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Renewable Energy Activities – Overriding the Interest of Biodiversity?

1 Introduction

Energy has been elevated to be a top priority for Sweden and the European Union. As a result of the new geopolitical landscape, altered by Russia's invasion of Ukraine and a period of very high energy prices around Europe, the EU has identified a need to urgently and rapidly transform the European energy system for energy independence. In order to achieve energy independence, the EU suggests that Member States have to deploy more renewable energy and increase energy efficiency.[1]

Deployment of renewable energy activities,[2] in addition to a climate strategy, are now considered crucial for *energy security* in Europe. As a result, the EU Commission released a Communication on REPowerEU that advised how its Member States could become energy independent.[3]

[1] The idea is that this transition will reduce emissions, reduce dependency on imported fossil fuels and provide affordable energy prices to European citizens and businesses across all sectors of the economy, see European Commission (2022) Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, COM(2022) 222 final 2022/0160 (COD), 18 May 2022.

[2] "Renewable energy activities" are used in this article as a concept for all renewable energy installations, storage and grid infrastructure that are necessary for the installation of more renewable energy.

[3] The Commission (2022) Communication from the Commission to the European Parliament, The European Council, The Council, The European Economic and Social Committee and the Committee of the Regions, REPowerEU: Joint European Action for more affordable, secure and sustainable energy, COM(2022) 108 final.

The Communication notes that many of the barriers (46%) were due to lengthy and complex administrative procedures, in addition to grid issues (particularly for wind power and photovoltaics).[4] Therefore, the EU Commission's main recommendation for energy independence was to improve processing time of legal permits for renewable energy activities.

The EU Commission therefore suggests amendment of the Renewable Energy Directive.[5] The proposal describes how Member States should work towards faster permit processing for renewable energy activities.[6] It suggests that the goals for 2030 should be amended to be a 45% share of renewable energy by 2030,[7] and that Member States should be required to "map" areas that are suitable locations for renewable energy activities[8] and identify "go-to areas" from that mapping process.[9] The planning activities involved in determining suitable locations should include a strategic environmental impact assessment,[10] as well as identifying appropriate permit conditions and suitable mitigation measures for those specific areas.[11] As a result, a detailed plan is required, with the implication that proposed renewable energy activities have been identified for each area. These planning activities require a detailed environmental impact assessment for specific projects at an early stage, which may be difficult to achieve as developers are not likely to be involved that early in the process.

Controversially, the proposal suggests changes that specify, in accordance with the proposed Article 16(a)(3), that there is no longer a require-

[4] Technical support for RES policy development and implementation – Simplification of permission and administrative procedures for RES installations ("RES Simplify"). https://data.europa.eu/doi/10.2833/239077 (2023-01-01).

[5] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources. Hereafter referred to as the "Renewable Energy Directive".

[6] European Commission (2022), Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, COM(2022) 222 final 2022/0160 (COD), 18 May 2022. Hereafter referred to as "the Proposal".

[7] Article 1(2). Proposal to amend Article 3(1) of the Renewable Energy Directive.

[8] Article 15(b) of the Proposal.

[9] Article 16(a) of the Proposal.

[10] Article 15(c)(2) of the Proposal that refers to 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 programs on the environment (SEA-Directive).

[11] Article 15(c)(1)(b) of the Proposal.

ment to compose an environmental impact assessment for renewable energy projects in the individual permit process. In addition, in accordance with the proposed Article 16(d), renewable energy activities are presumed to be of *overriding public interest* and *serving public health and safety*.[12] The presumption of the status of *overriding public interest* is welcomed by the wind power industry in Europe, which considers the status of overriding public interest to be essential to the expansion of renewables. *Wind Europe* suggests that it would speed up the permit processes and ensure a better working balance between the expansion of renewables and, for example, biodiversity.[13]

However, despite the increased urgency, the EU Commission has not suggested that other environmental interests are no longer relevant. Indeed, the Commission emphasizes that Member States should ensure that the energy transition needed to reach the 2030 renewable energy target are in line with other factors such as the targets of the EU Biodiversity Strategy.[14] Hence, the Commission has not suggested that there should be any weakening of the EU nature protection directives in order to fulfill the renewable energy goal; rather, that Member States should better plan to locate renewable energy activities in suitable locations so that, for example, biodiversity is not neglected.

One may worry that promoting a rapid energy transition will come at the cost of biodiversity protection. The main purpose of this article is to analyze whether the proposal impacts the legal protection of biodiversity when removing the requirement for individual environmental impact assessments and presuming that all renewable energy activities are of *overriding public interest*. In addition, this article also explores whether

[12] In this article the former concept will primarily be analyzed. Hence, what is of *overriding public interest*. In addition, in areas that are not "go-to areas" is that an action should not be considered to be *deliberate* if appropriate mitigation measures have been adopted. This concept is neither discussed in this article, it requires its own paper. The proposals of the status of overriding principle and the interpretation of *deliberate* are also part of the new Council Regulation that has been proposed during the time writing this article. See the EU Commission (2022), *Proposal for a Council Regulation laying down a framework to accelerate the deployment of renewable energy,* COM(2022) 591 final (the Regulation proposal). In this article only the Proposal of the amendments in the Renewable Energy Directive is discussed.

[13] See for example Wind Europe (2022), *Overriding public interest* is essential for the expansion of renewables: https://windeurope.org/newsroom/news/overriding-public-interest-is-essential-to-the-expansion-of-renewables/ (2022-12-27).

[14] See COM(2022) 108 final, p. 9.

the proposal of presuming that *all* renewable energy activities are of *overriding public interest* aligns with the subsidiarity principle in Article 5(3) of the TEU.

This article proceeds by presenting a background to the relevant EU legal framework in relation to renewable energy and biodiversity in the EU. Thereafter, the proposal for amendments in the Renewable Energy Directive are presented with regards to planning and the changes in the individual permit procedure. Afterwards, the proposal is analyzed with regards to its effect on biodiversity protection and the proposal's legality.

2 Political background – Goal of a sustainable energy transition in the EU

A transition to a *sustainable* energy system in order to deal with climate change has long been identified as the key strategy to reduce carbon emissions in the EU.[15] Such a transition requires more than renewable energy activities to be deployed. The energy activities also have to be deployed at a location and in a way that minimize their impact on the surrounding environment in order for the energy system to be considered sustainable. *Biodiversity* may be affected if the renewable energy activity is located in an area that is also an important habitat or location for certain species.[16] *Culture value* may also be affected if for example solar cells are installed on buildings or in areas that are protected due to their cultural value.[17] Hence, sustainability is much more than climate. In the Rio 2030 sustainability goals, "climate action" (number 13) and "affordable and clean energy" (number 7) are only two of the 17 sustainability goals listed.

[15] For a brief history of the renewable energy policies, see: Malafry, M. (2016) *Biodiversity protection in an aspiring carbon neutral society – The Relationship between renewable energy and the protection of biodiversity in an EU context*, p. 13–17. See for example: COM(2011) 885 final, p. 4 et seq. In all the scenarios the analysis shows that renewable energy will constitute the biggest share of energy supply in 2050. See also European Commission, Delivering the European Green Deal, see: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en (2023-01-01). For a list of documents and legislation with regards to energy, see: https://eur-lex.europa.eu/content/summaries/summary-18-expanded-content.html (2023-01-01).

[16] Malafry, M. (2016).

[17] Malafry, M. (2021), Skyddet av kulturvärden i omställningen till ett koldioxidneutralt samhälle: – En studie av det rättsliga skyddet av kulturvärden mot installation av solceller i plan- och bygglagen respektive kulturmiljölagen, *NMT,* Vol. 2020(2), pp. 77–98.

However, there are 15 other sustainability goals that should be fulfilled by 2030; for example, "life below water" (number 14) and "life on land" (number 15) – which both aim at protecting biodiversity. These goals should simultaneously be fulfilled as states undertake their climate action.[18] The General Assembly of the UN calls for "holistic and integrated approaches to sustainable development that will guide humanity to live in harmony with nature and lead to efforts to restore the health and integrity of the Earth's ecosystem."[19]

At the EU level, the EU Commission has long acknowledged the relationship between biodiversity and climate change. In 2001, the Commission acknowledged that both climate change and loss of biodiversity are two of the greatest threats to sustainable development,[20] and that a new approach to policy making is needed. A more coordinated policy approach was requested, where long-term perspectives are presented for win-win situations.[21] The importance of tackling both issues in the same context was also expressed:

> "We cannot halt biodiversity loss without addressing climate change, but it is equally impossible to tackle climate change without addressing biodiversity loss. It is therefore essential that climate change policy is fully complementary with biodiversity policy."[22]

The EU Commission has also pointed out that even though renewable energy is more environmentally friendly than fossil fuels, it is not necessarily without impact on biodiversity.[23]

In the Green Deal it is also emphasized that nature is an important part that needs to be addressed when transitioning to an EU that is carbon neutral. The Green Deal also claims that "nature regulates the climate, absorbs and stores carbon, and provides valuable renewable resources for the bio-economy. Restoring nature and enabling biodiversity to thrive

[18] RIO 2030 goals, for more info see: https://sdgs.un.org/goals (2023-01-01).

[19] See the UN General Assembly (2012), *The future We Want*, A/RES/66/288, section 40.

[20] See Commission Communication to the Council and the European Parliament (2001), *A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*, COM(2001) 264 final, p. 4.

[21] Ibid, p. 5.

[22] The European Commission (2009), *Environment: Commission calls for a shakeup in EU biodiversity policy,* IP/09/649, p. 5.

[23] COM(2012) 271 final, p. 11.

again offers a quick and cheap solution to absorb and store carbon."[24] In addition, the EU has a strategy for biodiversity. Earlier, the goal was to halt the loss of biodiversity by 2020.[25] The Post-Covid biodiversity strategy stresses that Europe's biodiversity should recover by 2030, "for the benefit of people, climate and the planet."[26] There is also a proposal for an EU directive on restoration of biodiversity.[27] As a solid base there are also EU directives with strong provisions protecting species and habitats at the EU level through the Habitats Directive, Birds Directive and the Water Framework Directive.[28] Any reason to see the loss of biodiversity less urgently because of the changed geopolitical landscape due to the Russian invasion of Ukraine has not been expressed. The loss of biodiversity is still alarming.[29]

While wind power is used as the primary example in this article, the implications are general in the sense that the concept of overriding public interest applies to *all* renewable energy activities. The main focus will be the provisions on habitat protection through the Natura 2000-network and strict species protection in the Habitats Directive.[30] That said, the provision under discussion may also be valid for any discussion on the meaning of the status of overriding public interest when applied to other nature protection directives.

[24] European Commission (2019), Communication from the Commission, *The European Green Deal*, COM(2019) 640 final, see also: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en (2023-01-01).

[25] See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions (2011), *Our life insurance, our natural capital: an EU biodiversity strategy to 2020***,** COM/2011/0244 final.

[26] European Commission (2019), Communication from the Commission, *The European Green Deal*, COM(2019) 640 final.

[27] The European Commission (2022), *Proposal for a Regulation of the European Parliament and the Council on nature restoration*, COM(2022) 304 final.

[28] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive), Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (the Birds Directive), 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 (the Water Framework Directive).

[29] See for example WWF (2021), *Living planet report*. Can be found at: https://livingplanet.panda.org/en-US/ (2023-01-01).

[30] The provisions on habitats protection and strict species protection will be presented in chapter 4.

3 The EU legal background

3.1 The EU competence in the field of energy and the environment

The Member State has *shared competence*[31] to adopt measures and policies in the areas of energy and the environment.[32] The competence of the EU is conferred from the Member States to the EU. In Article 4 of the Treaty of the European Union (TEU), it is stated that competence not conferred to the EU remains with the Member States.[33] The competence for the EU to legislate in the field of environment, energy and energy infrastructure, are specified in articles 192, 194 and 172 TFEU.

It is not completely clear where such competence begins and ends when the EU has shared competence. The principles of subsidiarity and proportionality guide the exercise of the EU competence. The Subsidiarity Principle implies that the EU should only act when the goals of its actions are better achieved at EU level than by individual actions by the separate Member States.[34] In accordance with Article 5 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, proposals of European legislative acts shall take account of the need for any burden to be minimized (whether financial or administrative) that are falling upon for example the regional or local authorities in order to achieve the intended objective.

If a Member State considers the EU to not have respected the principle of subsidiarity, it can bring an infringement procedure to the CJEU under Article 263 TFEU.[35] However, though the principle of subsidiarity

[31] See Article 2(2) TEU.

[32] The legal bases for energy is Article 194 TFEU and Article 192 TFEU with regard to the environment. The categories of shared competence are the general provision and are listed in Article 4 TFEU, see list in Article 4(2) TFEU. However, the list is not to be considered exhaustive; see Craig, P. (2010), *The Lisbon Treaty: Law, Politics, and Treaty Reform*, p. 168. The EU can also have *exclusive competence* to adopt policies in certain fields. In accordance with Article 3 TFEU.

[33] The principle of conferral is limited by the specific competences conferred upon it in the Treaties; see Article 5(2) TEU.

[34] See Article 5(3) TEU. The article is a principle about the exercise of competence. When the EU takes action, it needs to show that the conditions of Article 5 are fulfilled, for every single measure. For a more in depth discussion on the meaning of the subsidiarity principle, see Chalmers, D. et al. (2019), *European Union law: cases and materials*, p. 364.

[35] See also Craig, P. and Búrca, G. (2020) *EU Law – Text Cases, and Materials*, p. 127.

has been invoked before the Court, no annulment of EU measures or legislations has yet been undertaken.[36]

The Proportionality Principle stipulated in Article 5(4) TEU also has to be considered. It suggests that the type of measure the EU chooses must be proportional, or rather that the measure "shall not exceed what is necessary to achieve the objectives of the Treaties".[37] In the context of EU legislative powers, the principle of proportionality describes how far reaching an EU policy or action can be without impairing too much on the Member States' rights.

It can be argued that it is better to have a common EU legislation in the field of climate change due to its nature. Greenhouse gases are a global pollutant whose consequences know no national borders.[38] The damage is not distributed fairly, as some countries are more hurt by climate change than others. However, policies to combat climate change could be more efficient if companies and individuals are playing by the same rules in the EU. Also, in general, in order to achieve a high level of environmental protection in the EU, it might also be better for the EU to handle environmental policies that address environmental problems of a more local character, as it would ensure a minimum environmental standard for certain issues.[39]

However, from a constitutional perspective, renewable energy is a more sensitive issue than pure environmental protection, which implies that the EU does not have as clear a mandate to act. Energy issues have long been of national concerns. It has been discussed in the literature how much the EU can legislate in the field of energy due to the wording of Article 194 TFEU.[40] In this context, the current proposal may also be questioned on that basis, but it will not be discussed further here. Instead, the focus is whether the specific provision of giving *all* renewable energy activities the status of overriding public interest is aligned with the principles of subsidiarity and proportionality.

[36] See Chalmers, D. et al. (2019), *European Union law: cases and materials*, p. 364.

[37] See Article 5(4) TEU, For more info on the principle, see Usher, J.A. (1998), *General Principles of EC Law*, p. 37.

[38] See Krämer, L. (2012), *EU Environmental Law*, p. 18.

[39] See De Sadeleer, N. (2012). Principle of subsidiarity and the EU environmental policy. *Journal for European Environmental & Planning Law*, *9*(1), pp. 64–65.

[40] For a further discussion see Malafry, M. (2016), pp. 61–67.

3.2 Relationship between legislation of renewable energy and biodiversity at the EU-level

No formal hierarchy exists between different legislative acts at the EU-level.[41] In Article 7 TFEU it is codified that EU legislation should be consistent with other EU law. In the renewable energy context, this provision implies that the Renewable Energy Directive should be consistent with other EU law, including the nature protection directives. Article 7 TFEU demonstrates that the EU legislative acts should be construed in a way that enables the various acts to function consistently.[42] In the TEU it is established that the EU shall have a single institutional framework that ensures consistency, effectiveness and continuity of EU policy and actions.[43] The Renewable Energy Directive specifies that "the coherence between the objectives of this Directive and the Community's other environmental legislation should be ensured" during the planning or permitting procedures for renewable energy installations.[44] This provision implies that the environmental directives that protect biodiversity shall be accounted for even though reaching objectives with such legislation may be at odds with attaining the goals set out in the Renewable Energy Directive.

In EU case law – the *Puglia Case*[45] – the legal relationship between biodiversity protection and the promotion of renewable energy was indirectly discussed. The Court was asked for a preliminary ruling concerning the interpretation of the Habitats, Birds and the Renewable Energy Directive.[46] The referred question was whether a national provision, generally prohibiting wind power production (not for self-consumption) in

[41] However, regulations, directives and decisions may in addition to legislative acts also be "delegated" or "implementing" acts. These sources also form a hierarchy where the legislative acts are at the top of the hierarchy. For a description, see Article 290–291 TFEU; and Craig, P. and Búrca, G. (2020), *EU Law – Text Cases, and Materials*, pp. 145–151.

[42] In the literature it is expressed that "consistency implies that two rules are consistent when they produce the same result on the same facts or raise similar legal issue. Moreover, the notion of consistency is concerned with symmetry of all components of a given legal system"; see Herlin-Karnell, E., and Konstadinides, T. (2012), *Cambridge Yearbook of European Legal Studies*, pp. 141–142.

[43] See Article 13 TEU.

[44] Preamble, para. 44 of the Renewable Energy Directive.

[45] See Case C-2/10, *the Puglia Case*.

[46] The older version of the Renewable Energy Directive was discussed (Directive 2001/77).

a Natura 2000 site, conflicted with EU law. The prohibition applied generally throughout the entire protected area, disregarding the various local conditions.[47] In accordance with Article 6(3) of the Habitats Directive, a conditional environmental impact assessment is required to authorize activities that are *likely* to have a significant effect on a Natura 2000 site (a so-called appropriate assessment). The specific national law that was discussed in the case was a general prohibition on wind power projects of a certain size. No prior assessment of the wind power installation was here needed, since projects of this type were generally prohibited. Hence, the specific national legislation used was more stringent than the Habitats and Birds Directives. The Court considered the more stringent national law to comply with Article 193 TFEU. However, even though it was justified by Article 193 TFEU, the law must comply with the other provisions in the same treaty. The Court discussed whether this stringent approach was in conflict with Article 194 TFEU and whether the energy objectives provided in the Directive (promoting renewable energy) should take precedence over the protection of biodiversity pursued in the Habitats and Birds Directives. The Court clarified that it was sufficient to observe the wording of Article 194(1) TFEU, which states that the EU policy on energy must "have regard for the need to preserve and improve the environment" in order to answer that question.[48] The Court thereafter concluded that the general prohibition, in view of its limited scope, could not be "liable to jeopardize the European Union objective of developing new and renewable forms of energy".[49]

Nevertheless, the Court acknowledged that the general provision still needed to be non-discriminatory[50] and to respect the principles of proportionality, as reflected both in general EU law and specific provisions in the directives under interpretation.[51] The CJEU presents arguments that the specific legislation (that forbids wind power plants not for self-consumption) is both proportionate – since there is only a limited propor-

[47] The provision was "concerning the refusal to authorize the location of wind turbines not intended for self-consumption on land situated *within the confines of the Alta Murgia national park*, a protected area classified as a site of Community importance ('SCI') and special protection area ('SPA') forming part of the Natura 2000 European Ecological Network."; see Case C-2/10, *the Puglia Case*, para. 2.

[48] See Case C-2/10, *the Puglia Case*, para. 56.

[49] Ibid, para. 57.

[50] Ibid, paras. 61–66.

[51] Ibid, paras. 72–74.

tion of renewable energy production that it impacts – and is non-discriminatory – due to wind power's specific nature. This outcome is not to say that any type of ban would be acceptable. For example, if the ban included all types of renewable energy production, it may be hard to argue that the provision would be proportionate. Also, the general prohibition would most likely not be considered proportionate if it was applicable to all Natura 2000 sites, independent on the protected habitat.

In this case, the Court suggests that the general prohibition did not jeopardize the objective of developing new and renewable forms of energy due to its limited scope. In light of the new proposal for amendments of the Renewable Energy Directive, if renewable energy activities (independent of their size) are presumed to be of overriding public interest, a general prohibition of renewable energy of any size may not have been considered legal.

4 The protection of nature in the EU

4.1 Introduction

There is strong legal protection of nature in Europe. Nature is protected through a number of directives, primarily the Habitats Directive, Bird Directive and the Water Framework Directive.[52] For the purpose of this article it is not necessary to dive into the meaning and differences of the various directives since the main purpose is to discuss one concept that is similar in all directives: overriding public interest. The provisions in the Habitats Directive will serve as an appropriate example to discuss the concept of overriding public interest, as the concept has been used mostly in that context.

The Habitats Directive aims to contribute to ensuring biodiversity through the conservation of habitats and wild animals and plants in the EU territory.[53] The Birds Directive has a similar purpose for all wild birds.[54] Both species protection and habitat protection (Natura 2000) are protecting biodiversity in the EU. The Birds Directive and the Habitats Directive respectively require Member States to create a protection

[52] See Footnote 28. There is also a proposal for a Directive on Nature Restoration, se European Commission (2022), *Proposal for a Regulation of the European Parliament and the Council on nature restoration*, COM(2022) 304 final.

[53] Article 2(1) of the Habitat Directive.

[54] Article 1 Bird Directive.

system for all wild birds under the Birds Directive and for species listed in Annex IV of the Habitats Directive (species protection).[55] Article 5 of the Birds Directive and Article 12 in the Habitats Directive contain the relevant prohibitions.

There is also a requirement for Member States to protect important habitats for different species and important habitat types listed in Annex I and Annex II of the Species and Habitats Directive (Natura 2000) and Article 4(1) and (2) of the Birds Directive.[56] These areas are called Sites of Community Importance (SCI) and Special Areas of Conservation (SAC) in accordance with the Habitats Directive and Special Protected Areas (SPA) if the protection covers only birds in accordance with the Birds Directive. These proposed areas are then investigated by the Commission in order to ensure that a sufficient proportion of the habitat type or the habitat of the species is protected before the Commission approves the designation of the area.[57] A short introduction below is to the provisions on strict species protection and protection through the Natura 2000 network in the Habitats Directive.

4.3 Species protection

Species protection is regulated primarily in EU directives, more specifically in Article 12 of the Habitats Directive and Article 5 of the Birds Directive, where it is stated that certain species and all wild birds occurring within the territory of the Member States are protected.[58] Article 12 of the Habitats Directive includes a strict protection system for certain listed species according to Annex 4 of the Habitats Directive. It is prohibited to intentionally kill or disturb these listed species, especially during important periods for the species (e.g., mating and wintering periods).[59] In addition, it is prohibited to intentionally destroy or collect eggs in the wild, and regardless of intent, it is prohibited to damage or destroy mating or resting sites of these listed species.[60]

[55] See Article 5 Bird Directive.

[56] Notify that it is the provisions in the Habitats Directive about Natura 2000 that are applicable in accordance with Article 7 Habitat Directive.

[57] EU Commission (2011), *EU Guidance on wind energy development in accordance with the EU nature legislation*, p. 19.

[58] Article 5 Birds Directive is referring to Article 1 in the same Directive where it is stated.

[59] See Article 12(a) and (b) of the Habitats Directive.

[60] See Article 12(c) and (d) of the Habitats Directive.

According to the Article 5 of the Birds Directive, Member States are obliged to establish a general protection system for its species. In this, the Birds Directive differs from the Habitats Directive. According to the Habitats Directive, a strict protection system must be established for *listed* species, while the Birds Directive deals with a general protection system that includes *all* wild bird species. In addition, hunting is exempt from the Birds Directive under certain conditions.[61] Similar to the Habitats Directive, it is forbidden to intentionally kill the species. It is also forbidden to intentionally disturb wild birds under the condition that the disturbance "would be significant having regard to the objectives of this Directive".[62] In the EU case *Skydda Skogen* the CJEU discusses the meaning of Article 12 of the Habitats Directive. The Court states that the prohibitions in Article 12(1)(a)–(c) are independent of the actual risk of the species' conservation status being affected, and regardless of whether the species has achieved favorable conservation status. However, the CJEU believes that the conservation status of the species is relevant when applying Article 16 of the Habitats Directive (i.e., whether exemptions can be granted from Article 12 of the Habitats Directive). The discussions with regards to species protection are on a general level, though, and in this article the scope of the provision on the prohibition will not be discussed.

5 Proposal for amendments of the Renewable Energy Directive after REPOWER

5.1 Introduction

The new amendments were proposed as a result of the changed geopolitical landscape. The deployment of renewable energy was elevated in importance for reasons of *energy security* in Europe and renewable energy activities are now presented in new light. The transition of the energy system has been an issue in Europe for some time, but primarily as a means

[61] See Article 7 Birds Directive.

[62] See Article 5(a) och (d) Birds Directive. In addition, the act has to be deliberate for the ban to kick in if the species' nests and eggs are damaged. However, no intention is required to be covered by the ban when collecting eggs in the wild. It is also prohibited to keep birds of such species that may not be hunted or caught in accordance with Article 5(b) and (c).

of reducing greenhouse gas emissions and addressing climate change. The relationship between renewable energy and biodiversity is not necessarily conflicting, and the individual goals are both important to reach a sustainable future. The question is whether the proposed amendments would fundamentally change the existing relationship, or if it is only a semantic change that may give rise to confusion on how the future energy system can develop. The proposed changes are briefly described below, and the proposal will be analyzed in chapters 5 and 6.

5.2 The proposals of mapping and planning

One of the more interesting proposals are the provisions on mapping and planning of "go-to areas" for renewable energy activities.[63] The idea is that Member States shall adopt a plan where it has identified a land or sea area where deployment of a specific type or types of renewable energy is not expected to have significant environmental impacts. Priority should be given by the Member States to "artificial and built surfaces"[64] and the areas should exclude Natura 2000 sites, identified bird migration routes (and other important areas identified), nature parks and reserves. However, if artificial and built surfaces are located there, the areas are not excluded. Member states are furthermore obliged to use "all appropriate tools and datasets", including wildlife sensitivity mapping, to identify the go-to areas."[65] Hence, the main purpose of this planning is to identify where there are areas that are not in conflict with the nature protection directives.

When areas are identified, Member States shall establish appropriate rules for the renewable go-to areas, including the appropriate mitigation

[63] A renewable go-to area is identified as "a specific location, whether on land or sea, which has been designated by a Member State as particularly suitable for the installation of plants for the production of energy from renewable sources, other than biomass combustion plants". See Article 1 of the Proposal, that suggest a new Article 9(b) with that definition.

[64] such as "rooftops, transport infrastructure areas, parking areas, 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;"

[65] Article 16(a)(1)(a) of the Proposal.

measures needed in the specific area.[66] Those rules should then be applicable for the installation of the renewable energy activity. This part of the planning is a type of pre-assessment of the individual activity in order to first avoid and to second "significantly reduce" the negative environmental impacts that may arise from the activity.[67] A strategic environmental assessment is needed in accordance with the SEA Directive.[68] Hence, in this second step, the environmental impact is further mitigated. Many sensitive areas should already be excluded in the first step. However, such an approach requires the planner to suggest the renewable energy project type, its size and complexity, and its location in the "go-to area". Here, the strategic environmental impact assessment must be very specific, in order to not miss important aspects that should have been included in the plan. However, if the strategic environmental assessment is not sufficiently specific, those activities should be identified at the screening process during the individual assessment, and if needed, the developer should be required to submit an individual environmental impact assessment.[69] Nature might therefore not be at risk. From the developer's perspective, though, there is a risk that not all aspects are covered, and they invest time and money in a location that does not enable a *fast track* – which it is advertised as.

Thus, the proposed plans that should be composed at Member State levels are to be very comprehensive, at least in theory. However, due to a lack of resources it may be a difficult task in Sweden. In reality, the plans may not be sufficiently comprehensive and detailed for the fast permit process. This planning proposal needs to be read in conjunction with the changes made in the permit procedure for renewable energy activities that are intended in go-to areas. For such projects an environmental im-

[66] Where appropriate, Member States shall ensure that appropriate mitigation measures are applied to prevent the situations described in articles 6(2) and 12(1) of Directive 92/43/EEC, Article 5 of Directive 2009/147/EEC and Article 4(1)(a)(i) and (ii) of Directive 2000/60/EC. Such rules shall be targeted to the specificities of each identified renewable go-to area, the renewable energy technology or technologies to be deployed in each area and the identified environmental impacts. Compliance with such rules and the implementation of the appropriate mitigation measures by the individual projects shall result in the presumption that projects are not in breach of those provisions without prejudice to paragraphs 4 and 5 of Article 16(a). See Article 16(b)(1)(b) of the Proposal.

[67] Directive 2001/42/EC (SEA Directive). See Article 16(a)(1)(b) of the Proposal.

[68] Article 16(a)(2) of the Proposal.

[69] See Article 16(a)(4) and (5) of the Proposal.

pact assessment at the project level is then excluded, which implies that the environmental assessment carried out at the planning stage needs to be composed at a very detailed level, providing sufficient information to securely replace the requirements that otherwise would be satisfied by an individual environmental impact assessment.

5.3 The individual assessment of renewable energy activities in go-to areas

5.3.1 Introduction

The proposed planning described above could potentially lead to a more sustainable energy system in Europe. A better planning procedure in general,[70] and for renewable energy activities in particular, is identified in the literature to be an instrument that can enable a more sustainable future.[71] The literature suggests that better planning could potentially avoid many conflicts in the individual assessment procedures. However, the proposal has other provisions that may contradict each other and may lead to perverse outcomes, such as longer permit procedures or premature rejection by permit authorities due to the lack of information.

5.3.2 Time- limit and no environmental impact assessment?

The individual permit assessments are accompanied with strict time limits to speed up the process. If a project is to be located in a "go-to area", the competent authority shall validate the application or request the developer to submit a complete application within 14 days in accordance with Article 16(2) of the Proposal. In addition, the permit-granting process shall not exceed one year in accordance with Article 16(a)(1) of the Proposal.[72] If the project is located outside of such a designated area,

[70] See for example Christiernsson, A. (2011), *Rättens förhållande till komplexa och dynamiska ekosystem – En studie om rättsliga förutsättningar för adaptiv och ekosystembaserad reglering och planering för bevarandet av biologisk mångfald vid jakt*, dissertation, Luleå University of Technology and Forsberg, M. (2012), *Skogen som livsmiljö – En rättsvetenskaplig studie om skyddet för biologisk mångfald,* dissertation, Uppsala University.

[71] Pettersson, M. (2008) *Renewable Energy Development and the Function of Law A Comparative Study of Legal Rules Related to the Planning, Installation and Operation of Windmills*, Dissertation, Luleå University of Technology and Malafry, M. (2016).

[72] If extraordinary circumstances, that one year period may be extended by up to three months, see Article 16(a)(1) of the Proposal.

the deadline is two years instead of one year.[73] Developers that want to locate in an area outside a go-to area require an individual environmental impact assessment if applicable.[74] Hence, it is required to closely investigate the environmental impact that the specific renewable energy activity under the assessment may have. This situation does not differ much from today in a general sense, other than the time limits that would be stricter in the future.[75] Such rapid processing would likely require a significant increase in administrative funding.

As presented above, the planning should be detailed and even propose how the developer can mitigate its impact on the environment. However, without specific information on the size and type of operation under review, it is challenging to investigate and compose permit requirements in advance. It may be difficult to avoid the need for more information to be gathered at the individual stage, which is specific to the proposed operation. The main rule in the proposal is that no environmental impact assessment is required in the individual assessment of the activity.[76] However, the permit authority is screening the application and if the specific project is identified to have *significant unforeseen adverse effects* that were not identified during the strategic environmental impact assessment composed at the planning stage, an environmental impact assessment can be requested by the permit authority for the specific project.[77]

Whether such a procedure will save time in the permit procedure is questionable. A permit will be refused if the permit-granting authority does not consider the information in the application to be sufficient for

[73] See Article 16(b)(1) of the Proposal.

[74] See 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, annex II and III. As proposed in Article 16(b)(2)(b) of the Proposal.

[75] Another controversial amendment, that is specific to areas that are *not* "go-to areas", is the proposal of the provision that makes a definition of "deliberate" that differs from the current interpretation in EU law, see Article 16(2)(b) of the Proposal. As mentioned that will not be further discussed here.

[76] See Article 16(a)(3) of the Proposal.

[77] See Article 16(a)(4) and (5) of the Proposal.

assessing the application,[78] which is likely to happen when no environmental impact assessment was provided with the application. Anticipating and accounting for the information required to cover prospective applications in the planning stage would be difficult; in the worst case, failing to account for the information would lead to permit-granting authority denying applications more often to satisfy the time-limit. Performing an environmental impact assessment after the developer sends in its application will create a longer timeline than if the application was complete from the beginning, as it may suggest that the chosen location is not suitable after all. Therefore, I consider it questionable whether removing the environmental impact assessment requirement in the individual assessment is an appropriate measure, from the perspective of time and perspective of protecting biodiversity. However, such individual environmental impact assessment in the permit-procedure should often be required if there is derogation from the nature protection directives in question, as more information is likely needed. Also, if there is a derogation from the Natura 2000 rules, an appropriate assessment is always a legal requirement.[79]

5.3.3 Presuming that renewable energy activities are of overriding public interest

One of the changes proposed in the Proposal for new provisions in the Renewable Energy Directive is the one in Article 16(d), which suggests that renewable energy activities[80] shall be presumed to be of overriding public interest with regards to the derogation rules of the nature protection directives. More precisely:

[78] In accordance with Chapter 22 Section 2 of the Swedish Environmental Code (1998:808) an application can be denied if the application is not sufficient. If an environmental impact assessment is needed it is also established in case law that an environmental impact assessment has to be undertaken in the right way and be sufficient to assess the project's environmental impact, if not it can be ground for denial of the application, see for example: NJA 2008 s. 748, MÖD 2003:27 and MÖD 2002:29.

[79] See for example C-304/05, *Commission v. Italian Republic*. Article 6(3) of the Habitats Directive.

[80] Here the term "renewable energy activities" are used for the activities specified in Article 16(d) of the Proposal. In essence all activities that are related to the functioning on renewable energy production, distribution and storage.

> "By [three months from entry into force], until climate neutrality is achieved, Member States shall ensure that, in the permit-granting process, 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 are presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in the individual cases for the purposes of Articles 6(4) and 16(1)(c) of Directive 92/43/EEC, Article 4(7) of Directive 2000/60/EC and Article 9(1)(a) of Directive 2009/147/EC."

The same provision is also suggested in the Proposal for a Council Regulation regarding a framework to accelerate the deployment of renewable energy.[81] The only difference is that it does not apply if *species protection* is concerned, then priority should only apply to projects of overriding public interest if areas are made available for appropriate species conservation measures "contributing to the maintenance or restoration of the populations of the species at a favorable conservation status" and such measures are undertaken.[82] In the Proposal (amendment of the Renewable Energy Directive) that is discussed in this article, such limitation is not proposed.

However, the wording is the same regarding the main provision. That all renewable energy activities – in general – are of *overriding public interest* and *serving public health and safety*. This specific wording is one of the derogation clauses for the various nature protection directives, namely the protection of nature through Natura 2000, species protection (both regarding birds and other fauna) and the Water Framework Directive.[83]

The proposed provision has to be seen in relation to the proposals prior in the Directive. As mentioned before, in accordance with the proposed Article 15(c), the Member States shall identify areas where the renewable energy activity does not have "significant environmental impact",[84] and exclude for example, protected areas, such as Natura 2000 sites, nature parks, and identified bird migration routes.[85] "Mapping" of the areas should use "all appropriate tools and datasets" to identify "go-to areas"

[81] The EU Commission (2022), *Proposal for a Council Regulation laying down a framework to accelerate the deployment of renewable energy*, COM(2022)591 final, 2022/0367(NLE) (Regulation Proposal).

[82] Article 2 of the Regulation Proposal.

[83] Focus in this article is primarily on the provisions in the Habitats Directive.

[84] See Article 15(c)(1)(a) of the Proposal.

[85] Ibid.

and establish rules with appropriate mitigation measures to be adopted.[86] In addition, a strategic environmental impact assessment should be carried out at the planning stage if the activity is located in a go-to area.[87] The idea is that the plan should be so detailed that one can presume that projects are not in breach of the nature protection directives. Hence, by now suggesting that renewable energy activities are of overriding public interest will only theoretically have a limited effect on biodiversity in those areas, as the proposed sites have already been identified by avoiding impact on, for example, biodiversity. Although, in the Council Regulation, no planning is suggested but special rules apply to species protection that could limit the impact.

Nevertheless, when an environmental impact assessment is not provided in go-to areas, there is uncertainty how the derogation rules should be assessed. How should the alternatives to the proposed activity be presented, when it is a requirement for the application of the derogation rules? By adding this dimension to the permit procedure and not requiring an individual environmental impact assessment, it is difficult to understand how these provisions will be beneficial to either the developer or biodiversity. With regards to derogation from the Habitats Directive, an appropriate assessment is a requirement prior to deciding if a project is of overriding public interest. If derogation rules are recommended to be applied, one would assume that an environmental impact assessment is required also in the individual assessment. If not, it is questionable whether the proposal is in line with the nature protection directives, as an appropriate assessment is at least required in accordance with Article 6(3) of the Habitats Directive if a derogation is needed.[88] The use of the derogation rules in areas that are not planned are as mentioned limited when it comes to species protection but not in relation to other nature protection provisions. However, I consider that due to the complexity of the

[86] See Article 15(c)(1)(b) of the Proposal.

[87] See Article 15(c)(2) of the Proposal.

[88] See Case C-304/05, *Commission v. Italian Republic*, para. 82. This case concerned improvement of a Ski resort in order to facilitate an accommodation of the 2005 World Alpine Ski Championship. In this case the socio-economic interests of the site were discussed without having undertaken an appropriate assessment in accordance with Article 6(3) of the Habitats Directive. The Court concluded that an appropriate assessment was a prerequisite to be able to discuss whether the project was considered to be one of overriding public interest. The strict interpretation was also emphasized in C-182/10, *Solvay and Others,* para. 73.

derogation rules the status of overriding public interest may not be as significant as it sounds.

6 When can derogation be granted from the nature protection directives

6.1 Introduction

If an activity is to be a valid derogation from the nature protection directives, many criteria are required. This article will not go in to the specific assessment required under all the nature protection directives, but focus on Article 6(4) of the Habitats Directive and primarily discuss two of the criteria that are common for the nature protection directives.[89] Namely, a project has to have a status of overriding public interest[90] and no alternative solutions exist.

In accordance with Article 6(4) of the Habitats Directive, an activity can be permissible, even though adversely affecting the integrity of the site concerned, if it meets certain criteria. The first is if no alternative solutions exist, and the second is if the renewable energy project is considered to be of overriding public interest. Furthermore, if the above criteria are met, all necessary compensatory measures must be taken to ensure that the overall coherence of Natura 2000 is protected. Hence, in the Article there are three steps that needs to be taken. My analysis will focus on the first two. Even though the Article is pedagogically constructed, specifying the different steps in order, case law shows that there is confusion on the order in which these criteria apply. The discussion on overriding public interest is sometimes discussed before considering alternative solutions.[91] Compensatory measures that are something to consider in the third step have also been adopted prior to the first two steps, which has not been accepted by the CJEU.[92]

[89] See also Article 16 of the Habitats Directive regarding derogation from the species protection, Article 9 of the Birds Directive and Article 7(4) of the Water Framework Directive.

[90] In the Birds Directive such criteria does not exist. It is there "serving public health and safety" that is the criteria.

[91] See Case C-239/04, *Commission of the European Communities v. Portuguese Republic*.

[92] Regarding compensatory measures; see Case C-521/12, *T.C. Briels and Others v. Minister van Infrastructuur en Milieu*.

Even if renewable energy activities are, per definition, presumed to be of overriding public interest, it still must be shown that there are no other solutions. The following section will therefore analyze how the concept of overriding public interest may be interpreted and has been interpreted at the EU-level, and how and when *alternative solutions* need to be examined and presented in the process.

6.2 Overriding Public Interest

There are no decisions by the CJEU defining what is of overriding public interest, but there are a number of Opinions by the EU Commission suggesting what type of projects may be of that nature. Even though Opinions by the Commission are not legally binding,[93] they may still give some guidance on how the concept is interpreted in the EU.

Nevertheless, how the concept could be interpreted has been under assessment by the CJEU. First, in C-304/05, CJEU emphasized that Article 6(4) of the Habitats Directive must be interpreted strictly, as it constituted a derogation from Article 6(3).[94] Then, in C-182/10, the CJEU further spells out the requirements under Article 6(4). The Court suggested that an interest capable of justifying the implementation of a plan or project must be both 'public' and 'overriding'. This means that it must be of such an interest that it can be weighed up against that directive's objective of the conservation of natural habitats and wild fauna and flora in the Habitats Directive.[95] The Court thereafter suggested that projects should satisfy those conditions only in exceptional circumstances.[96] The CJEU has not assessed the question with regards to wind power, but the question was touched upon in the *Schwarse Sulm case* with regards to a

[93] See Article 249 TFEU.

[94] See Case C-304/05, *Commission v. Italian Republic*, para. 82. This case concerned improvement of a Ski resort in order to facilitate an accommodation of the 2005 World Alpine Ski Championship. In this case the socio-economic interests of the site were discussed without having undertaken an appropriate assessment in accordance with Article 6(3). The Court concluded that an appropriate assessment was a prerequisite to be able to discuss whether the project was considered to be one of imperative reasons of overriding the public interest. The strict interpretation was also emphasized in C-182/10, *Solvay and Others,* para. 73.

[95] See Case C-182/10, *Solvay and Others,* para. 75.

[96] Ibid, para. 76.

hydro power plant.[97] In that decision, the Court expressed the view that the construction of a hydro power plant may be of an overriding public interest.[98] Further, the court states that Member States "must be allowed a certain margin of discretion for determining whether a specific project is of such interest".[99]

However, the court has not given a clear picture on what projects are of overriding public interest. Some guidance can be found in the EU Commission Guidance Document, which is not a legally binding source but can give direction to the types of projects that can be considered to have such an interest. The EU Commission suggests that it refers to situations where indispensable plans or projects are undertaken within the framework of actions or policies aiming to protect fundamental values for the citizens' life; within the framework of fundamental policies for the State and the Society; or within the framework of carrying out activities of economic or social nature that fulfil specific obligations of public service.[100] A few cases are also presented that are suggested to be considered to be of *overriding public interests*.[101] Infrastructure such as motorways,[102] high speed lines,[103] and the building of ports,[104] are some examples. The Commission also emphasizes that projects of that kind should have a *long-term interest* and that short-term interests should not be considered

[97] See Case C-346/14, *Commission v. Austria*, para. 82. The case was initiated by the European Commission, which considered that the decision of granting a hydropower plant a permit, despite its impact on the water system, was not acceptable under the Water Framework Directive. The Court dismissed the Commission's action as it had failed to establish the infringement as alleged. The Commission had not shown that the report that the derogation decision was based on was incomplete or incorrect.

[98] Ibid, para. 69.

[99] Ibid, para. 70.

[100] See The EU Commission (2007), *Guidance Document on Article 6(4) of the 'Habitats Directive' 92/43/EEC*, p. 8.

[101] Ibid, p. 8–9.

[102] The development of an intersection of the *Peene Valley* in Germany in order to link a small region (with exceptionally high unemployment) with the central regions, see Ibid, p. 8.

[103] High speed line in France – the TGV East, due to lack of options for linking the existing lines, see Ibid., p. 9.

[104] Project Mainport Rotterdam in the Netherlands. Due to increased demand for space in the harbour if the competitive position of the harbour was to be maintained. It was also justified by the fact that by enabling more transportation of goods to go by boat instead of by road, the development was in fact reducing greenhouse gas emissions and congestion, see Ibid, p. 9.

to be of such importance that they can outweigh the conservation interest of the Directive.[105]

If a site is particularly important from a biological point of view (for example, if it hosts a priority natural habitat and/or priority species) then the interpretation of overriding public interest becomes stricter. At such a point, overriding public interest will be those interests concerning human health, public safety, or overriding beneficial consequences for the environment. In these cases, the Commission needs to formulate an Opinion.[106] The Commission of the European Union has in its Opinions suggested when certain projects are acceptable due to the application of the derogation rules in the Habitats Directive. For example, in the Swedish *Botnia Case*, the Commission suggested that the Botnia project was an infrastructure project of overriding public interest due to a number of reasons: that the project was an environmental form of transportation in the region, and that the project would create better conditions for cooperation among northern cities.[107] An Opinion by the Commission is not legally binding, but it still has an impact on how EU law is interpreted and applied in the EU Member States.[108] However, if the Member State does not act in accordance with the Opinion, the Commission can decide to take the case to the CJEU.[109] A negative Opinion could also help a person to bring the case to national courts if it was not followed up by the Member State. Therefore, there are incentives for Member States to prepare cases accordingly, in order to get the informal permission from the Commission to derogate from the Habitats Directive. However, it is questionable whether socio-economic reasons can be valid arguments for considering a project to be of overriding public interest when located in

[105] Ibid, p. 8; compare the EU Commission Opinion regarding the extension of a coal mine; see: European Commission, C(2003) 1304 of 24 April 2003.

[106] See Article 6(4)(2) of the Habitats Directive.

[107] European Commission, Opinion: K(2003) 1309 of 24 April 2003; see also discussion on the Botnia case in Krämer, L. (2009), The European Commission's Opinions under Article 6(4) of the Habitats Directive, *Journal of Environmental Law,* Vol. 21:1, pp. 72–73.

[108] See Article 249 of the EC Treaty.

[109] See Article 226 of the EC Treaty.

priority natural habitats.[110] It has been argued that socio-economic interests could never be a valid ground to justify such a project.[111]

An EU Member State has argued that a project is of overriding public interest due to the threat that climate change poses on humanity. In the Netherlands, the exemption has been used in regards to derogation from both the habitat and birds directives, where it was suggested that: "sustainable energy projects contribute to limiting climate change and therefore help to protect flora and fauna".[112] In Swedish case law, a project has seldom been considered of overriding public interest, but the argument has been mentioned or assessed in court decisions. For example, a ski resort[113] and a kaolinite mine[114] were not considered to be of that dignity; however, a stabilization of a major highway, E20[115], and a flood protection system were considered to be of that nature.[116] Prior to the E20 case, a similar case was assessed by the court that considered erosion protection of the highway E55, but the court did not consider the environmental impact assessment to be sufficient and therefore the application was rejected.[117]

In sum, no simple definition exists of what is of overriding public interest in the EU. If a general provision – that *all* renewable energy activities are of overriding public interest due to energy security – was introduced, it may not make the process faster, as it requires the assessing authority to closely examine the *alternative solutions* available. The Member States still need to decide if a specific project is a valid derogation from the nature protection directives. The status of the project is only one of the criteria that must be fulfilled prior to granting the activity derogation from the

[110] See Article 6(4)(2) of the Habitats Directive.

[111] See Chris B. (1997) Implementatic van de Habitat-Richtlijn in het Nederlandse natuurbechermingsrecht, as referred to in Nollkaemper, A., *Journal of Environmental Law*, Vol. 9:2, p. 279.

[112] See Backes C, Ackerboom S. (2018) *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, Ocean and Sustainability Law, p. 28.

[113] See MÖD 2015:3.

[114] See Land and Environmental Court of Appeals judgment of the 30 April 2019 in case number M 10717-17, p. 21.

[115] See Land and Environmental Court of Appeals judgment of the 22 of April 2021 in case number M 11476-17.

[116] See MÖD 2018:28.

[117] See MÖD 2014:46.

nature protection directives. Prior to discussing whether the project is of overriding public interest, alternative solutions, both form and location must be explored and excluded.[118]

6.3 The Relevance of alternative solutions

Alternative solutions have to be excluded prior to the application of the derogation rules from all nature protection directives. It is pointed out in Case C-239/04 that showing the absence of alternative solutions is a prerequisite. The court clarified that a Member State fails to fulfil its obligations under Article 6(4) of the Habitats Directive if it implements a project despite a negative environmental impact assessment in accordance with Article 6(3), and without having demonstrated the absence of alternative solutions.[119] However, the meaning of alternative solutions has not yet been interpreted by the CJEU.[120] Neither has it been interpreted very strictly by the Swedish courts or by the Commission in its Opinions. However, the Commission suggests in the Guidance Document that all alternative solutions must be analyzed, including both location and form of the activity. In other words, in addition to alternative locations or routes, analysis must consider different scales or designs of the activity and alternative processes.[121] The Commission further states that, when the national authorities are assessing alternative solutions:

[118] See for example Article 6(4) and Article 16(1) of the Habitats directive, Article 9(1)(a) of the Birds directive and Article 4(7) of the Water Framework Directive. The following section is primarily discussing the concepts from the caselaw in relation to Article 6(4) as there is most caselaw on that derogation. When it comes to species protection, in addition to the requirement that there are *no satisfactory alternative,* the derogation cannot be "detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range".

[119] The court here also mentioned that any *reasonable* scientific doubt as to the absence of any adverse effect on the integrity of the site must be removed before the project is authorized; see Case C-239/04, *Commission of the European Communities v. Portuguese Republic*, para. 24.

[120] The CJEU has stated that showing the absence of alternative solutions is a prerequisite for assessing whether the project has to be undertaken due to overriding public interest; see case C-239/04, *Commission of the European Communities v. Portuguese Republic*, para. 24.

[121] See EU Commission (2007), *Guidance Document on Article 6(4) of the Habitats Directive*, p. 6.

> "It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria."[122]

However, such a strict interpretation of alternatives has not been seen in case law or in the Commissions Opinions. As mentioned above, one Swedish Case – *The Botnia Case* – entailed an Opinion from the Commission, which regarded the route of a train track in the northern part of Sweden.[123] When the developer examined alternative routes of the track, the developer showed two alternative routes that would have little or no impact on the Natura 2000 site. However, those sites were not chosen for seemingly economic reasons. The argument was not that the building of the route would be more costly if it was not built through the Natura 2000 site, but that the operation of the train route would be problematic and would result in lower profit. The alternative routes would take 10–20 per cent longer in time and imply that Umeå would continue to be a dead end station and not a through route station as the proposed alternative. The Swedish authorities suggested that because of these reasons the proposed alternative, which affected the Natura 2000 site, was the only viable alternative.[124] The Commission accepted this reasoning in its Opinion.[125] In the Swedish court case, the assessment was only regarding the compensation measures as the court felt bound by the government's decision with regard to the location and the other as-

[122] See Ibid, p. 7. Even though guidance documents do not have any legal force, they still have an impact on the interpretation of EU legislation and are often used by national authorities and courts in their legal reasoning in their judgments and decisions, at least in Sweden.

[123] The *Botnia Case* was highly debated in Sweden and gave rise to a number of decisions by the Government and the Swedish Courts, and a number of appeals; see, for example: RÅ 2004 ref. 108, RÅ 2008 ref. 89 and MÖD 2006:44.

[124] At the time the lower Courts considered themselves bound by the Government's decision and the appeal regarding the Natura 2000 permit was only a judicial review and did not result in any change of the Natura 2000 decision due to it not being considered a point of law, though the Supreme Administrative Court had a dissenting opinion with a different view, see RÅ 2008 ref. 89.

[125] See the Commission, Opinion: K(2003) 1309 of 24 April 2003. See also Krämer, L. (2009), pp. 72–73.

pects of the Natura 2000 permit.[126] Due to the fact that the scope of the examination only applied to conditions for the permit, MÖD rejected the request to obtain a preliminary ruling from the CJEU regarding alternative railway sections.[127]

As mentioned above, the guidance document states that economic criteria cannot be seen as overruling ecological criteria when assessing alternative locations, as the comparison shall only "deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions".[128] Economic criteria cannot only refer to the cost of developing the project as there are also economic considerations regarding the operation of the activity. It is interesting to note how the Commission accepted this line of argument. Even though the prerequisite of showing the absence of alternative solutions was not handled appropriately, the project was considered to be of overriding public interest and on that basis a valid derogation in this case.[129] In addition, the quality of the reasoning in the Opinion can be questioned due to the acceptance of the project even though no compensatory measures were provided by the Swedish authorities.[130] The court decided that the compensatory measures that were suggested were not enough and sent the case back to the environmental court for further processing.[131]

Alternative solutions, however, have not stretched to alternative forms in any Opinion.[132] This outcome is especially interesting in the renewable energy context where expansion of renewable energy sources is a priority in the EU Member States. The meaning of what is required by alternative solutions could therefore also include alternative forms of production (in accordance with the Guidance Document) to better reflect the EU environmental and energy policy objectives. Renewable energy activities are

126 "Botniabanan" was prior to NJA 2013 s. 613.

127 See MÖD 2006:44.

128 Compare EU Commission, (2007) *Guidance Document on Article 6(4) of the 'Habitats Directive' 92/43/EEC*, p. 7. See also Michanek, G. and, C. Zetterberg (2021), *Den svenska miljörätten*, p. 257.

129 Michanek and Zetterberg point out that the Opinion by the Commission is not in line with the Guidance Document or the Habitats Directive, emphasizing that economic interest cannot be prioritized over ecological interests; see Michanek, G. and, C. Zetterberg (2021), pp. 257–258.

130 See discussion in Krämer, L. (2009), p. 73.

131 See MÖD 2006:44.

132 See discussion on alternative solutions in Krämer, L. (2009), p. 80.

also not necessarily site specific. The sun is shining and wind is blowing in many places. Hence, with regards to many renewable energy activities, alternative locations may also be a valid *alternative*. The reason to use the derogation rules may become very limited in the case of renewable energy activities, and the status of overriding public interest may be unnecessary language that confuses an already-complex legal procedure.

7 How the proposal affects the relationship between renewable energy activities and biodiversity

As described in this article, the relationship between the various legislative acts is the same as before: both are directives and should not contradict one another. Hence, there is no change in the relationship between EU legislative acts even if the proposal will be adopted. With regards to the status of renewable energy activities to be presumed to be of *overriding public interest* in relation to the nature protection directives, the status does not change the current relationship between norms at the EU level. Also, the status does not mean that renewable energy activities have an automatic exemption from the nature protection directives. The assessment that needs to be made prior to a valid derogation to take place is more complex, as explained above, as it requires that there are no *alternative solutions*. For the permit authority to undertake such an assessment, a comprehensive investigation needs to be undertaken for the permit authority to be able to decide upon the matter. If the requirement for an EIA in the individual assessment is relaxed for go-to areas, it will be difficult for the permit authority to decide upon the matter and premature rejections of such applications may be more common.[133] It is therefore a proposal that does not necessarily lead to the intended purpose of speeding up the administrative procedures or the expansion of renewables in the EU in designated go-to areas.

However, by not requiring an environmental impact assessment, the screening process may become unnecessarily burdensome because it is difficult to ensure that the environmental impact assessments at the planning stage will cover everything that the individual project encompasses.

[133] See for example Judgment by the Land and Environmental Court of Appeal on the 19 of August 2020 in case number M 4612-19.

In addition, the process may not save time because the developer may find it easier to compose an environmental impact assessment prior to its application rather than when the permit-authority decides that it is needed. It is important to clarify that an environmental impact assessment may often be required when a derogation from the nature protection directives are needed, especially as it is required by EU law in some cases.[134]

In light of the CJEU case law and the Opinions by the Commission, it transpires that the implementation and application of the provision set out in Article 6 of the Habitats Directive is not always satisfactory. Only the parts that have been interpreted by the CJEU have resulted in a more adequate interpretation of the provision. The EU Commission Guidance Document suggests a rather strict interpretation of the provisions, but the Commission itself does not follow it in its Opinions to the Member States.[135] The extent to which alternative solutions need to be presented, both regarding location and form, is not established in case law.

In summary, the meaning of *overriding public interest* is not established by EU case law. Case C-346/14 suggests that the Member States should decide whether a certain project is of that nature. However, in accordance with the Guidance Document on Article 6(4) of the Habitats Directive, only very large projects may be considered to be of such importance.[136] The concept implies that the interest (promoted by the project) must override the interest (objective) of the specific directive that the derogation is to be granted from. Projects may therefore be of overriding interest in relation to the Water Framework Directive but not in relation to the Habitats Directive. However, if there is a presumption that *all* renewable energy activities are of overriding public interest, such variation will not be accounted for. Furthermore, such a status may not necessarily speed up the permit-granting process because it is much more complicated to make an assessment (on whether a project can be a valid derogation from the nature protective directives) than to only consider the status of the project. Such an assessment requires a much better basis for the decision and, in most cases, an environmental impact assessment. By suggesting that renewable energy activities are to be exempted from the environ-

[134] See for example C-304/05, *Commission v. Italian Republic*.

[135] As discussed above in section 4.

[136] See EU Commission (2007), *Guidance Document on Article 6(4) of the 'Habitats Directive' 92/43/EEC*, p. 8.

mental impact assessment requirement in the individual assessment, together with the proposal that all renewable energy activities are presumed to be of overriding public interest, gives rise to legal uncertainty for the developer as it is a confusing legal construction. If an environmental impact assessment does not accompany an application when a derogation is needed, such a project should, after the screening, be required to do one anyway. As mentioned before, the CJEU has clarified that a specific environmental impact assessment is undertaken prior to assessing if a project can derogate from the Habitats Directive.[137] The question is whether such an order of events would save time or if it would be more time consuming to go through a screening procedure and either be denied a permit or asked to do an environmental impact assessment after an application is composed.

7.1 Is the proposal in line with the subsidiarity and proportionality principles?

Earlier the CJEU suggested that the decision of what is of *overriding public interest* should be left for a decision at the Member State level in the individual assessment.[138] However, if the proposal of presuming that all renewable energy activities are of that nature, then the question is no longer left to the permit-granting authority in the individual case.

It can therefore be questioned if the proposal is in fact an acceptable article due to the subsidiarity principle codified in Article 5(3) of the TEU. What is of overriding principle in one country may not be of that nature in another country. It can also depend on different regions in the same country. Due to the different preconditions in different Member States, a wind park project of ten turbines might be of overriding public interest in some Member States but not others, where only larger projects are likely to get such status. It is therefore on the one hand difficult to centralize the definition of what is and is not of overriding public interest. On the other hand, the current energy crisis in Europe, due to the changed geopolitical landscape, together with the imminent threat of climate change, shows that a rapid increase in renewable energy in Europe is arguably of overriding public interest and may be a decision that is better handled at the EU-level.

[137] See Case C-304/05, *Commission v. Italian Republic,* para. 83.
[138] See Case C-346/14, *Commission v. Austria.*

However, the proposal can also be questioned on the basis of the Proportionality Principle in Article 5(4) of the TEU. Is it still important to determine whether a marginal wind turbine is of such great importance, irrespective of where it is located? Or, is it more suitable to only grant large projects that dignity? In other words, is the proposal proportional? By presuming that all renewable energy projects are of overriding public interest, the provision becomes too general. It may be hard to argue that renewable energy of any size could be of overriding public interest due to the general EU principle of proportionality. It is not proportionate to derogate any renewable energy activity on the basis that it is a renewable energy activity, as that activity still must have a public interest. Arguably, small installations do not merit such consideration. For example, large infrastructure such as highways may be of overriding public interest but that does not entail that every single paved road is of similar dignity. The same argument can be applied to marginal renewable energy installations.

It is also questionable if the administrative burden put on the Member States and their authorities are justified. A lot of the proposed changes require a significant increase in resources for the planning, legal assessment and screening phases. However, it is not clear how those processes will be financed.[139]

8 Concluding Remarks and Way Forward

The proposal to elevate renewable energy to be of *overriding public interest* does not necessarily imply that renewable energy is prioritised over the protection of biodiversity. That conclusion is supported by the EU political documents and the EU legal framework. Furthermore, the proposal suggests that locations suitable for renewable energy activities should be mapped beforehand and that such locations should avoid areas that can be of interest to biodiversity. If a conflict occurs with a renewable energy activity – due to its potential impact on Natura 2000 sites, species protection, or its effect on the water status – the project may still be permissible if the conditions under the derogation rules are fulfilled. Only one of the preconditions is that the project is of *overriding public interest*. However,

[139] Article 5 of the Consolidated version of the Treaty on the Functioning of the European Union – PROTOCOLS – Protocol (No 2) on the application of the principles of subsidiarity and proportionality (the Subsidiarity Protocol), *Official Journal 115, 09/05/2008 P. 0206 – 0209.*

one prerequisite for all derogation clauses is that there are no alternative solutions, which is hard to argue with regards to wind power as most conflicts can be avoided if the location changes. That said, there may be cases where there are no alternative solutions and only then can the derogation rules be applied.

Independent of why an interest is considered to be of overriding public interest, either for climate or energy security, the same counter argument is valid. Even though the climate objective or energy security objective behind the promotion of renewable energy is of great importance – arguably of *overriding public interest* – each individual renewable energy activity is not likely of that nature. However, with regards to large-scale projects, such arguments may be valid. It is difficult to see that a marginal turbine has such an importance. This may imply that large-scale hydropower installations, large-scale transmission line projects and large wind power parks may be of that nature, either due to their considerably large contribution to reduction of GHG emissions or because of their importance as a large electricity producer (or distributor) due to an energy security objective.

The question of alternatives is part of the environmental impact assessment and the permit authority shall, according to the letter of the law, only accept an application that includes sufficient information to decide upon the matter in accordance with Chapter 22 Section 2 of the Swedish Environmental Code. If a derogation is to be explored, I always consider an environmental impact assessment to be required, as it requires more specific information that is not available to the planning authority. However, even if an environmental impact assessment theoretically should be required (due to the need of more information) it is difficult to ensure in practice when considering urgencies, procedural costs, and (if the new proposal becomes a reality) the very strict time restraints that the permit authorities have to adhere to when it comes to renewable energy projects.

However, if the initial mapping and planning are undertaken in accordance with the proposal, it may be very seldom that the status of the project has to be raised – especially if, for example, Natura 2000 areas are to be excluded and migration routes are to be avoided. As Darpö et al. investigated, only 10% of the wind power cases in Sweden between 2014 and 2018 were hindered by species protection.[140] If Sweden undertakes better mapping and planning, further conflicts may be avoided and that

[140] Darpö et al. (2022), *Artskydd och beslutsprocesser,* Vindval, Report 7009, p. 7.

number may be lowered. In this case and particularly in the Swedish context, the derogation rules should therefore not be as relevant for the transition of the energy system. Hence, the energy transition should be less intrusive on biodiversity in theory. In practice, it may lead to perverse consequences if the status is understood to be a fast track for renewable energy activities. The question then changes to whether the wording – of presuming that all renewable energy activities are of overriding public interest – is in fact necessary or proportionate. The proposal of presuming that all renewable energy activities are of overriding public interest may be difficult to argue as a proportionate amendment, even though the proposal is supported by climate and energy security reasons. This is primarily due to the wording of the proposal that suggests that *all* renewable energy activities are of that nature, where one would presume that this depends explicitly on the size of the activity. The specific Member States preconditions may also vary and a project that is of overriding public interest in Poland may not be of overriding public interest in Sweden. Therefore, the proposal may have unintended effects, which is why I suggest that the proposal should not be introduced in the Renewable Energy Directive. Instead of finding special treatment in the EU for renewable energy activities, perhaps Sweden and other Member States should focus on ensuring better location planning for renewable energy activities in areas where it has minimum effect on biodiversity and other environmental values.

Another dimension requires attention but is not discussed in this article: the relationship between the plans on go-to areas and the municipal veto in Sweden. Today, the municipality has input on the locations of wind power within its municipal boundaries, in accordance with Chapter 16 Section 4 of the Environmental Code. In a report from 2022, the authors identified that 76% of all wind power applications in Sweden during 2021 were denied due to the municipal veto.[141] The rule has been

[141] Westander, H. and J. Risberg (2022), *Kommunalt veto 2020–2021*. Can be found at: https://svenskvindenergi.org/wp-content/uploads/2022/03/Kommunala-vetot-2020-och-2021-2022-03-18-slutversion.pdf (2023-01-01).

questioned in the literature[142] and the authors suggest that the veto was neither proportionate nor necessary in accordance with the Renewable Energy Directive.[143] Recently, an Official Governmental Report proposed that the municipal veto should change to a process requirement in the form of a "location notice" (*lokaliseringsbesked*), which must be in accordance with the municipality's overview plan.[144] Such change would increase the predictability for developers of wind power while at the same time ensuring the municipality's influence over land use within the municipality. However, it can still be questioned whether such a location notice is a necessary and proportionate process condition that is acceptable according to the EU's Renewable Energy Directive, especially now in light of the proposed amendments in the Directive. If this proposal becomes reality, it is uncertain whether the municipal veto will survive as the Directive does not give room for such municipal power. The risk of keeping the proposal in the Swedish Government Official Report is that project developers will be steered in the wrong direction towards places that are not necessarily a location suitable from environmental point of view.

In summary, this article suggests that even though the proposal for amendments in the Renewable Energy Directive gives the impression of elevating renewable energy over nature protection values, it will likely not have a significant impact on the protection of biodiversity as other safeguards exist to ensure that renewable energy activities are not deployed with unnecessary impact on its surrounding environment. I do question if the intended purpose of the proposal, of speeding up the process for renewable energy activities, will take place, or if the additional language only adds to an already complex legal permit procedure. In addition, it is uncertain whether the proposal aligns with the subsidiarity principle – if the status of renewable energy activities can be better decided at the EU-level and whether the proposal of presuming that *all* renewable energy

[142] See for example Michanek, G. (2014) One national wind power objective and 290 self-governing municipalities in *Renewable Energy Law in the EU: Legal Perspectives on Bottom-up Approaches*, eds. Peters M, Schomerus T, Elgar E, p. 144 and Darpö, J. (2020) 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, p. 59–79, on p. 66.

[143] Malafry, M. (2016), p. 77–78.

[144] For a discussion, see: Malafry, M. and M.C. Öhman (2022) *Rättsliga förutsättningar för havsbaserad vindkraft*, Vindval Rapport 7028, p. 33–35.

activities are of overriding public interest satisfies the principle of proportionality. Hence, I find that the proposal of giving renewable energy the status of overriding public interest not to be a necessary nor appropriate language to add in the Renewable Energy Directive to ensure a faster transition to a sustainable energy system in Europe.