

# Will European biodiversity be sacrificed on the Green Transition altar...?

– Perspectives on habitats and species protection in times of energy crises

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## Abstract

This article concerns the new legislation on energy efficiency and deployment of renewables, and its presumed consequences for biodiversity issues in Europe. The overriding question is how key components of the revised version of the Renewables Directive (2018/2001) – the “RED III” – will function together with some of the basic requirements for good governance in decision-making under EU environmental law. Most importantly, the new legislation contains planning instruments, requirements on the national decision-making processes such as time limits, and a declaration that renewables are of overriding public interest in serving public health and safety when balancing them against nature conservation interests.

The author’s conclusion is that the reform contains pros and cons: On the one hand, planning is an instrument well suited for resolving conflicts concerning widespread land-use activities such as renewable energy installations. Planning may also provide for a more comprehensive approach to biodiversity issues in this context. On the other hand, the reform is one sided in focusing on the lessening of administrative burdens. It is shown why some of the provisions will function less well within the national permit regimes on renewables, concerning biodiversity issues as well as in relation to the effectiveness of the procedure as such. It also remains to be seen how the national courts and the CJEU will deal with the problems related to conflicts created by the introduction of new provisions in existing legislation while at the same time leaving that legislation intact.

**Keywords:** Renewable energy, EU Renewable Directive, RED III, environmental decision-making, renewable acceleration areas, planning, permit procedure, time limits, overriding public interest, public health and safety, biodiversity, species protection, nature conservation

## 1. Introduction

This contribution concerns the new legislation on energy efficiency and deployment of renewables, and its presumed consequences for biodiversity issues in Europe. The overriding question is how key components in the coming legislation will function together with some of

the basic requirements for good governance in decision-making in the field of EU environmental law. The point of departure is the revised version of the *EU Renewables Directive (2018/2001)*, the so-called *RED III*<sup>1</sup> from 2023. The discussion will also include some comparisons with other coming pieces of legislation on renewables un-

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<sup>1</sup> I use the term “RED III” for the revised Directive (2018/2001) on the promotion of the use of energy from renewable sources, as amended by Regulation (EU) 2022/759 of December 2021 and Directive 2023/2413 of October 2023. For the consolidated version, see; Consolidated TEXT: 32018L2001 – EN – 20.11.2023 (europa.eu).

der the Green Transition.<sup>2</sup> As for the encounter with environmental law, the focus of this paper is on the obligations regarding nature conservation and species protection under the Birds Directive (2009/147) and the Habitats Directive (92/43).<sup>3</sup> Although existing permitting proce-

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<sup>2</sup> [https://reform-support.ec.europa.eu/what-we-do/green-transition\\_en](https://reform-support.ec.europa.eu/what-we-do/green-transition_en).

<sup>3</sup> Valuable contributions to the discussion about RED III and EUs biodiversity obligations can be found in Tegner Anker, H & Egelund Olsen, B: *EU Species Protection Law and Wind Energy: Current Challenges and Danish Experiences* (European Energy and Environmental Law Review, February 2023, pp. 36–47), Malafry, M: *Renewable energy Activities – Overriding the interests of biodiversity?* (In *Hållbarhet ur ett rättsligt perspektiv*, de Lege, Yearbook 2022 of the Faculty of Law, Uppsala Universitet. Iustus 2023), Jendroska, J Anapyaova, A: *Towards a green energy transition: REPower Directive vs Environmental Acquis?* Environmental Law Network International (ELNI) 2023 pp. 1–5 and Montini, M: *Addressing the conflicts between climate-related renewable energy goals and environmental protection interests under the RED Directive* (European Law Open (2024), pp. 209–219 Cambridge University Press). Further, there are also quite a few scholarly contributions on RED III within the discourse of Energy law, out of which *Seeking to deliver renewable energy infrastructure within a ‘incomplete and vague’ legal framework* (Carbon and Climate Law review (CCLR) 2022 pp. 192–204) and *Climate, Energy – and Environment? Reconciliation of EU environmental law with the implementation realities of EU climate law* (Climate Law 2022 pp. 242–272), both by Alison Hardiman, can be mentioned. Even though legal scholars within this discourse tackle the true conflict between climate and biodiversity, it is challenging to discuss these matters from their perspective, as the opposing interests to renewables commonly are described as “barriers” only, according to which the permit bodies and courts take excessive account of “local flora and fauna” as well of the interests of nearby communities. As for the environmental issues, I have never come across a case where such local impacts on flora and fauna have been decisive, at least not concerning the application of the EU Nature Directives. Concerning the opposition from local communities, the overarching theme in the Energy law discourse seems to be the need for lessening of the requirements for public participation and access to justice according to Aarhus. Strangely enough, these ideas seem only to apply to the public concerned, never to the operators. Here, I draw my line for discussion as I regard the principle of judicial protection as one of the key pillars of environmental democracy within the EU which may not be questioned.

dures for wind farms will be used as illustrative examples, drawing from the Swedish experience, the discussion will be held at a general level for the European reader.<sup>4</sup>

## 2. REPowerEU Plan

The REPowerEU Plan was launched in May 2022 in response to Russia’s invasion of Ukraine and the resulting energy crises in Europe.<sup>5</sup> The aim of the plan is to save energy, to accelerate the transition towards a fossil-free society, and to diversify EUs energy supplies. The first step in lawmaking of relevance for environmental permitting procedures came with the so-called Emergency Regulation (EU) 2022/2577.<sup>6</sup> In order to mitigate the effects of the energy crisis, this legislation established temporary rules to accelerate the permit-granting processes for the production of energy from renewable energy sources, as well as for grid and infrastructure projects that are needed to integrate renewable energy into the electricity system. The Emergency Regulation introduced most of the key components recurring in RED III, such as acceleration areas for renewables, timelines for the permitting processes, positive silence rules<sup>7</sup> and a presumption

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<sup>4</sup> Those who are interested in environmental permitting procedures in the Nordic countries may find some information in Darpö, J: *Nordic Environmental Permitting Processes – results from a comparative study of environmental law and processes in Denmark, Norway, Iceland, Sweden, and Finland*. Nordic Council of Ministers (Nordiska rådet) 2023-07-03.

<sup>5</sup> REPowerEU (europa.eu).

<sup>6</sup> Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy.

<sup>7</sup> Or “tacit agreements” or “deemed approval”. The opposite is “negative silence” rules – also called “implied dismissals” or “deemed refusals” – which can be found in Article 10(6) of the EC Merger Regulation 139/2004. In the field of environmental law, Article 8(3) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, states that the failure of the institution to reply within the prescribed time limit shall be considered as a negative re-

that renewable energy projects are of “overriding public interest”. Becoming directly applicable in the Member States from 30 December 2022, it was meant to expire on 30 June 2024 when it was supposed to be replaced by RED III. However, after a short evaluation by the Commission,<sup>8</sup> most articles were prolonged for an additional year to make the transition seamless and more structured for the Member States.<sup>9</sup>

The revision of the Renewables Directive (2018/2001, RED) was finally decided in October 2023 (Directive 2023/2413). In it, the scope of Directive 2018/2001 is expanded, and the demand sectors are covered more comprehensively. Targets for the share of renewables are set for industry, transport, heating and cooling, as well as for buildings. The mandatory sustainability criteria concerning forest biomass are further specified in line with the principle of sustainable forest management. RED III includes provisions to streamline procedures for the permitting of renewable energy projects through spatial planning, simplification and shortening of time frames. Parts of the new provisions were to be implemented in the Member States by 1 July 2024, while another 18 months may be used for others. An important step in the implementation of RED III is the requirement for the Member States to set up and report to the Commission National Energy and Climate Plans (NECP). In the NECP, each Member State is obliged to show its proposals on how to contribute to the fulfilment of the 42,5% tar-

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ply and entitle the applicant to institute court proceedings and/or make a complaint to the Ombudsman. Such negative silence rules have also taken root in Member State laws and are today quite common (see opinion by Advocate General Wahl in C-58/13 and C-59/13 *Torresi* (2014), at para 70).

<sup>8</sup> 8f706e90-9a36-4d01-aac8-846cbd3d9d60\_en (europa.eu).

<sup>9</sup> Council Regulation (EU) 2024/223 of 22 December 2023 amending Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy.

get for the share of renewable energy in the EUs overall energy consumption by 2030.

There are obviously many more initiatives from the EU to further the Green Transition that may have an impact on environmental issues raised in different permit regimes under EU law. The *Critical Raw Materials Act* (CRMA) aims at ensuring access to a secure, diversified, affordable and sustainable supply of critical raw materials in the EU.<sup>10</sup> In addition, the Net Zero Industry Act (NZIA) sets up the goal to make the EU home to clean technologies and to facilitate progress towards a strong domestic manufacturing capacity of those technologies.<sup>11</sup> Both these Regulations contain solutions similar to the Emergency Regulation and RED III, such as designating strategic projects, planning, and setting time limits for the permit-granting procedure. It is also worth mentioning the *European Wind Power Action Plan*, launched by the Commission in October 2023.<sup>12</sup> Although the proposals here align with the general trends in the above-mentioned legislation, they are mostly of a “softer” nature, such as guidelines, common digital tools, initiatives for the exchange of “best practices”, recommendations on how to improve auction designs, and financial measures. Even so, they are helpful in understanding the direction of the EU’s commitment to the achievement of climate

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<sup>10</sup> Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020.

<sup>11</sup> Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe’s net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724.

<sup>12</sup> COM(2023) 669 final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *European Wind Power Action Plan*. Brussels 24.10.2023.

neutrality and to the fulfilment of its international obligation to maintain and improve biodiversity in nature.

### 3. The rules for permit-granting procedures in RED III

#### An overview of the new regime

To begin with, RED III gives a more comprehensive definition of “renewable energy” compared with its predecessors. According to Article 2(1), the definition covers energy from renewable non-fossil sources, that is, wind, solar and geothermal energy, osmotic energy, ambient energy, tidal, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas.<sup>13</sup> New concepts introduced with the 2023 reform are defined, such as “renewables acceleration area”, meaning a specific area on land, inland waters or sea designated as particularly suitable for the installation of renewable energy plants (Article 1(9a)). Interestingly, a definition of “permit-granting procedures” is lacking from the catalogue in Article 2. Instead it is given in Article 16(1):<sup>14</sup>

The permit-granting procedure shall cover all relevant administrative permits to build, repower and operate renewable energy plants, including those combining different renewable energy sources, heat pumps, and co-located energy storage, including power and thermal facilities, as well as assets necessary for the connection of such plants, heat pumps and storage to the grid, and to integrate renewable energy into heating and cooling networks, including grid-connection permits and, where required, environ-

mental assessments. The permit-granting procedure shall comprise all administrative stages from the acknowledgment of the completeness of the permit application in accordance with paragraph 2 to the notification of the final decision on the outcome of the permit-granting procedure by the relevant competent authority or authorities.

Article 3(4a) of RED III requires Member States to establish a framework enabling the deployment of renewable electricity to a level that is consistent with the set national contribution and the indicative trajectories referred to in RED III. That framework is intended in particular to tackle remaining barriers to a high level of renewable electricity supply, including those related to permit-granting procedures, and the development of the necessary transmission, distribution and storage infrastructure.

Rules on administrative procedures and environmental permitting are given in twelve new provisions in Articles 15, 15b–15e and 16–16f. First, it is stated that the Member States shall ensure that the national rules concerning the authorisation, certification and licensing procedures applied to plants and transmission for renewables are proportionate and necessary and contribute to the implementation of the energy efficiency first principle. Administrative procedures shall be streamlined and expedited at the appropriate level and given predictable time frames. Rules on the procedure are required to be objective, transparent, proportionate, and non-discriminatory (Article 15).

According to Article 15b, by 21 May 2025, Member States shall carry out a coordinated mapping for the deployment of renewable energy in their territory to identify the potential of land and water areas for the installation of renewable energy plants and their infrastructures necessary to meet their national contributions

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<sup>13</sup> One may note that nuclear power is not covered in this definition, although it is still mentioned as a net-zero technology in the NZIA.

<sup>14</sup> The wording of Article 16(1) of RED III mirrors the definition in Article 2(1) of the Emergency Regulation (EU) 2022/2577.



towards the overall EU renewable energy target for 2030.

### **Renewable Acceleration Areas and Dedicated Infrastructure Areas**

Renewable Acceleration Areas are regulated in Article 15c, which requires Member States to adopt one or more plans for renewable energy sources where the deployment is not expected to cause significant environmental impact. Biomass and hydropower may be excluded. Priority is to be given to artificial and built surfaces and their direct surroundings, whereas Natura 2000 sites, national nature reserves and major migratory routes for birds and mammals must be avoided. Appropriate rules on effective mitigation measures to avoid adverse environmental impacts are required to be adopted for the installations and their connection to the electric grid. When this is not possible, measures to reduce such impact are required to be prescribed to ensure compliance with Articles 6(2) and 12(1) of the Habitats Directive (92/43), Article 5 of the Birds Directive (2009/147) and Article 4(1), point (a)(i) of the Framework Water Directive (2000/60).

These rules for mitigation must be targeted to the specificities of each renewable acceleration area and type of renewables. Compliance with the prescribed measures creates a presumption that the projects in the acceleration areas are not in breach of the nature conservation or species protection obligations in those directives. New mitigation technologies and measures may be tested for a limited period if closely monitored, and appropriate steps have to be taken if those measures prove to be ineffective. Before the adoption of a renewable acceleration area, a Strategic Impact Assessment is required to be undertaken according to Directive 2001/42, and, if the plan is likely to have a significant effect on a Natura 2000 site, an Appropriate Impact As-

essment (AIA) must be undertaken according to Article 6(3) of the Habitats Directive (92/43).

The acceleration areas must undergo periodic review, particularly in the context of the updating of the National Energy and Climate Plans (NECP) every ten years (Article 15c). Similar provisions are given in Article 15e for areas with grid and storage infrastructure necessary to integrate renewables into the electric system (“dedicated infrastructure areas”), which aim to support and complement the renewable acceleration areas. Finally, according to Article 15d, public participation must be ensured in line with Article 6 in the SEA Directive (2001/42).

### **Main principles and organisation of the procedure**

Article 16 of RED III contains rules on the organisation and main principles of the permit-granting procedure. These provisions apply both inside and outside the renewable acceleration areas. As noted, the procedure is intended to cover all relevant administrative permits to build and operate renewable energy plants and their connection to the grid, including environmental assessments. The procedure must comprise all administrative stages from the acknowledgement of a complete application to the final decision. A decision on whether an application is complete or not shall be issued by the competent authority within 30 days if the project will be performed in a acceleration area, or within 45 days in other cases. When an application is not complete, the competent authority must request the applicant to submit the missing information without undue delay.

Member States are also required to appoint one or more contact points whose task is to inform and guide the applicant throughout the procedure and ensure that the deadlines are met. Applications may be submitted in digital form. An applicant shall not be required to con-

tact more than one contact point during the entire procedure. Further, Member States shall ensure that those concerned in a permit procedure have easy access to alternative dispute resolution mechanisms. All appeals are to be handled in the most expeditious manner possible.

Still another provision of general applicability is given in Article 16f, which states that, from 21 February 2024 until climate neutrality is achieved, Member States shall ensure that, in the permit-granting procedure, renewables shall be presumed to have overriding public interest and to serve public health and safety when balancing different interests according to Article 9(1) of the Birds Directive (2009/147), Articles 6(4) and 16(1) of the Habitats Directive (92/43), as well as Article 4(7) of the Framework Water Directive (2000/60).

#### **Permit-granting procedure within renewable acceleration areas**

The permit procedure for projects within renewable acceleration areas is regulated in Article 16a. To begin with, time limits are stated: the procedure as a whole for the permitting of renewables on land may not exceed 12 months, and may not exceed 24 months for off-shore projects. Under extraordinary circumstances those deadlines may be extended by up to 6 additional months. For the repowering of renewable energy plants and their grid connection, the time limit is six months.

As already noted, projects within acceleration areas are presumed to not cause any significant effect to the environment according to Article 4(2) in the EIA Directive (2011/92) or Article 6(3) of the Habitats Directive (92/43). Therefore, if the project complies with the requirement for mitigation measures in Article 15c, it is exempted from carrying out an Environmental Impact Assessment (EIA) and an Appropriate Impact Assessment (AIA) according to those directives.

Even so, the competent authority must undertake a screening process to clarify if the project is likely to give rise to significant unforeseen adverse effects that were not identified in the SEA for the plan. For this evaluation, the project developer is to provide information about the mitigation measures for the project, and the screening process must be concluded within 45 days. If the competent authority has not decided on the matter within that deadline, the project is authorized from the environmental perspective without any express decision (a so-called “positive silence rule”). In contrast, if the authority finds that the project may give rise to significant unforeseen adverse effects to the environment that cannot be mitigated with the measures prescribed in the renewable acceleration area, an EIA/AIA is required to be performed within 6 months. However, Member States may exempt wind and solar projects from such assessments under the condition that the operator adopts proportionate mitigation measures, or alternatively, undertakes or pays for compensating programs.

#### **Permit-granting procedure outside renewable acceleration areas**

The rules of procedure are somewhat different outside the renewable acceleration areas (Article 16b). First, different time limits apply: 2 years for the granting of a permit for renewables on land, 3 years for off-shore projects. When an EIA is required, it is to be carried out in a single procedure in which all relevant assessments are combined. The competent authority must issue an opinion on the scope and detail of the EIA, and the scope may not be subsequently extended. If the permit conditions for the project contain necessary mitigation measures, any killing or disturbances of the species protected under Article 5 of the Birds Directive (2009/147) and Article 16(1) of the Habitats Directive (92/43) shall be treated as not being deliberate.

## Repowering

“Repowering” is defined in Article 2(10) as

*“renewing power plants that produce renewable energy, including the full or partial replacement of installations or operation systems and equipment for the purposes of replacing capacity or increasing the efficiency or capacity of the installation.”*

Shorter time-limits apply to those projects. In addition, there is also a limitation to the requirements under the EIA Directive (2011/92) for the repowering of a renewable energy plant. Both the screening and the assessment are limited to the potential impacts from the change or extension, compared with those of the original project (Article 16c).

## 4. Analysis and discussion

### Introduction

In this section, I will analyse and discuss the main issues in RED III concerning the environmental permitting procedure. However, this analysis is a preliminary one, limited to highlighting some points for further discussion, as we are only in the beginning stage of the implementation of RED III in the Member States.

### The general discourse

For obvious reasons, the preambles of the Emergency Regulation (EU) 2022/2577 and the Directive 2023/2413 are largely coloured by the energy crises in Europe after Russia’s invasion of Ukraine and the subsequent shortage in energy supply. In addition comes the general drive in the EU for green transition towards climate neutrality by 2050. Thus, the discourse is in line with many of the legislative initiatives from the EU institutions since the beginning of 2022. On top of this comes the fact that growing concerns about the high dependency of countries outside

of the EU on vital resources have created a kind of “green nationalism”, especially pointing at unfair competition from China. From a Scandinavian perspective, it is important to understand this emergency context, as most of our countries do not have any shortage of energy supply. This is especially true when it comes to Sweden and Norway. We are in the lead concerning the share of renewables in the energy mix, with Sweden in the top of EU27 with 66%, while both Iceland and Norway are above 70%.<sup>15</sup> Sweden is also the leading exporter of electricity to Europe at a level of over 33 terawatt-hours per year.<sup>16</sup> Against this backdrop, the analysis in this text may suffer from a certain lack of understanding of the European energy crises, as the public debate on these issues in Sweden has mainly focused on the high electricity prices resulting from the improved connection with the European continent through the Baltic cables (we are thus “importing their prices”). But even with this caveat, some remarks may be noted on the discourse in the preambles of the Emergency Regulation and RED III.

To begin with, there can be no doubt that the text is formulated mainly by the DG Energy and that the general direction here is “full speed ahead” for industrial development. Electrification and the increase of energy production is the overarching theme, and very little text is spent on energy saving. This is somewhat surprising, as the revised Energy Efficiency Directive (2023/1791) significantly raises the EUs ambition in this respect, including a binding goal to which the Member States are expected to contribute.<sup>17</sup>

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<sup>15</sup> European Environment Agency: Share of renewable energy sources, by country. Statistics (updated) 2024-09-20; <https://www.eea.europa.eu/en/analysis/maps-and-charts/countries-breakdown-actual-res-progress-15>.

<sup>16</sup> <https://www.statista.com/statistics/1405405/net-electricity-exports-europe-by-country/>.

<sup>17</sup> Energy efficiency directive – European Commission (europa.eu).

How each country will fulfil this duty is expected to be clarified in the Member States' reports of their final updated National Energy and Climate Plan (NECP), which were due on 30 June 2024. So far, it is too early to draw clear conclusions from this reporting.<sup>18</sup>

Surely, the new legislation on renewables brings some welcome news, such as requirements for integrated permit procedures, contact points in order to advise applicants and decision-making bodies, and time limits for different stages of the permit-granting process. At the same time, however, the package is based on a quite one-sided approach where only energy concerns are visible and regulations are characterized as “administrative burdens”. When environmental protection concerns are mentioned, it is merely done by a general reference to the “no-harm principle”. The general point of departure seems to be the assumption that the Union, simply by reducing greenhouse gas emissions by way of renewable energy, also can tackle challenges related to the environment, such as the loss of biodiversity. There is little thought on how this will be performed, while at the same time it is repeatedly emphasised in the preamble that environmental assessments must be made simpler and faster. Consequently, the precautionary principle is not mentioned at all in the preambles of the Emergency Regulation or Directive 2023/2413.

Another point of departure for the legislation is that permit procedures must be made swifter. This is repeated many times in the ar-

gumentation and made clear in preambular point 20 of Directive 2023/2413 (*italics added*):

Lengthy administrative permit-granting procedures are *one of the key barriers to investment* in renewable energy projects and their related infrastructure. Those barriers include the complexity of the applicable rules for site selection and administrative authorisations for such projects, the complexity and duration of the assessment of the environmental impact of such projects, and related energy networks, grid-connection problems, constraints on adapting technology specifications during the permit-granting procedure, and staffing problems of the permit-granting authorities or grid operators. In order to accelerate the pace of deployment of such projects it is necessary to adopt rules which would simplify and shorten permit-granting procedures, taking into account the broad public acceptance of the deployment of renewable energy.

Even though I have a general knowledge about environmental protection systems in the EU, I really cannot say if this is a valid description of the permit-granting procedures in the Member States of the EU. However, statements like this are often based on different consultants' reports and, in my experience, such reports differ quite substantially in quality. For example, in a report from the RES Simplify project in 2023, it was reported that Sweden was one of the Member States where bureaucratic barriers pose major challenges to wind power development, that permits are granted at a very low rate and that permit procedures may take as long as ten years, both on land and at sea.<sup>19</sup> These statements are quite surprising and one may wonder why the authors did not undertake basic fact checking.

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<sup>18</sup> On that date, only four Member States had reported their NCP. As of December 2024, the number has risen to 14 Member States, but – according to the Swedish expert Magnus Nilsson – the reports are too vague to say anything without thorough analysis; [https://commission.europa.eu/energy-climate-change-environment/implementation-eu-countries/energy-and-climate-governance-and-reporting/national-energy-and-climate-plans\\_en#national-energy-and-climate-plans-2021-2030](https://commission.europa.eu/energy-climate-change-environment/implementation-eu-countries/energy-and-climate-governance-and-reporting/national-energy-and-climate-plans_en#national-energy-and-climate-plans-2021-2030).

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<sup>19</sup> SE\_SWD\_2023\_627\_en.pdf (europa.eu).



In reality, the Swedish wind power industry is a success story with few comparisons; in 2023, wind power production amounted to 34 terawatt-hours and 20% of the total electricity production. This is an increase of more than 20% per year every year since 2021. For two years in a row, Swedish wind farms stand for 2% of the world's electricity production from wind power. According to the official statistics, the permit-granting time in the Swedish Regional Licensing Boards is 349 days (median value). Moreover, the granting rate is about 80%.<sup>20</sup> According to our research, the permitting procedure as such does not pose any barrier, as the main obstacle has been local resistance and the so-called "municipal veto".<sup>21</sup> It is true, however, that the development of wind energy located in the sea has been very slow in Swedish waters as compared with our neighbours. However, this cannot be explained by so-called "bureaucratic barriers", as resistance from the Armed Forces is the major reason for denying permits at sea. On closer scrutiny, the "facts" presented in the RES Simplify report were provided by the Swedish wind industry, well-known for its relentless campaigning and imaginative use of statistics. Thus, if industry is the main provider of facts to these reports, I suggest caution concerning any general statement about slow environmental procedures as a barrier to the Green Transition.

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<sup>20</sup> See SOU 2022:33 *Om prövning och omprövning – en del av den gröna omställningen*, part 3 about "myths and trues", also the Government's Proposition 2023/24:152, part 4.2. Both documents are unfortunately available only in Swedish.

<sup>21</sup> See Darpö, J: *Should locals have a say when it's blowing? The influence of municipalities in permit procedures for wind-power installations in Sweden and Norway*. *Nordic Environmental Law Journal* 2020:1, pp. 59–79.

### Renewable Acceleration Areas

RED III introduces a system with binding plans on the regional or national level by way of "renewable acceleration areas". As noted, the Member States are obliged to designate at least one such plan for one or more renewable energy techniques and their connection systems on land and/or sea. The acceleration areas are required to be "sufficiently homogenous" and the deployment of renewables here are expected not to entail significant environmental impact. The plans for the adoption of an acceleration area is subject to an environmental assessment according to the SEA Directive (2001/42), and, if they are likely to have a significant impact on Natura 2000 sites, to an appropriate assessment according to Article 6(3) of the Habitats Directive (92/43). Appropriate rules must be established for effective mitigation measures that will be adopted as parts of the permits for the renewable plants and their connection facilities in order to avoid or reduce such impact. Only when the installation is "highly likely" to give rise to significant unforeseen adverse effects that were not identified in the SEA, may additional investigations, assessments or mitigation measures be required. If the permit body in this situation decides that an EIA or an AIA is required, this assessment and procedure must be undertaken within six months.

First, a general remark on this. Modern wind farms and their connection to the grid are major industrial installations, commonly covering hundreds of hectares of land or sea. Like all widespread and "area-consuming" activities, they are best regulated by means of planning ahead for the solving of conflicts between different interests. From a nature conservation perspective, planning may also provide for a population-based approach to species protection on a larger scale. Thus, if properly performed and detailed, an early environmental assessment and

consultation with the public concerned according to the SEA Directive may well be a suitable tool for a proactive handling of the conflict between wind energy and biodiversity. There are lessons to be learned about such good examples from planning for wind farming from different places in Europe, for example, in Flanders.<sup>22</sup>

### **Planning, SEA and EIA**

Against this backdrop, I do not think that one can object to a planning instrument such as renewable acceleration areas as a matter of principle. Instead, concerns can be raised about the lofty legislation and the weak quality control in RED III. The most important question here concerns the safeguarding of a thorough investigation in line with the precautionary principle as regards the impacts on Natura 2000 and strictly protected species and their habitats. These worries are fortified by the arguments in the preamble that the legislation allows for “simplified assessments”. The regulation seems to make it possible for a Member State to introduce one single acceleration area for the whole country or a large region, covering all kinds of renewables and their connections to the grid. Surely, such an application would be considered quite extreme, as the RED III states that the acceleration areas should be homogeneous, and the projects should not be expected to have significant effects on the environment. But even so, we know little today about how this instrument will play out in practical terms. There is, however, reason to believe that a SEA for a vast area with a variety of activities cannot serve as an effective means for fulfilling the EUs biodiversity obligations.

In practical terms, it may not be feasible to prescribe effective mitigation measures as early as in the planning phase of such an all-compassing renewable acceleration area.

Further, the “highly likely” formula places the burden of proof on the authorities and the public to show the necessity of further investigations and environmental assessments when an application for a project permit is submitted within an acceleration area. There is no exception to this rule, so that it will apply even if the project is applied for years after the initial SEA was performed. Learning from the experience of environmental cases in courts, this standard may be a trigger point for conflict. In virtually all environmental cases there are objections about the need for, the quality and the scope of the EIA. It is no wonder that EIA Directive (2011/92) is the single piece of legislation – together with the Habitats Directive (92/43) and the Birds Directive (2009/147) – that has created the biggest part of today’s great body of case-law in environmental matters from the EU Court of Justice (CJEU).<sup>23</sup> In situations in which the permit-granting authority ignores objections from the public about the inadequacy of an SEA, this may even prove to be something that complicates and delays the procedure, if the appeal body or court finds the objections to be well-founded and remands the application to be considered anew. Not least, the tight time frames for the procedure and the existence of a positive silence rule in this context may prove to be counter-productive, as the authority’s attitude on the matter will not be known at the outset. In this context, it also may be noted that it is only when the permit author-

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<sup>22</sup> See Backes, C & Ackerboom, S: *Renewable energy projects and species protection. A comparison into the application of the EU species protection regulation with respect to renewable energy projects in the Netherlands, United Kingdom, Belgium, Denmark and Germany* (Utrecht Centre for Water, Oceans and Sustainability Law, 2018).

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<sup>23</sup> Focus on Environmental Impact Assessment (EIA) (era-comm.eu) If I am not mistaken about the Eurlex statistics, both the EIA Directive (85/337 and 2011/92) and the Habitats Directive (92/43) count for more than 160 cases each in the CJEU, while the Birds Directive (79/409 and 2009/147) counts for almost 150.

ity posits that an additional EIA is needed that the decision is required to be published.

### **Exemption possibilities**

Another concern may be raised about the exemption possibilities. According to Article 16(a)(5), the Member States may exclude wind projects from “such assessments”, in my understanding referring to an updated EIA in the above-described situation. The only precondition for this is that the exclusion is based on “justified circumstances”, including those needed for achieving the climate and energy targets. This may of course be interpreted by governments where the industry has a strong voice as the main way to escape the otherwise-applicable biodiversity obligations. If an exemption applies, the operator is admittedly obliged to undertake proportionate mitigation measures or to contribute financially to a protection programme in order to ensure the conservation status of the species affected. However, this kind of legal construct is full of pitfalls, of which a few can be mentioned here. To begin with, the assessment of what are “justified circumstances” leaves it open for the national governments to include just about anything. And how can “proportionate mitigation measures” be evaluated when no investigation or assessment has been undertaken of the protected interest that is at risk. The same can be said about the effectiveness of any compensation schemes, which according to experience can be complicated enough to establish even if one knows what kinds of risks have to be dealt with. How will it be possible to design such programmes when knowledge about the damage to be avoided is meagre?<sup>24</sup>

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<sup>24</sup> In this context it should be noted that the CJEU repeatedly has stated that a precondition for making derogations according to Article 6(4) of the Habitats Directive is that an AIA has been performed showing what risks are at hand and how they can be dealt with, see

### **Decision-making outside renewable acceleration areas**

Another peculiarity in RED III concerns the processing of EIAs for projects outside acceleration areas. According to Article 16(b)(2), if an EIA is required, it is to be carried out in a single procedure that combines all relevant assessments for the project. Further, before the investigations are begun, the competent authority is obliged to issue an opinion on the scope and the level of detail of the information to be included in the EIA report. This opinion is binding in that the scope of the report cannot be extended subsequently. In my view, such a “preclusion” raises questions. Even though the provision reflects a common critique from industry about “excessive demands on investigations”, the authors clearly have not considered the effects on environmental procedure. First, the provision is unclear as the preclusion only limits “the scope” of the report, and not its “level of detail”. Second and more important, it is common knowledge that EIAs are normally substantially amended during the consultation phase of the permit procedure. Other branches of administration, as well as the concerned public, often have valuable comments on the investigations and assessments to be performed. If the scoping decision must be taken before that phase and perhaps even when there is not a draft report, we will see a lot of deficient EIAs. The effect of that on the protection of biodiversity is obvious. Also, the preclusion cannot be upheld during the appeal procedure as the EIA Directive (2011/92) has not been changed as regards the demands on the re-

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C-239/04 *Commission v Portugal* (2006) para 35, C-182/10 *Solvay* (2012) paras 73–74, C-521/12 *Briels* (2014) para 35, joined cases C-387/15 and C-388/15 *Orleans* (2016) para 61, C-167/17 *Sweetman* (2018) para 35, see also *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), section 5.2.

port.<sup>25</sup> In this context, one must remember that most – if not nearly all – permit decisions on renewables are challenged by way of appeal. This in turn means that at the end of the day, many permits will either be quashed or the cases remanded by the appeal body or court back to the administration with instructions on how the EIA must be amended. In this way, the RED III preclusion provision may be a recipe for delaying and prolonging the permit procedures, which is quite the opposite of the intent of the reform.

### Repowering

The new rules on “repowering” are scattered in several provisions. Different time frames are given for repowering projects in renewable acceleration areas, outside those areas, and for those which do not result in an increase of the capacity of the power plants by more than 15%. The most important rule about application for the repowering of a renewable energy plant is given in Article 16c(2), stating that if the project is subject to a screening process according to Article 16a(4), the determination of the need for a new EIA shall be limited to the potential impacts of only the change or extension as such.

In my view, this statement is not easy to understand or implement. The definition of “repowering” is very broad in RED III. For example, it seems to cover the total replacement of all wind turbines in a given area. As the first wind parks in Europe have operated for 20 years and their production capacity is rather limited, we are dealing with a rapid development in technology. In those days, wind turbines on land commonly did not exceed 150 meters in total height, as compared with today’s installations at almost 300 meters. In this situation, it is not easy to say what is the “change or expansion”.

The new location of wind turbines in a development area may also be quite different, as the modern parks contain fewer but larger turbines. In consequence, the environmental impact is different, and can be higher depending upon the area’s sensitivity. Even so, Article 16a(4) may be interpreted so as to allow in a renewable acceleration area the expansion of the projects therein, including the “highly likely” criteria for an EIA. This provision in turn can be understood in two contrasting ways. The first one restricts the use of acceleration areas, as such a plan may only cover homogenous areas where no significant impact is expected to arise, not only for the foreseeable projects, but also for their expansion through repowering. The other interpretation makes room for an even more expansive application with acceleration areas covering vast areas with different renewable energy plants and their connections, where even a total new design of the installations is allowed without an EIA. This latter understanding is of course rather extreme, but in my view it is not unrealistic in the current discourse of “green nationalism”. It may also find some support in the statements about “simplified assessments” in the preamble of Directive 2023/2413.<sup>26</sup>

One final concern should be noted about repowering. The underlying idea behind limiting the assessment of environmental impacts from the repowering of an installation is that the operator and the supervisory authorities have been informed and updated on the impacts from the existing source. The monitoring and reporting requirements may differ from one country to another, but as for Sweden, it is simply not happening. Public schemes for the control and monitoring of the state of the environment covering larger areas rarely include impacts to specific species. As for the operator’s

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<sup>25</sup> Articles 3 and 5 together with Annex IV of the EIA Directive (2001/92).

<sup>26</sup> See for example preambular points 39, 40 and 44.



responsibility to monitor the environmental effects of the permitted activity, it covers subsequent effects to the species investigated in the EIA report only when that reporting requirement has been clearly stated in the conditions. Such conditions in permits for wind farms are rare, at least when it comes to long-term effects. Consequently, when a permit-holder applies for an expansion or change in an activity, there is little or no knowledge about what has happened since the first permit application and EIA were discussed. However, this is not a phenomenon restricted to renewable energy installations, but is an issue for all activities with such an impact. Further, it goes without saying that knowledge about the cumulative effects on the environment from renewables and their connections to the grid, forestry, roads, mines, and other such operations is non-existing. If the situation is similar in other countries, this is something that needs to be considered when discussing “administrative barriers” to the repowering of renewables. In this context, it may be noted that this relaxed attitude to the following up of long-term effects on protected habitats and species is not in line with EU nature protection directives.

### **Time limits**

RED III introduces strict time frames for permit procedures. As a general rule, an application must be confirmed or dismissed by the permit authority within 30 days if the project is located in a renewable acceleration area, and within 45 days in other cases. The time frame for the permit procedure within an acceleration area is 12 months if the project is on land, 24 months at sea, and 6 months for repowering. Outside those areas, it is 24 months on land, 36 months at sea and 12 months for repowering. In all cases, the time frame for the permit procedure may be extended by 6 more months if this can be duly

justified on the grounds of “extraordinary circumstances”.

To begin with, these time frames may seem short as the permit procedure includes all relevant assessments and evaluations for the project (Article 16(1)). However, as the counting of time starts when the application is complete and ends when the permit authority issues the final decision, the time frames will probably not pose a great challenge to most Member States, at least not for those with an integrated environmental procedure. As for the systems where many separate permits are required for a renewable energy project, the time frames may seem tight and will probably require a certain integration. In my view, this is a positive development from an environmental perspective. On the other hand, it should also be noted that a developer is not always willing – and sometimes is not even able – to apply at the outset for all permits for a project. This may for example be the case concerning the building of a wind park and its subsequent connection to the electric grid. It is reasonable to believe that in those cases, the attitude of the developer remains decisive. However, the time limit for accepting the application may prove counterproductive. It is a common feature in environmental procedure that the project developer – intentionally or not – submits an application which has some or even many flaws. The idea behind this is to cause the permit authority to issue an order for amendments to the application, which of course is very informative and has a guiding effect on the proceedings to follow. A tight time frame for confirming an application may therefore encourage the authority to dismiss the application right away without any such order. Alternatively, it may lead the permit authority to accept an inadequate application which is ultimately quashed on appeal. It is hard to see how any of these results would be beneficial, either for the project developer or

for the deployment of renewables. In addition, some of the other time frames seem very short. It goes beyond my understanding how an EIA or an AIA covering the impacts on species during different seasons of the year could possibly be performed with investigations and hearings concluding within six months, which is the rule if the authority finds the “highly likely” criterion to apply in a renewable acceleration area.

Tight time frames may therefore trigger another adaptation of the national permit systems that may not have been foreseen by the EU legislator, at least in those legal systems where the EIA procedure is integrated into the permit procedure. As the time frames cover all stages of the decision-making, they may create a certain incentive for the Member States to separate the EIA procedure – which often is very time-consuming when it comes to larger and more controversial activities – from the actual permit procedure. There is nothing in the legislation that prohibits such a “Finnish solution”, namely, that there is a general requirement for an EIA for all major activities in a certain area – say a harbour – which is evaluated and confirmed by a competent body of administration separate from the permit authority.<sup>27</sup> Using this “confirmed” EIA, the project developer may thereafter apply for all permits needed for the operation, at which time the permit authority is able to restrict its evaluation of the EIA to the question of whether it suffices for the project at stake. Most importantly, this evaluation may be limited to whether there is a need for an updating of the original EIA or not. Also in this respect, there are pros and cons with the tight time frames for the environmental procedure, so that the effectiveness of this solution remains debatable.

Still another question on time frames concerns the role of the courts. According to Article

16(8), the time frames in RED III do not apply to “judicial appeals and remedies” or to any “other proceedings before a court or tribunal”. In Sweden however, it is the environmental courts which issue integrated environmental permits for large scale industrial installations and water operations. This solution is unusual within the EU and quite odd, as seen in the case *Djurgården-Lilla Värtan* from 2009 (C-263/08). Here, the CJEU struggled to understand that Swedish environmental courts are permit-issuing bodies in the first instance, finally stating that they did so “exercising administrative powers”.<sup>28</sup> It remains to be seen whether this system will survive the demands for time frames in the environmental procedure and other requirements of EU law. Even though Sweden is alone in the EU having courts with jurisdiction to issue environmental permits in the first instance, other national courts may have similar functions for parts of what are regarded as “all relevant permits” according to Article 16(1). Especially concerning access to land and water, compensation and similar matters, this may be a more common solution in several Member States. As courts cannot be ordered by the administration to undertake a certain action in individual cases, such decision-making must be removed from the permitting procedure time frames. Alternatively, all such decision-making and its associated time frames would have to be transferred to the administrative level.

#### **Overriding public interest presumption and “deliberate” killings/disturbances criterion**

Two of the main features of RED III directly target the interpretation of the nature directives of EU law. Both have general applicability, covering projects inside and outside renewable acceleration areas. First, according to Article 16f, renewables are presumed to have overriding

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<sup>27</sup> See (footnote 5), section 2.3 and 3.

<sup>28</sup> C-263/08 *Djurgården-Lilla Värtan* (2009) para 37.

public interest in serving public health and safety when balancing different interests under the Birds Directive (2009/147), the Habitats Directive (92/43), and the Water Framework Directive (2000/60). Further, when appropriate mitigation measures have been prescribed for a renewable energy project, killings and disturbances of species resulting from the permitted activity are regarded as not being “deliberate”. In this respect, the provisions differ somewhat for permits inside (Article 15c) and outside (Article 16b) the acceleration areas, but the essence is the same. Such killings and disturbances will consequently not be in breach of either Article 5 of the Birds Directive (2009/147) or Article 12 of the Habitats Directive (92/43). Also, when mitigation measures have not been widely tested, they may be used in pilot projects for a limited period of time. In any event, according to both Articles under RED III, the Member States are obliged to undertake appropriate monitoring of the effects on the species and must prescribe further measures if required.

These features of the reformed RED III have been welcomed with enthusiasm and great expectations from the wind industry and other elements of the renewable business sector.<sup>29</sup> However, I am not convinced that new rules will have any substantial effect on the application of the species protection provisions in the three directives. To begin with, it is worth noticing that none of the three directives has been changed. Concerning the overriding public interest rule, it is admittedly difficult to assess how it will play out in the water regime, as Article 4(7) of the Water Framework Directive (2000/60) is a rule about the balancing of different interests. However, as for the derogation rules in the EU nature direc-

tives, it certainly does not suffice that an activity is of overriding public interest, as both Article 9(1) of the Birds Directive (2009/147) and Articles 6(4) and 16(1) of the Habitats Directive (92/43) combine this criterion with a requirement that there be no alternatives. As for the Habitats Directive, the derogation ground is applicable only when there are “imperative reasons” of overriding public interest, an additional requirement lacking in Article 16f. Further, Article 16(1) of RED III adds that the derogation may not be detrimental to the maintenance of the population’s favourable conservation status, something that also is implicit in the two other derogation grounds. As noted, many renewable energy projects, and especially wind farms, are widespread activities, where alternative locations often are available. In national case-law, windfarms therefore are rarely approved in areas where they cause any substantial harm to species, even if there is an important public interest such as energy supply in the region. One can expect that the courts will be even more sceptical in situations in which the environmental impacts of the project have been poorly investigated. An exception may however be made for certain locations at sea which are hard to replace with others; the overriding public interest rule for renewables may therefore be more decisive in those areas. Further, Article 16f states that all renewables are presumed to be of overriding public interest. Even though the provision thus is applicable to all such installations – even very small ones without any real consequence – we may assume that the courts will in many cases simply rebut the presumption in line with existing case-law on the matter. This remains however to be seen.<sup>30</sup>

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<sup>29</sup> WindEurope: Overriding public interest is essential to the expansion of renewables (2022-10-14); “Overriding public interest” is essential to the expansion of renewables | WindEurope.

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<sup>30</sup> Melina Malafry gives a thorough analysis of the issues related to the application of this provision in relation to the nature directives in the article mentioned in footnote 4, see section 5.3.3 (p. 176 ff.).

Something similar can be said about the “deliberate” criterion, at least concerning wind energy projects. In my view, the rules in Article 15c and 16b align with how most Member States handle this criterion in the permitting of wind farms.<sup>31</sup> As for the protection of birds, certain locations of wind turbines are not accepted due to their proximity to the nests, flight routes or foraging areas of those species that are regarded as sensitive in this respect, such as birds of prey, other slow-flying species, forest hens and certain waterfowl. In some parts of Europe, instruments such as DT Bird are used to detect nearby birds and activate warning sounds or the stoppage of the turbine in case of a collision risk.<sup>32</sup> For the protection of bats, a common condition is to prescribe the use of Batmode techniques, that is to close down the turbine during sunset and sunrise during the summer and at certain wind conditions and temperatures. The idea of using these mitigation measures is to avoid coming into a derogation scenario, as the rules on this in the EU nature directives are strict and not really relevant for widespread activities such as wind energy projects. Against this backdrop, I would argue that the rules on deliberate killings and disturbances of species merely codify what is already in place in most Member States.

It must also be mentioned that there are also aspects of RED III which are positive for species protection. Most importantly, in several places it is emphasised that the control and monitoring of the effects of the renewable installations are crucial for the application of the new rules. In sum therefore, one may argue that the provisions

about overriding public interest and deliberate killings/disturbances will not be detrimental to the protection of European biodiversity.

### **Public participation and access to justice**

The new system of renewable acceleration areas in RED III also raises important questions concerning public participation and the principle of legal protection under EU law. Point 30 in the Preamble of Directive 2023/2413 states that Member States should take appropriate steps to promote participation in order to increase the public acceptance of renewable energy projects. The Preamble also notes that the Aarhus Convention remains applicable in the EU. Preamble point 20 of RED III states that broad public acceptance of the deployment of renewable energy should be taken into account when adopting rules for simplifying and shortening permit-granting procedures. This is developed in Article 15d of RED III, where it is made clear that public participation regarding the plans designating acceleration areas shall be both direct and indirect in line with the consultation order in Article 6 of the SEA Directive (2011/42). This requires that a draft of the plan to be adopted and the environmental report shall be made available for the public at an early stage in the decision-making process in order to afford an effective opportunity within appropriate time frames for the public to express opinions. The public is defined in line with the Aarhus Convention and the Public Participation Directive (2003/35), namely those who are affected by or have an interest in the decision-making, including their organizations, such as environmental NGOs.

All this seems to be fine from a public participation aspect, but how will it play out in practice? To begin with, individuals who might be affected by projects within a renewable acceleration area will have the opportunity to participate in the decision-making process by way of

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<sup>31</sup> According to the study performed by Backes & Ackerboom (see footnote 23, this technique was applied everywhere except for The Netherlands.

<sup>32</sup> Rydell, J & Ottvall, R & Pettersson, S & Green, M: *The effects of wind power on birds and bats – an updated synthesis report 2017*. Vindval report 6791, December 2017; FULL-TEXT01.pdf (diva-portal.org).



making addresses to the authorities and taking part in hearings and other proceedings. In this context, it should be emphasised that the case-law of the CJEU remains relevant regarding the requirements for such participation to be effective.<sup>33</sup> However, access to justice to challenge an adopted plan will rarely be afforded, as those having an interest or enjoying a right seldom can be defined as early as this stage. They will instead be left to appeal the permit for the project after a process where the time frames have been short and most important parameters such as the location of the project have already been set. This may prove challenging.<sup>34</sup>

The situation for the ENGOs is different. To begin with, the organizations will have the same opportunities as individuals to participate in the decision-making procedure. As for access to justice, they are in a better position. A decision to adopt an acceleration area clearly concerns environmental matters and will be regarded as appealable under the principle of legal protection in EU law, as the plan has a binding effect on subsequent permits.<sup>35</sup> But even if standing most

likely is not a problem in the Member States, the question arises about what can actually be challenged in this stage of the decision-making. Clear conflicts with other interests will of course be justiciable, as well as grossly insufficient conditions on mitigation measures and very poor investigations and assessments. But many parameters need to be seen in their actual context in order to evaluate the project's impact on protected interests such as those of species. It remains to be seen what the substantive outcome of such a legal action would be.

And yet, there is an “elephant in the room” and that is the Sami people, being the only indigenous people on the European continent.<sup>36</sup> Their land- and cultural rights are protected by an array of international and European instruments, such as the UN Convention on Civil and Political Rights (ICCPR), the UN Convention on anti-discrimination (ICERD), and the European Convention on Human Rights and Freedoms (ECHR). The Sami reside in the northern parts of Scandinavia and Karelia, that is in Norway,<sup>37</sup> Sweden, Finland and Russia, all countries bound by these international obligations. The Sami's traditional enterprise of reindeer herding is heavily impacted by modern developments such as mining, roads and railroads, forestry, tourism, and – not least – wind farms. In recent years the treatment of the Sami people has raised international attention, and criticism from different committees under such agreements has been common.<sup>38</sup> Several Sami villages have also been

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<sup>33</sup> See for example C-826/18 *LB and others* (2021) para 43 and C-280/18 *Flausch* (2019) paras 45–54 about the information duty towards the public concerned, and C-474/10 *Seaport* (2011) para 46 about the requirement that sufficient time to evaluate the envisaged plan or programme and the environmental report shall be afforded.

<sup>34</sup> For an illustrating example, see the case *Karin Andersson v. Sweden* in the European Court of Human Rights (ECtHR 2014, case No. 29878/09).

<sup>35</sup> In order to illustrate the development in EU law on the principle of legal protection in environmental matters, compare the old case C-236/92 *Comitato* (1994) on waste plans and the newly decided C-873/19 *Umwelthilfe v DE* (2022) and the case-law mentioned therein, see also Darpö, J: *Can nature get it right? A study on the Rights of Nature in the European context*. Report to the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, Brussels 2021-03-01, section 4; CAN NATURE GET IT RIGHT? A Study on Rights of Nature in the European Context | Think Tank | European Parliament (europa.eu).

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<sup>36</sup> Of course, indigenous peoples reside in other places subject to some level of European governance, such as Greenland and the French “départements d'outre-mer”, for example, French Guiana in South America.

<sup>37</sup> As noted, Norway is a party to the joint European energy market and bound to the EU legislation through the EEA agreement.

<sup>38</sup> In the beginning of 2024, the Advisory Committee under the Framework Convention for the Protection of National Minorities issued its 5<sup>th</sup> report on Sweden, criti-

successful in their actions in courts, at least in Sweden and Norway. The Norwegian Supreme Court in 2021 quashed the permits for Europe's two largest wind farms (already in operation) with reference to breaches of Sami cultural rights under Article 27 ICCPR.<sup>39</sup> In Sweden, the Supreme Court declared that certain legislation on hunting infringes upon the Sami land-use rights and therefore is illegal. The court further declared that the Indigenous and Tribal Peoples' Convention from 1989 (the so-called ILO 169) is an international standard to be respected by Sweden, even though the country has not ratified this instrument.<sup>40</sup>

Very little of this is visible in the EU legislation under the Green Transition. In RED III, the Sami people are not even mentioned. The Critical Raw Materials Act (Regulation 2024/1252, CRMA) contains an obligation about meaningful consultation with local communities – including indigenous peoples – in line with Union legislation and international standards (Preamble points 17 and 20, Articles 6 and 7)). To that end, a plan for such consultation must be provided, including proposed measures dedicated to the prevention and minimisation of adverse effects on these interests. These are rather vague requirements and it remains to be seen if they have impact on the national permit decision-making processes. The EU Parliament voted for a strengthening of that requirement to include the principle of Free Prior and Informed Consent, but this reference disappeared during the trilogue. Apparently, the Swedish and Finnish

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cizing the Government for its failure to afford the Sami people influence over industrial developments in the reindeer herding areas; 1680ae851a (coe.int).

<sup>39</sup> The Fosen judgement; Licences for wind power development on Fosen ruled invalid as the construction violates Sami reindeer herders' right to enjoy their own culture (domstol.no).

<sup>40</sup> The Girjas judgement; The "Girjas" case – press release – The Supreme Court (domstol.se).

governments have not been too keen on defending Sami rights in the EU negotiations. Unfortunately, this is typical of the political attitude towards the solving of conflicts of interest concerning the Green Transition. Another apparent example concerns local opposition to wind farms – quite strong in many Member States – which is equally invisible in the new legislation. Experiences from both Norway and Sweden show that one cannot neglect the role of the municipalities when it comes to local acceptance of this type of development.<sup>41</sup> This political abdication is worrying as it leaves it to the courts to step in to resolve such conflicts on a case-by-case basis. This in turn, is a sure recipe for the fuelling of the conflicts, which is what we need the least in times of energy crises. Or to phrase it more eloquently in Franz Timmermann's words: "*If the transition will not be just, there will be no transition*".

### Systemic issues

Finally, the European energy crises have triggered quite a few questions of a more systemic nature on the encounter between the interests of green transition and those of environmental protection. One obvious example is the sharply increased use of the derogation ground for "exceptional cases" in Article 2(4) of the EIA Directive (2011/92).<sup>42</sup> The strong drive for centralisation and streamlining of national permit pro-

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<sup>41</sup> See Darpö; *Should locals have a say when it's blowing?* mentioned in footnote 22, also Gulbrandsen, L & Jackson Inderberg, TH & Jevnaker, T: *Is political steering gone with the wind? Administrative power and wind energy licensing practises in Norway*. Energy Research and Social Science 74 (March 2021).

<sup>42</sup> Between May 2017 and November 2021, one such notification was made to the Commission. Thereafter, between August 2022 and August 2024, 41 notifications have been made from different Member States, mostly covering LNG terminals and pipelines, natural gas pipelines and irrigation projects; <https://circabc.europa.eu/ui/group/26370f9e-245c-4c09-8a75-68655a74875b/library/7da90f54-cc36-44b4-8c78-d2435f1d44c8/details>.

cedures is another. The increased use in recent years of EU regulations instead of directives in this field of law also raises interesting questions. On the one hand, EU regulations are directly applicable and therefore are a more efficient means for the introduction of new legislation in the Member States. On the other, there is also a tendency to formulate provisions in new regulations more vaguely than in directives, leaving it open for Member States to apply a national understanding of the common rules. The Emergency Regulation (EU) 2022/2577 is a showcase in this respect. Also, there is an ongoing debate on competence concerning the adoption of the Regulation. It is questioned whether Article 122 TFEU can be used as legal basis for this kind of regulation, but also whether the legislation is not in breach of Articles 191 and 194 TFEU.<sup>43</sup> As the legal basis for Directive 2023/2413 is Articles 114, 192 and 194, these issues are not directly applicable to RED III. But as for the content of the reformed directive and its relation to the requirements in existing environmental law, such as the nature directives, several questions remain. Can one really introduce a refreshed understanding of existing legislation and new provisions in EU law without also changing those provisions that are impacted, and how does this harmonise with the existing understanding in the case-law of the CJEU? This is a valid question concerning some provisions in RED III, such as the preclusion provision compared with Article 5(2) of the EIA Directive (2011/92). How this conflict plays out will be interesting to follow, but as I said in the introduction, for now we have to wait until we

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<sup>43</sup> T-534/23 *Föreningen Svenskt Landskapsskydd and Others v Council* and T-535/23 *CEE Bankwatch Network and Ökobüro v Council*, for a general introduction to this discussion, see Helle Tegner Anker (University of Copenhagen); *EU competence and the energy crises*. Environmental Law Lectures Series, Maastricht University 2023-05-04; Environmental Law Lecture Series by Prof. Helle Tegner Anker – YouTube.

have seen more of the implementation of RED III in the Member States and the subsequent case-law from the national courts and the CJEU.

## 5. Concluding remarks

As almost always, there are pros and cons to the introduction of any new regulation on environmental issues. On the one hand, planning is an instrument well suited for widespread land-use activities such as renewable energy installations. In this respect, RED III is a step in the right direction towards an effective resolution of the conflicts of interest that come with the development of renewable energy sources. Planning may also provide for a more comprehensive approach to biodiversity issues in this context. Some of the new provisions for streamlining the permit procedures are also welcome and will contribute to the Green Transition in Europe. On the other hand, RED III is to a certain extent coloured by haste and a too close relationship between the legislator and those who are expected to be regulated. Simply by taking for granted the background description provided by industry, the approach of the reform in some aspects has become one sided. This is the background to why some of the provisions will function less well within the national permit regimes on renewables, not only concerning biodiversity issues but also in relation to the effectiveness of the procedure as such. These problems are not confined to the renewable acceleration areas, but will certainly also occur in the ordinary permit procedure. The combination of short limits counted from when the application is regarded by the permit bodies to be “complete” and the requirement to give the public concerned “early and effective opportunities to participate” in the environmental decision-making procedures according to the EIA Directive may prove especially challenging. Also the level of detail of the new rules may be problematic when the new rules

are to be implemented into existing procedural orders in the Member States. In my view, a little more systematic and procedural analysis and a little less superficial policymaking would have made a difference in this respect. Even so, I am not overly concerned about the outcome of RED III in those Member States with legislators loyal to the EU system as a whole, including our international obligations to biodiversity and access to justice. More troublesome is how this new pack-

age will play out in the Member States where what one may call “climate nationalism” has a strong voice. One may reasonably fear that the focus in the implementation in those countries will be on “full speed ahead” with any kind of development and the lessening of any kind of administrative burdens. If that will be the case, the reform may be characterised as the sacrificing of biodiversity on the Green Transition altar.