

English Translation of the document “INFORME SOBRE LA PROPUESTA DE REGLAMENTO PARA ACELERAR EL DESPLIEGUE DE LAS ENERGÍAS RENOVABLES ADOPTADA POR LA COMISIÓN EL 9 DE NOVIEMBRE DE 2022” (Abel La Calle Marcos¹, 21 de noviembre 2022)

« INFORMATION ON THE PROPOSAL FOR A REGULATION ON ACCELERATING THE DEPLOYMENT OF RENEWABLE ENERGIES ADOPTED BY THE COMMISSION ON 9 NOVEMBER 2022 », Abel La Calle Marcos ¹ (21 November 2022) (Originally in Spanish)

Background

1. On 20-21 October 2022, a European Council was held on a number of issues including the conflict in Ukraine, critical infrastructure, the energy crisis and economic measures, and external relations. In its conclusions it called on the Commission to "urgently" present decisions and proposals on certain additional economic measures on the energy crisis, including "speeding up the simplification of permitting procedures in order to accelerate the deployment of renewables and networks, for example with emergency measures on the basis of Article 122 TFEU" ².

2. On 9 November 2022, the Commission submitted to the Council of the European Union a proposal for a regulation to "accelerate the deployment of renewable energy" ³ (the Proposal).

3. The Commission accompanied the proposal with a press release focusing on three ideas in this regard, that it "strengthens" the ecological transition, "moves away" from Russian gas and "accelerates" renewable energy permitting⁴. It argues that: a) increasing the use of renewables reduces dependence on Russian gas and the energy bill; b) it "accelerates" the REPowerEU plan that already envisaged "simplifying procedures" for permits to "increase the speed and scale of investments" in renewables, in the framework of the European Green Deal; and c) the acceleration is motivated by the deterioration of the energy market that puts "security of supply at risk".

Legal basis

4. The legal basis for the proposal is the one suggested by the European Council and taken over by the Commission, Article 122(1) of the Treaty on the Functioning of the European Union (TFEU).

5. It should be recalled, on the one hand, that Article 122 of the TFEU is found in "Title VIII Economic and Monetary Policy" and more specifically in "Chapter 1 Economic Policy". On the other hand, paragraph 1 of this article establishes the possibility that the Council, on a proposal from the Commission, may "decide, in a spirit of solidarity between Member States,

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2. Conclusions adopted by the European Council at its meeting on 20 and 21 October, EUCO 31/22, paragraph 18.f.

3. European Commission, Proposal to the Council, Regulation establishing a framework for accelerating the deployment of renewable energies, Brussels, 9.11.2022, COM(2022) 591 final 2022/0367 (NLE).

4. European Commission, REPowerEU: Commission strengthens green transition and moves away from Russian gas by accelerating renewables permitting, Press release, 9 November 2022, Brussels, IP-22-6657.

on measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, especially in the field of energy".

6. It is clear from the context of the title and chapter in which the provision chosen as the legal basis is found and from the literal content of the provision that its material scope is economic and, more specifically, that relating to financial aid. This has been pointed out by the Court of Justice when it clarified that "Article 122 TFEU concerns only financial aid granted by the Union and not by the Member States"⁵.

7. However, the main purpose of the proposal is to derogate from the objectives and obligations relating to the protection of biodiversity⁶, the protection of waters and their ecosystems⁷, and environmental impact assessment⁸, in short, derogations in the field of environmental protection.

8. This creates an inconsistency between the legal basis (economy) and the content of the concrete measures proposed (environment). Inconsistency which shows a lack of legal basis for adopting such measures.

9. Article 122 of the TFEU is not included in "Title II Common Provisions", which would allow the adoption of measures with different contents, but in "Title VIII Economic and Monetary Policy" and "Chapter 1 Economic Policy", which restricts the content of the measures to be adopted to this material area.

10. The content of the Article 122(1) of the TFEU only authorises the adoption of derogations of an economic nature; it does not authorise the legislator to establish environmental derogations such as those provided for in Articles 2, 3 and 4 of the proposal. It follows that Article 122(1) TFEU does not constitute an appropriate legal basis for adopting the environmental derogations provided for in the proposal.

11. This interpretation is reinforced by the fact that the Commission bases its choice of legal basis on the existence of a "serious difficulty in the supply of energy" which has led "not only to soaring energy prices, but has also endangered security of supply", which according to the institution is placing "significant burdens on consumers and businesses"⁹. However, the proposal does not contain financial support to states that are adversely affected by the described "serious difficulties in the supply of energy", but derogations from environmental objectives and obligations.

12. We consider that the proposed environmental derogations cannot reasonably be considered as falling within the concept of financial support to Member States as set out in Article 122 TFEU.

6. Article 6.4, 16.1.c and 12.1 of Directive 92/43 and Article 9.1.a and 5 of Directive 2009/147.

7. Article 4.7 of Directive 2000/60.

8. Article 4(2) of Directive 2011/92, and Annex II.3.a and b, in conjunction with Annex II.13.a.

9. COM(2022) 591 final, page 3.

The principle of non-regression

13. The Treaty on European Union states that the Union "shall work for the sustainable development of Europe based on ... a high level of protection and improvement of the quality of the environment ... and shall promote ... solidarity between generations "¹⁰.

14. In furtherance of the general environmental objectives of the Treaty on European Union, the Treaty on the Functioning of the Union of the European Union lays down the "precautionary principle and the principle that preventive action should be taken in order to rectify environmental damage, as a priority at source, and the polluter pays principle "¹¹.

15. A high level of environmental protection and environmental solidarity between generations cannot be achieved without respecting the principle of non-regression in environmental protection objectives and obligations. Any regression in environmental protection reduces or prevents the improvement of the quality of the environment, prevents preventive action to the same extent and may prevent those responsible for the deterioration from paying for the required restoration.

16. The ultimate basis for the principle of non-regression in environmental protection is the ethical obligation of a society not to compromise the well-being and subsistence of future generations.

17. Therefore, the principle of non-regression must be understood as implicit in Article 3 TEU.

18. It is also this principle of non-regression that inspires and motivates the establishment of strict limits on exceptions to environmental objectives and obligations.

19. In water policy, the principle of non-regression is implicit in the principle and objective of preventing further deterioration¹². A regression in the degree of protection of waters and their associated ecosystems would allow further deterioration that would be incompatible with the above-mentioned principle of prevention, so preventing deterioration also implies preventing the reduction of established protection.

20. This principle of non-regression is also explicitly present in the precautionary approach to the implementation of environmental objectives. The Water Framework Directive states in its recitals that "the implementation of this Directive will achieve a level of protection of water at least equivalent to that provided for in certain existing provisions which are to be repealed once the relevant provisions of this Directive are fully implemented "¹³. The text also states that "measures should be taken to ensure that the implementation of the new provisions, including paragraphs 3, 4, 5, 6 and 7, ensure at least the same level of protection as existing Community standards "¹⁴.

10. Article 3.3 of the TEU.

11. Article 191.2 TFEU.

12. Articles 1, 4.1.a.i and 4.1.b.i of Directive 2000/60.

13. Recital 51 of Directive 2000/60/EC.

14. Article 4(9) of Directive 2000/60/EC.

21. This non-regression clause in the degree of protection of waters and their associated ecosystems is legally binding for reasons of its literal interpretation and context. The use of the expression "measures must be taken to ensure ..." leaves no doubt as to the mandatory nature of such conduct, as does the expression "shall ensure as a minimum ..." in relation to the result to be achieved.

22. The place of the non-regression clause in the Directive determines its binding nature. In addition to being included in the recitals, it is included in the text of the Directive, specifically in the central article of the obligations for water and associated ecosystems, the article devoted to environmental objectives. It is therefore an obligation of result to be achieved by the States in accordance with the founding treaties¹⁵.

23. The non-regression clause analysed above prevents States from reducing the existing degree of protection for waters and their associated ecosystems. The Directive does not give Member States a margin of discretion to reduce the level of protection of Community standards, a level which has the character of a minimum as literally stated in the Directive and can therefore only be increased by Member States.

24. The scope of this non-regression clause is not limited to achieving the level of protection provided by the Community rules in force at the time of entry into force of the Water Framework Directive. On the one hand, the application of this clause covers situations where the level of protection provided for in the derogations to the environmental objectives¹⁶ conflicts with the level of protection provided for in the pre-existing directives. On the other hand, it necessarily includes a working method, a non-regressive dynamic of the pursuit of environmental objectives for 2015, without prejudice to the above-mentioned derogations.

25. In short, the extension of the exceptions to compliance with the environmental objectives, either through new extensions or the distortion of the concept of natural causes in the determination of less stringent objectives, would be contrary to the non-regression clause of protection implicit in the constitutive treaties¹⁷ and expressly included in the legal regime of environmental objectives in water policy¹⁸.

26. It is clear that the measures contained in the proposal represent an extension of the derogations to the established environmental objectives and obligations and therefore constitute a regression in the state of environmental protection created with the Water Framework Directive and therefore contradictory to its objectives and useful effect.

27. In sum, the environmental regression violates the objective of achieving sustainability based on a high level of protection and improvement of the quality of the environment and the promotion of solidarity between generations set out in Article 3(3) TEU and, therefore, the proposal insofar as it entails environmental regression violates these objectives of the European Union.

16. Articles 4(3) to 4(7) of Directive 2000/60/EC.

17. Articles 3(3) TEU and 191(2) TFEU.

18. Articles 1, 4.1.a.i, 4.1.b.i and 4.9 of Directive 2000/60/EC.

The principle of integration

28. The Treaty on the Functioning of the European Union states that "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development"¹⁹.

29. The Charter of Fundamental Rights of the European Union states that "A high level of environmental protection and the improvement of the quality of the environment shall be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development"²⁰.

30. The proposal is not compatible with the principle of environmental integration in sectoral policies as it does not integrate and ensure the requirements and objectives of protection of biodiversity (Directive 92/43 and Directive 2009/147) and water and its ecosystems (Directive 2000/60) into energy policy.

31. The fact that the proposal's objectives include 'increasing the speed and scale of investment' in renewable energies should not be seen as a justification for considering that this is an environmental policy and that it is not necessary to guarantee the environmental stocks which, according to the principle of integration, should be respected.

32. In this respect, the Court of Justice has held that the mere fact that a Community measure takes account of environmental requirements does not mean that it is therefore part of Community environmental policy²¹.

33. This contradiction is even more evident when it has not been demonstrated in the proposal that the measure has the capacity to actually achieve the desired effect, and, on the other hand, no attempt has been made to identify, quantify and assess that the allegedly beneficial effects of the proposal may outweigh its impacts on biodiversity and water and its ecosystems.

34. The uncertainties resulting from the lack of regulatory impact assessment also make the precautionary principle²² applicable in the sense that measures such as the insufficiently assessed proposal should not be adopted.

The presumption of public interest override

35. The scope of application of the presumption is limited to "the planning, construction and operation of plants and installations for the production of energy from renewable sources and their connection to the grid, as well as the related grid and storage assets themselves"²³ (hereinafter renewable energy production).

19. Article 11 TFEU.

20. Article 37 Charter of Fundamental Rights of the European Union.

21. Judgment of 24 November 1993, *Mondiet* (C-405/92, EU:C:1993:906), paragraphs 17 to 28. See also the Opinion of Advocate General Gulman in the same case (EU:C:1993:822) points 12 to 17. The same principles have also been confirmed in the subsequent case law of the Court of Justice, see e.g. *Case C-336/00 Huber* (EU:C:2002:509), paragraph 33.

22. Article 191(2) TFEU.

23. Article 2.1 of the proposal.

36. The proposal states that in weighing the legal interests of each case "there shall be a presumption" that renewable energy production plans or projects "are of overriding public interest and contribute to public health and safety".

37. The wording given to the precept, in which it says "...it shall be presumed that..." and does not include the possibility of contradicting this presumption in the procedure, seems to indicate that it is a presumption of law and by law, in which what is presumed is taken to be true in any case, without discussion (there is no room for proof to the contrary). In contrast to the case of rebuttable presumptions in which the veracity of the presumption can be disputed, a dispute can take place (evidence to the contrary is admissible).

38. The concept of public interest is commonly used in EU law and in certain cases it is used to justify exceptions to a specific general rule, in a similar way as in the Member States.

39. The concept of "overriding public interest" is used in the rules reflected in the proposal for that purpose to justify an exception to a general rule. But the inclusion of the adjective "overriding" in the wording introduces an important change.

40. The noun "interest" is determined by the adjective "public" which, as opposed to "private", requires a relation to general social values and by the adjective "superior" which intensifies this requirement of a relation to social values with a higher rank. Therefore, this intensification of the requirement for committed social values has to be adequately identified, described and assessed in each case.

- In the protection of the Natura 2000 network

41. The proposal seeks to establish that this presumption arises 'in particular 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'.

42. Directive 92/43 establishes in Article 6(3) and (4) a procedure for the examination of plans and projects with the following phases or stages: (1) consists of an assessment and is governed by Article 6(3), first sentence; (2) concerns the decision of the competent national authorities and is governed by Article 6(3), second sentence; and (3) is triggered if, despite a negative assessment, it is proposed not to reject a plan or project but to further examine it, is provided for in Article 6(4).

43. The application of the proposal would take place at the third stage of the procedure described above, when, despite a negative assessment, the competent authorities are willing to proceed with the approval procedure. In such cases, renewable energy plans or projects would be presumed to be of "overriding public interest", an expression that seems to equate the proposal to "overriding public interest".

44. But the application of the proposal could also apply at the same stage to situations where, in addition to requiring a negative assessment, the site concerned "hosts a priority natural habitat type and/or species". In these cases, "only considerations relating to certain goods

may be invoked", including "human health and public safety", which is also presumed in the proposal.

45. In addition to the application to the procedure under consideration of paragraphs 3 and 4 of Directive 92/43, the proposal also envisages the application of Article 16(1)(c) of that Directive which provides for a derogation from the obligations to establish a system of strict protection of animal species (Article 12), plants (Article 13), or measures for the collection of species (Article 14) or the capture or killing of wild species (Article 15).

46. Having analysed the exemptions to which the presumption of overriding public interest applies, it can be concluded that they go to the heart of biodiversity protection and that reducing their strictness poses a significant risk of deterioration of the Natura 2000 network, as recent scientific knowledge has shown.

47. Research carried out by the Experimental Station of Arid Zones of the Spanish National Research Council²⁴, have shown that in areas with high environmental values of Community interest where there is a proliferation of applications for photovoltaic plants, the only effective control to prevent the generalised deterioration that was already occurring in the area were the scientific reports introduced in the procedure precisely under the procedure of Article 6(3) and (4) of Directive 92/43. Thanks to these reports, it has been possible to reduce the impact of photovoltaic plants on these key areas for the conservation of biodiversity by 70% to 90%.

48. Without these scientific reports, provided during the public information period, the Administration alone is not able to guarantee a low environmental impact of the photovoltaic plant projects it assesses. The allegations help to mitigate the shortcomings in the procedure. A significant number of PV plants that did not receive expert allegations were authorised despite their considerable impact on areas of biodiversity conservation interest.

49. The study demonstrates that the public information period helps to alleviate the lack of reliable and up-to-date information on the distribution and status of endangered species. These shortcomings translate into environmental zoning for the implementation of renewable energies that is poorly designed by administrations. The latter is a general problem already identified by the EU Biodiversity Strategy to 2030, in particular on the conservation status of species and areas of Community interest.

50. The data provided by the study show that, if the presumption of overriding public interest were to be applied, projects rejected because of their negative impact could be approved and thereby create a widespread deterioration of the study area and the extinction of certain species in that area, which may be extrapolated to other areas currently in a similar situation.

24. Valera, F.; Bolonio, L.; La Calle, A.; Moreno, E. "Deployment of Solar Energy at the Expense of Conservation Sensitive Areas Precludes its Classification as an Environmentally Sustainable Activity." *Preprints* 2022, 2022110405. <https://www.preprints.org/manuscript/202211.0405/v1>

- On the protection of waters and their ecosystems

51. The ultimate objective of Directive 2000/60 is to achieve good status of all waters in the Union by 2015²⁵ and to this end it establishes two intrinsically linked objectives and obligations: to prevent or avoid deterioration and to improve or restore surface water and groundwater²⁶.

52. The obligation to prevent or avoid deterioration of water and its ecosystems has two exemptions, so that Member States do not infringe the prohibition of deterioration when temporary deterioration occurs due to natural or exceptional causes²⁷ or when the action leading to the deterioration meets certain requirements²⁸. It is in the latter case that the presumption of the proposal would apply.

53. The application of the exemption for new deterioration-generating actions is conditioned by the fulfilment of certain requirements. Among them is that the reasons for the deterioration of waters are of overriding public interest²⁹. The application of the proposal would imply that renewable energy plans and projects are, in any case, considered to be of overriding public interest. This implies that the impairment caused by the new development does not constitute an infringement of the prohibition of impairment. - Anticipated exemption from the obligation to prove overriding public interest

54. The presumption set out in the proposal means that all renewable energy production plans and projects are exempted in advance from the requirement to prove that they are in the overriding public interest.

55. This exemption in advance allows any renewable energy production project, even if it only responds to a purely private interest, to cause damage to an ecosystem that is simultaneously protected by Directive 2000/60, Directive 92/43 and Directive 2009/147. This could occur, for example, in a dam project for the production of electricity on a stretch of river that is both a Special Protection Area for Birds (SPA) and a Special Area of Conservation (SAC) and, in addition, harbours priority species that would also be affected.

56. The anticipated exemption from the overriding public interest test for renewable energy production plans or projects entails an absolute or indiscriminate prioritisation of a class of plans and projects that breaks the principle of case-by-case control, which is the only one that allows for a proper environmental assessment, as recognised by the case law of the Court of Justice with regard to the Environmental Impact Assessment Directive³⁰.

25. Articles 1 and 4.1 of Directive 2000/60.

26. Article 4.1 of Directive 2000/60.

27. Article 4.6 of Directive 2000/60.

28. Article 4.7 of Directive 2000/60.

29. Article 4.7.c of Directive 2000/60.

30. Judgments of the Court of Justice of 2 May 1996, *Commission v. Belgium*, C-133/94, EU:C:1996:181; of 24 October 1996, *Kraaijeveld and others*, C-72/95, EU:C:1996:404; of 8 September 2005, *Commission v. Spain*, C-121/03, EU:C:2005:512.

Conclusions

57. The proposal for a regulation to "accelerate the deployment of renewable energies" submitted on 9 November 2022 by the Commission to the Council of the European Union is not in conformity with EU law for at least the following reasons:

- Lack of legal basis as it cannot be reasonably understood that the proposed environmental derogations can be considered as falling within the concept of financial assistance to Member States as set out in Article 122 TFEU, chosen as the basis for the proposal.
- It violates the principle of environmental non-regression implicit in the objective of achieving sustainability based on a high level of protection and improvement of the quality of the environment and the promotion of solidarity between generations set out in Article 3(3) TEU, as it reduces the existing level of protection by extending the derogations.
- It contradicts the principle of integration laid down in Article 11 TFEU and Article 37 of the Charter of Fundamental Rights by preventing fundamental environmental protection requirements from being fully integrated into the definition and implementation of energy policies.
- It transgresses the limits set out in the main directives on the protection of biodiversity and ecosystems (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) and the principle of case-by-case monitoring, leading to significant risks of deterioration which have not been assessed and therefore contradict the precautionary principle of Article 191(2) TFEU.