"*, with regards to the application of Articles 4(14) and (15) and 5(11) and (12). This provision, additionally, grants Member States the option to *exempt* such plans or projects even "*from the requirement that no less damaging alternative solutions are available under (NRL) Article 4(14) and (15) and Article 5(11) and (12),"* provided that a SEA or an EIA have been carried out. Thus, Member States may apply the derogation outside Natura 2000 sites without prior inquiry and prioritisation of less damaging alternatives, both for areas subject to restoration measures and for areas of occurrence of NRL Annex I and Annex II habitats.

Still, it is currently uncertain how the condition of a prior SEA or EIA for the application of this exemption can be fulfilled, given that most renewable energy projects are exempt from the scope of the EIA Directive and that an SEA does not cover individual projects. This matter will likely need to be determined my a court, however in the meantime competent authorities should take a precautionary approach.

327 To meet the area-based targets of NRL Articles 4(1), 4(4), 4(7) (for terrestrial habitats) and NRL Articles 5(1), 5(2) and 5(5) (for marine habitats).

328 NRL, Article 15(3)(c).

329 For more on the "non-deterioration" obligation and its importance for the achievement of the Union's and Member States' climate targets, see Agapakis, I.; "Nature Restoration Regulation: Two Steps Forward, One Step Back?", EU Law Live, 23.01.2024.

330 NRL, Articles 4(11) and 5(9), respectively.

331 NRL, Article 4(12).

332 NRL, Article 5(10).

333 NRL Articles 4(16)(c) and Article 5(13)(c), respectively

334 NRL Articles 4(14)(c) and 4(15)(c), as well as Articles 5(11)(c) and 5(12)(c), respectively.

Public participation in the permitting stage

The public is entitled to participate in the decision-making process regarding projects that significantly impact the environment. Public participation in the decision-making process on individual projects can increase public acceptance and improve the quality of decision-making. Integrating the views of the public early in the decision-making process can also help avoid lengthy litigation in the later stages of the permitting process.

Public participation in permitting individual projects usually involves carrying out an EIA as an important tool for the public to be informed about the environmental impacts of a given project and to formulate its views accordingly. While an EIA is not mandatory for the authorities to organise public consultations, in practice the EIA and the EIA Directive provide both substantive information and a process for organising public consultations.

It is important to stress that even for projects located inside the RAAs the RED does not envisage an absolute derogation from the obligation to carry out an EIA and thus to consult the public in the permitting process. Projects that may be eligible to derogate from the obligation to carry out an EIA or appropriate assessment under the Habitats Directive (see Chapter 5.1.), Article 16a(4) of the RED envisages a screening process to determine whether the project "*is highly likely to give rise to significant unforeseen adverse effects given the environmental sensitivity of the geographical areas where they are located, which were not identified during the environmental assessment of the plans designating renewables acceleration areas (..).*"[335]

7.1. Does there need to be a public consultation if the project is located inside an RAA?

7.1.2. Where an EIA or other relevant assessments are carried out

In the RAAs, Article 16a(5) of the RED states that an EIA and, if applicable, an assessment under the Habitats Directive must be carried out if "*a specific project is highly likely to give rise to significant unforeseen adverse effects in view of the environmental sensitivity of the geographical area where the project is located that cannot be mitigated by the measures identified in the plans designating acceleration areas or proposed by the project developer.*" Even though the environmental impacts of the projects deployed in the RAAs should be assessed in detail at the SEA stage, an EIA will nevertheless be required for projects listed in Annex I of the EIA Directive and other projects where significant unforeseen effects on the environment are identified following the submission of an individual renewable energy project (see Chapter 5.2 on the EIA for individual projects in RAAs). Similarly, projects outside the RAAs are fully subject to the requirements of the EIA and Habitats Directives to determine whether an environmental or appropriate assessment must be carried out.[336]

Where an EIA is carried out Article 6(4) of the EIA Directive guarantees that the public concerned be "*given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2)337 and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority.*" Therefore where a project is subject to an obligation to carry out and EIA or an assessment under other applicable EU law, a public consultation should be carried out.

7.1.2. Where an EIA or other assessments are not carried out

The RED establishes a system where the decision-making on renewable energy projects in the RAAs and their environmental projects consists of two closely related stages. Thus the RED establishes a process where the consultations corresponding to the level of detail required under Article 6 of the Aarhus Convention, that means public consultations involving the public on a local level, would be carried out at the mapping and designation process of the RAAs.

Article 6 of the Aarhus Convention sets out detailed requirements for effective public consultations in the context of decision-making on specific activities that have a significant environmental impact. Thus, the Aarhus Convention entitles the public concerned to participate in the decision-making process concerning projects that have a significant impact on the environment.[338] Regardless of whether an EIA is

335 RED, Article 16a(4), see also Article 15e(3)-(5) for the screening in grid and infrastructure storage areas and Article 16c(2) and (3) for screening for repowering projects.

336 RED, Article 16b(2).

337 Article 2(2) of the EIA Directive reads: "The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive."

338 Article 6 of the Aarhus Convention, see also United Nations Economic Commission for Europe, The Aarhus Convention: An Implementation Guide, Second edition, 2014, p.127.

determined to be necessary by the competent authority, if the public concerned were not properly consulted at the designation stage, they must be heard in the permitting stage. The public affected by the renewable energy project such as the local communities living near the planned project and its adjacent infrastructure must be able to participate in the decision-making process in at least one of the stages of the larger permitting process envisaged under the RED.

Therefore, it is crucial to properly identify and consult the public concerned on a local level in the mapping and designation of the RAAs (see Section 2). Failure to do so must be corrected by organising a public consultation in the permitting stage of individual projects.

→ **RECOMMENDATION**

Public consultations on projects that have significant effect on the environment should be carried out on a local level regardless of whether an EIA is or is not carried out. Where and EIA is carried out, public consultations should be carried out in accordance with the EIA directive. Where no EIA is carried out, the public concerned on a local level be consulted if it has not already been done in the RAA mapping and designation stage.

7.2. Effective public consultations in the permitting stage

The requirements for organising an effective public consultation largely overlap with those analysed in Chapter 3. In organising an effective public consultation in the permitting stage both in and outside renewables acceleration areas, the competent authorities should primarily be guided by the analysis in Chapter 3.3.

Access to Justice

8.1. Access to justice where an EIA or other assessment under EU law is required

Article 16(5) of the RED requires Member States to "*ensure that applicants and the general public have easy access to simple procedures for the settlement of disputes concerning the permit-granting procedure and issuance of permits to build and operate renewable energy plants, including, where applicable, alternative dispute resolution mechanisms*." This provision corresponds to Article 9(2) of the Aarhus Convention which grants the public concerned access to justice to challenge the legality of any decisions, acts or omissions taken in the course of decision-making which requires public participation under Article 6 of the Aarhus Convention. In simple terms, access to justice be ensured regarding decision-making processes for specific activities, such as permitting individual renewable energy projects, that may have a significant impact on the environment.

An EIA may be required following a screening process for projects both in and outside RAAs.[339] Where an EIA is necessary for an individual project, access to justice must also be granted under the EIA Directive.[340]

The right of access to justice also stems from other EU laws applicable in the permitting process of renewable energy and related projects under the RED, including the Habitats Directive[341] and the WFD.[342]

→ RECOMMENDATION

The national law must grant access to the public to challenge violations of environmental law in the mapping and designation process in line with Article 9(2) of the Aarhus Convention.

8.1.1. What decisions can be challenged?

Article 11(1) of the EIA Directive grants access to justice "*to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive*". Similar wording can be found in Article 9(2) of the Aarhus Convention.

These provisions provide a right of access to justice concerning all kinds of decisions that are or should be subject to public participation under the EIA Directive, or which affect the right of the public concerned to participate in such decisions. These necessarily include:

- decisions not to submit a particular project to an EIA (screening decisions) or an omission having this effect;[343]
- final permitting decisions;[344]
- final permitting decisions that are ratified by a legislative act.[345]

Access to justice and the right of review should also be granted in relation to EIAs spoiled by errors[346] and other steps in the process leading up to the final permitting decision, as well as any failures to ensure meaningful and effective public participation. The public concerned also has a right to challenge violations of environmental law in the permitting process.

In *Slovak Bears II* the CJEU concluded that Article 9(2) of the Aarhus Convention read in conjunction with the right to an effective remedy in Article 47 of the Charter of Fundamental Rights, gave the right to challenge decisions falling within the framework of Article 6(3) of the Habitats Directive before a national court.[347] Such decisions may concern, "*a request to participate in the authorisation procedure, the assessment of the need for an environmental assessment of the implications of a plan or project for a protected site, or the appropriateness of the conclusions drawn from such an assessment as regards*

339 See RED, Article 16a(4) and (5) and Article 16b(2).

340 EIA Directive, Article 11..

341 C-243/15, *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín (Slovak Bears II)*, para. 56.

342 C-664/15, *Protect*, para. 42.

343 C-137/14, *European Commission v Germany*, para. 48. See also cases C-570/13 *Gruber*, para. 44, and C-75/08 *Mellor*, para. 59 and ACCC/C/2010/50 (Czech Republic), para. 82.

344 See ACCC/C/2010/50 (Czech Republic), in which the Aarhus Committee stated: "…the rights of such NGOs under Article 9, para. 2 of the Convention are not limited to the EIA procedure only, but apply to all stages of the decision-making to permit an activity subject to article 6." Also, ACCC/C/2011/58 (Bulgaria), paras. 72 - 81 in which the Committee clarifies that the public concerned must be able to challenge final permits where no EIA has taken place in breach of the law, or where the conclusions of the EIA have not been taken into account in the final permit decision. See also, C- 72/95, *Kraaijeveld*; C-435/97, *WWF and others*; C-201/02, *Wells*; C-263/08, *Djurgarden*, paras 37-39; C-115/09, *Trianel*,, para. 59, C-72/12 *Gemeinde Altrip*.

345 C-128/09, *Boxus and others*.

346 C-137/14, *European Commission v Germany*, paras. 47 - 51.

347 C-243/15, *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín (Slovak Bears II)*.

the risks of that plan or project for the integrity of the site".[348] The CJEU also clarified that it is immaterial whether such decisions are autonomous or integrated in a decision granting authorisation.[349]

Similarly, breaches of the WFD in the permitting process can also be challenged before courts.[350] The CJEU has recognised that the members of the public concerned "*must be able to assert, before the competent national courts, that there has been a breach of the requirements to prevent the deterioration of bodies of water and to improve the status of those bodies of water.*"[351] Members of the public concerned also have access to justice to challenge a permitting decision that may have a significant adverse effect on the state of water forming the subject of the permit.[352]

It is important to note that Article 16a(5) of the RED states that following a screening process a project may be authorised by a competent authority without requiring an explicit decision that an EIA is not required. The RED does not explicitly regulate the duty to communicate such a decision and its reasoning to the public. However, a negative screening decision is open to to judicial review under Article 11 of the EIA Directive and Article 9(2) of the Aarhus Convention,[353] which in turn requires a reasoned screening decision to be challenged. As the CJEU has explained "*effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However, where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.*"[354]

To avoid unnecessary delays resulting from the need to request the reasoning of negative screening decisions before they can be contested in court, all screening decisions, including negative ones, should be made publicly available with full reasoning in line with Article 16a(5) of the RED. This is in particular because any time limits to bring judicial proceedings usually start from the time the applicant can be considered to have been informed of the decision.

→ **RECOMMENDATION**

The public concerned should be given access to justice to challenge negative screening decisions, final permitting decisions and any other breaches of environmental law, including provisions on public participation, in the permitting process.

All decisions subject to judicial challenge, including the decision not to require an EIA for an individual project, should be written, reasoned and available to the public.

8.1.2. When can a challenge be brought?

Member States have the freedom to decide when, in the permitting process, to allow judicial challenges. Therefore depending on the national law of each Member State, access to justice in relation to EIAs, public participation rights, and breaches of environmental law in the permitting process can be either granted directly after these steps have taken place or as a part of the judicial review of the final permitting decision. The competent authorities should provide clear and understandable information about how and when the public concerned can access courts.[355]

Regardless of the procedure chosen by the Member States the public concerned must have an effective opportunity to raise all substantive issues before an independent court and have them examined on their substance. The court should also be able to order effective remedies for any breaches of the public's rights or breaches of environmental law regardless of when in the permitting process the review takes place.[356]

348 C-243/15, *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín (Slovak Bears II)*, para. 56.

349 Ibid.

350 C 535/18, *Land Nordrhein-Westfalen*, paras. 120-135.

351 C 535/18, *Land Nordrhein-Westfalen*, para. 135.

352 C-664/15, *Protect*, para. 42.

353 See alsoC-75/08 *Mellor*, paras. 58-59.

354 See also C-75/08 *Mellor*, paras. 59.

355 See Chapter 8.1.3. on information about the right to bring a legal challenge.

356 See Chapter 8.1.4. on the procedure of the judicial proceedings.

→ **RECOMMENDATION**

Member States have the freedom to decide when in the process of granting access to justice – during the permitting process or after the final decision is issued. Regardless of the procedure chosen by the Member States, the courts must be able to examine any substantive issues raised by the public concerned and address and remedy them on their merits.

8.1.3. Who can bring a challenge?

Article 11(1) of the EIA Directive and Article 9(2) of the Aarhus Convention give the right to access justice to the members of the public concerned. The public concerned is defined as "*public affected or likely to be affected by, or having an interest in, the environmental decision-making; 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*."[357]

Member States may choose an additional criterion in national law to grant standing to the members of the public concerned, granting access to the members of the public concerned who either:

- have sufficient interest, or
- maintain impairment of a right, where the administrative procedural law requires this as a precondition.[358]

What constitutes sufficient interest can be determined on a case-by-case basis in accordance with the criteria laid out in national law, but such criteria should be interpreted broadly in line with the objective of granting the public concerned wide access to justice.[359]

The ACCC has stressed that the national criteria cannot be so narrow as to effectively bar applicants from accessing justice. For example, the ACCC has held that a general requirement that "*the decision affects [the applicant] adversely and is subject to appeal*" is permissible, as long as it is not interpreted in a way that excludes individuals who may be harmed, or exposed to other kinds of inconvenience by an environmentally harmful activity allowed by a permit. [360] In addition, the ACCC specified that the applicable criteria must not depend on one isolated factor, such as distance from the permitted activity.[361] In determining the relevant criteria for assessment of sufficient interest, Member States must consider all relevant aspects of a specific act or omission that could affect the interest of an applicant and allow for a flexible approach and inclusion of a broad range of interests that can be affected by the project.

Similarly, a cautious approach should be taken in choosing the impairment of rights approach. Generally, environmental law is designed to serve the broader interests of the public rather than individual interests. In this context, a strict requirement of an existing impairment of individual rights to access courts may prove contrary to the purpose of the permitting process which is to ensure that the renewable energy plant does not cause unjustified damage to the environment and people's rights. Thus, criteria set for the impairment of rights should allow for a broad interpretation both in terms of the scope of the impaired rights and the nature of the impairment. Criteria such as prolonged presence in the vicinity of a project or limiting the rights to only property rights are recognised by the ACCC to be too narrow.[362] For example, the CJEU recognised that persons legitimately using an element of the environment, such as groundwater, that could potentially be polluted as a result of the operation of the permitted project, have rights that are capable of being impaired.[363] It also held that in such case the applicant did not need to demonstrate a risk to their health as a result of the pollution.[364]

Environmental NGOs that fulfil any relevant registration criteria under national law must be granted access to courts. In the *Trianel* case, the CJEU made it clear that, although the EIA Directive allows Member States to require individuals to demonstrate the impairment of an individual public law right to have standing, this cannot be required of NGOs as a condition for them to be recognised as the public concerned.[365] It also confirmed that, when challenging a decision under the EIA Directive, NGOs may rely on infringements of EU law which protect the general interest.

357 EIA Directive, Article 1(2)(e) and Aarhus Convention, Article 2(5).

358 EIA Directive, Article 11(1) and Aarhus Convention, Article 9(2)n.

359 EIA Directive, Article 11(3) and Aarhus Convention, Article 9(2), see also ACCC/C/2010/48 (Austria), para. 61; ACCC/C/2010/50 (Czech Republic), para. 75 and CJEU C-570/13, Gruber, para. 39

360 ACCC/C/2013/81(Sweden), paras. 86-87. Although this communication was decided on the basis of Article 9(3) of the Aarhus Convention, it is equally applicable to the context of Article 9(2) of the Aarhus Convention.

361 ACCC/C/2013/81(Sweden), para. 101.

362 ACCC/C/2010/48 (Austria), para. 63.

363 C-197/18, *Wasserleitungsverband Nördliches Burgenland*, paras. 41 and 43 and C 535/18, *Land Nordrhein-Westfalen*, para. 132.

364 C-197/18, *Wasserleitungsverband Nördliches Burgenland*, para. 43 and C-535/18, *Land Nordrhein-Westfalen*, para. 133.

365 C-115/09, *Trianel*, para. 45.

→ RECOMMENDATION

Access to justice should be granted to the members of the public concerned that either have sufficient interest or maintain that their rights have been impaired, where the administrative procedural law requires this as a precondition. None of these criteria can be interpreted so narrowly as to bar access to justice for individuals who may be harmed, or exposed to other kinds of inconvenience by an environmentally harmful activity allowed by a permit.

Environmental NGOs must be deemed to have sufficient interest to be recognised as public concerned. They cannot be required to demonstrate impairment of an individual right to have the right to access courts.

8.1.4. Procedure

Article 16(6) of the RED requires Member States to ensure access to justice concerning the environmental aspects of permitting. It states that "*administrative and judicial appeals in the context of a project for the development of a renewable energy plant, the connection of that plant to the grid, and the assets necessary for the development of the energy infrastructure networks required to integrate energy from renewable sources into the energy system, including appeals related to environmental aspects, are subject to the most expeditious administrative and judicial procedure that is available at the relevant national, regional and local level*."

Article 9(2) of the Aarhus Convention does not exclude a preliminary review procedure before an administrative authority however it requires subsequent access to judicial procedures.

Article 9(4) of the Aarhus Convention lists additional criteria for the review mechanism, namely that it must provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Its decisions must be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, must be publicly accessible. In principle, according to the CJEU, any procedural limitations on the right to an effective remedy within the meaning of Article 47 of the Charter of Fundamental Rights must be justified, provided by law and respect the essence of that law, necessary, subject to the principle of proportionality and genuinely meet the objectives of the public interest recognised by the EU or the need to protect the rights and freedoms of others.[366]

This is especially important in choosing whether and which types of complaints will be subject to urgent procedures under national law. While expeditious dispute settlement in itself is welcome, any limitations designed to shorten the proceedings, such as shorter time limits or reduced scope of review, cannot fall short of the minimum requirements of accessibility and effectiveness. In any case, in determining procedural requirements for judicial review Member States are not bound by the need to fit judicial proceedings within the strict permitting deadlines. According to Article 16(8)(b) the duration of the permitting procedure shall not include the "*time for any judicial appeals and remedies, other proceedings before a court or tribunal, and alternative dispute resolution mechanisms, including complaint procedures and non-judicial appeals and remedies*."

Finally, judicial review must offer the possibility of issuing an injunctive order that is effective and available not only in theory but in practice.[367] Injunctive relief can be critical in an environmental case since environmental disputes often involve future, proposed, or ongoing activities that can present imminent threats to human health and the environment.[368] In many cases, if left unchecked, the resulting damage to health or the environment would be irreversible and compensation in such cases may be inadequate.[369] The general principle of effective judicial review under EU law also requires that interim suspensive measures such as injunctive order be available. For example, the CJEU has held that effective prevention of environmental damage requires "*that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent that pollution, including, where necessary, the temporary suspension of the disputed permit*."[370]

366 C-664/15, *Protect*, para. 90.

367 ACCC/C/2008/24 (Spain), paras. 104-105.

368 United Nations Economic Commission for Europe, The Aarhus Convention: An Implementation Guide, Second edition, 2014, p. 201.

369 Article 6 of the Aarhus Convention, see also United Nations Economic Commission for Europe, The Aarhus Convention: An Implementation Guide, Second edition, 2014, p. 201.

370 C-416/10, *Krizan*, para. 109.

8.1.5. Overriding public interest

According to Article 16f of the RED, by 21 February 2024, until climate neutrality is achieved, Member States shall ensure that, in the permitting procedure, the planning, construction and operation of renewable energy plants, the connection of such plants to the grid, the related grid itself, and storage assets are presumed as being in overriding public interest and serving public health and safety.[371] Such presumption is, however, rebuttable and can be overturned where it is determined that a project will cause significant, unmitigable harm to the environment.[372] Therefore the presumption of overriding public interest is subject to judicial review and cannot prevent Member States' courts from making a full assessment of permitting disputes on their merits,[373] including the proportionality of potential damage to the environment against other competing interests.

Article 47 of the Charter of Fundamental Rights of the EU and Article 9(4) of the Aarhus Convention require that courts provide an effective judicial review, which also includes the ability of the courts to provide an effective remedy for any damage to the environment. This may mean that the courts are required and must be able to compensate for past damage, prevent future damage or provide for restoration.[374] The requirement that the remedies should be effective means that they should be capable of real and efficient enforcement.[375]

Therefore, the presumption of overriding public interest cannot act as a bar to meaningful judicial review and should not prevent courts from taking any measures, including, where appropriate, a refusal to issue a permit to a project.

8.1.6. Tacit administrative approval

16a(6) of the RED allows certain intermediary administrative steps within the permitting procedure for projects located in RAAs to be granted by tacit approval. According to Article 16a(6), the lack of reply by the relevant competent authorities within the established deadline should result in the specific intermediary administrative steps being considered as approved. This does not apply in cases where the specific renewable energy project is subject to an EIA or where the principle of administrative tacit approval does not exist in the national legal system of the Member State concerned. Tacit approval also does not apply to final decisions in the permitting procedure, which must be explicit.[376]

It is not clear to what kind of decisions or administrative steps tacit administrative approval would apply, however, it should not apply to decisions which are subject to public participation or can potentially breach environmental law as those decisions are subject to judicial review in line with Articles 9(2) and 9(3) of the Aarhus Convention.

Decisions made by tacit administrative approval contain no reasoning and may remain unpublished. While this may be appropriate for purely technical administrative steps, decisions subject to judicial review must be published to enable the public to bring a challenge. In those cases a tacit administrative approval that does not require an express written decision is not compliant with the Aarhus Convention and is also likely to cause delays as potential applicants can first require access decision in question before deciding on whether to challenge it. According to CJEU, where the public concerned is willing to exercise or simply decide on whether to exercise its right to challenge a specific decision, it is entitled to request reasons for the decision either directly or through a court.[377] Delays caused by the need to request reasons for such decisions could contribute to delays in permitting proceedings and prolong legal uncertainty.

An example of this is the negative screening decision referred to in Article 16a(5) of the RED (see section XX above). A negative screening decision is subject to judicial review under Article 11 of the EIA Directive and Article 9(2) of the Aarhus Convention[378] therefore EU law requires that the reasoning of such decisions be made available to the public.[379]

371 RED, Article 16f.

372 See Chapter 6.1.

373 C-75/08, *Mellor*, para. 59.

374 United Nations Economic Commission for Europe, The Aarhus Convention: An Implementation Guide, Second edition, 2014, p.200.

375 United Nations Economic Commission for Europe, The Aarhus Convention: An Implementation Guide, Second edition, 2014, p.200.

376 RED, Article 16a(6).

377 See also C-75/08, *Mellor*, paras. 59.

378 See also C-75/08, *Mellor*, paras. 58-59.

379 See also C-75/08, *Mellor*, paras. 59.

→ RECOMMENDATION

The members of the public concerned should have access to Member States' courts. They should provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. The courts' decisions must be given or recorded in writing.

Presumption of overriding public interest must be subject to judicial review and cannot prevent Member States' courts from making a full assessment of permitting disputes, including the proportionality of potential damage to the environment against other competing interests.

Tacit administrative approval should not apply to decisions that are subject to public participation or can potentially breach environmental law as those decisions are subject to judicial review.

8.1.7. Alternative dispute resolution mechanisms

Article 16(5) of the RED mentions the possibility of using alternative dispute resolution (ADR) mechanisms to settle disputes concerning the permitting procedure and the issuance of permits to build and operate renewable energy plants. However, several considerations should be kept in mind in considering whether alternative dispute settlement mechanisms are suitable for disputes in the permitting process.

Firstly, the CJEU has held that effective judicial review requires *"not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety."*[380] This necessarily involves the interpretation and application of EU environmental law, including the RED and a range of other applicable laws. The use of ADR in permitting procedures would mean that arbitral panels, mediators or other mechanisms would likely be tasked with interpreting and applying the relevant EU law. However, where ordinary courts would be entitled or even required to file a preliminary reference request to the CJEU to ensure a consistent interpretation of EU law,[381] ADRs have no obligation or right to request clarifications from the CJEU on the interpretation and application of EU law. The CJEU clarified in *Komstroy* that an *"ad-hoc arbitral tribunal, such as that referred to in Article 26(6) ECT, does not constitute a component of the judicial system of a Member State. [..]"*[382] The exceptional jurisdictional nature of ad-hoc arbitral tribunals means that such tribunals cannot, in any event, be classified as courts or tribunals *'of a Member State'* within the meaning of Article 267 TFEU, and are not therefore entitled to make a reference to the CJEU for a preliminary ruling. Thus, ADR cannot ensure that disputes involving EU law are settled in a manner that ensures the full effect of EU law therefore they should not replace judicial proceedings before Member States' courts.

Where ADRs are used, their scope of application should be limited. As ADR is a party-owned process[383] and tends to involve

380 Case C-137/14, *Commission v Germany*, para. 80.

381 Article 267 TFEU.

382 C-741/19, *Republic of Moldova v. Komstroy LCC*, paras. 51-52.

383 See UNGA, "Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises," A/76/238 (2021), para. 26; see also .Joint Submission from the Center for International Environmental Law (CIEL), the International Institute for Sustainable Investment (IISD) and ClientEarth on the call for inputs from the Special Rapporteur on Human Rights and the Environment, p.2.

high costs, a considerable length of the process[384] and lack of transparency in the process[385] these mechanisms should not be used for disputes involving the public concerned. Disputes concerning matters of heightened public interest due to the impact of the outcome on the environment or people's rights should also be excluded from the jurisdiction of ADRs. Where ADR mechanisms are considered, Member States should ensure that safeguards are in place that guarantee the independence and impartiality of arbitrators,[386] consistent interpretation of applicable law,[387] and sufficient regard for public interests such as public health, environmental or labour standards.[388]

→ **RECOMMENDATION**

ADRs with exceptional (non-permanent) jurisdiction cannot ensure that disputes involving EU law are settled in a manner that ensures the full effect of EU law therefore they should be used in disputes that involve interpretation of EU law and should not replace judicial proceedings before Member States' courts.

Where ADRs are used, their scope of application should be limited and accompanied by safeguards to guarantee independence and impartiality, adequate consideration of public interests, consistent application of law and transparency.

8.1.8. Information about the right to bring legal challenges

Article 11(5) of the EIA Directive requires Member States to "*ensure that practical information is made available to the public on access to administrative and judicial review procedures*." The same obligation is found in Article 9(5) of the Aarhus Convention.

The CJEU has interpreted the obligation to make available information on administrative and judicial review as an obligation "*to obtain a precise result which the Member States must ensure is achieved*."[389] If there is no specific statutory or regulatory provision concerning information on the rights offered to the public, the mere availability of rules concerning access to administrative and judicial review procedures in the official publication or on the Internet is not sufficient to conclude that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.[390] This means that the information must be provided through channels that actually reach the public concerned and inform them of their rights in a manner that is simple and understandable.

Full transparency of the permitting process, in particular detailed information about the timeline of the major steps of the process, opportunities to participate and access to justice is crucial to increase public acceptance of renewable energy projects. Throughout the permitting process, the competent authorities should therefore ensure regular channels of communication to provide information the public will need for meaningful participation. These same information channels (including meetings or other interactions with the public concerned) should be used to inform the public concerned about their rights to access justice. This information should be provided simply and understandably, especially if different mechanisms apply to different decisions or stages of the process.

→ **RECOMMENDATION**

Information about access to justice, including applicable procedures, timelines, and practical details of filing a complaint should be included in all communications with the members of the public concerned. The information channels used to communicate information about public participation, as well as meetings or other interactions with the public concerned, should be used to inform the public concerned about their rights to access justice.

384 Schill, S. W., Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward. International Centre for Trade and Sustainable Development/World Economic Forum, 2015, p.2

385 UNGA, "Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises," A/76/238 (2021), para. 72.

386 UNGA, "Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises," A/76/238 (2021), para. 72.

387 Submission to the Organisation for Economic Co-operation and Development on Investment Agreements and Climate Change, contributed by the Center for International Environmental Law (CIEL), ClientEarth, and the International Institute for Sustainable Development (IISD), para.9.

388 UNGA, "Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises," A/76/238 (2021), para. 48.

389 C-427/07, *Commission v Ireland*, para. 97.

390 C-427/07, *Commission v Ireland*, para. 98.

8.2. Access to justice where an EIA is not required in the permitting process

Where an EIA is determined not to be required in the permitting process, members of the public do not lose their right to challenge the potential breaches of environmental law. Article 9(3) of the Aarhus Convention grants the members of the public, including environmental NGOs a general "*right to have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*." National law in this context includes any applicable EU law.[391]

Therefore, members of the public can still challenge permits if they contravene national law related to the environment, regardless of whether they were preceded by EIA or not. See more on access to justice under Article 9(3) in Chapter 4.

391 ACCC/C/2006/18 (Denmark), para. 27; see also C-664/15, *Protect*, para. 90. and C-873/19, Deutsche Umwelthilfe eV, para. 58.

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