

The Impact of the Russian War of Aggression against Ukraine on EU Environmental Law : Environmental Deregulation in Times of Energy Crisis?

The Impact of War (in Ukraine) on the EU

Da Silva, Erriketi Tla

<https://doi.org/10.5040/9781509986118.ch-012>

This publication is made publicly available in the institutional repository of Wageningen University and Research, under the terms of article 25fa of the Dutch Copyright Act, also known as the Amendment Taverne.

Article 25fa states that the author of a short scientific work funded either wholly or partially by Dutch public funds is entitled to make that work publicly available for no consideration following a reasonable period of time after the work was first published, provided that clear reference is made to the source of the first publication of the work.

This publication is distributed using the principles as determined in the Association of Universities in the Netherlands (VSNU) 'Article 25fa implementation' project. According to these principles research outputs of researchers employed by Dutch Universities that comply with the legal requirements of Article 25fa of the Dutch Copyright Act are distributed online and free of cost or other barriers in institutional repositories. Research outputs are distributed six months after their first online publication in the original published version and with proper attribution to the source of the original publication.

You are permitted to download and use the publication for personal purposes. All rights remain with the author(s) and / or copyright owner(s) of this work. Any use of the publication or parts of it other than authorised under article 25fa of the Dutch Copyright act is prohibited. Wageningen University & Research and the author(s) of this publication shall not be held responsible or liable for any damages resulting from your (re)use of this publication.

For questions regarding the public availability of this publication please contact openaccess.library@wur.nl

Govaere, Inge , Sacha Garben , and Eleanor Spaventa , ed. Impact of War (in Ukraine) on the EU. Oxford Dublin: Hart Publishing, 2025. Modern Studies in European Law. Modern Studies in European Law. Bloomsbury Collections. Web. 21 Aug. 2025. <http://dx.doi.org/10.5040/9781509986118>.

Accessed from: www.bloomsburycollections.com

Accessed on: Thu Aug 21 2025 13:41:50 Midden-Europese zomertijd

Copyright © Erriketi TLA Da Silva. All rights reserved. Further reproduction or distribution is prohibited without prior permission in writing from the publishers.

12

The Impact of the Russian War against Ukraine on EU Environmental Law: Environmental Deregulation in Times of Energy Crisis?

ERRIKETI TLA DA SILVA*

12.1. Introduction

The EU is facing the dual challenge of ensuring energy security and compliance with environmental commitments in the wake of geopolitical turmoil. Russia's aggression in Ukraine prompted a reassessment of the EU's energy situation, with the need to focus on reducing reliance on Russian fossil fuels, and revealed the intricate web of connections between energy and environmental policies.

Russia's invasion of Ukraine disrupted energy supplies and initially sent Europe into a state of panic. The EU, heavily dependent on Russian fossil fuels, faced an unprecedented energy crisis. This situation led to demands from the industry, agriculture and fisheries sectors to delay the implementation of environmental regulations and to ask for greater financial support. The immediate impact on energy supply and prices, as well as the urgent need to reduce dependency on Russian fossil fuels, demanded a fast response. However, tackling this crisis had to be reconciled with the ultimate goal of achieving climate neutrality by 2050 as part of the European Green Deal.¹

In order to address this unprecedented crisis, the EU launched the REPowerEU plan,² representing a big step towards energy transition and reducing dependency on Russian fossil fuels. A series of targeted amendments to existing energy and environment legislation and to the Recovery and Resilience Facility were introduced in order

*I would like to express my sincere gratitude to Professor Dr N Notaro for his invaluable guidance and expertise during the process of writing this chapter.

¹Commission, Communication from the Commission, 'The European Green Deal' [2019] COM(2019) 640 final.

²Commission, 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 Plan [2022] COM(2022) 230 final.

to increase renewable energy production and to ensure the financing of the plan, while demonstrating a commitment to accelerate the green transition. It has been claimed that this rapid shift could advance the green transition by five to 10 years, signalling a significant commitment to the acceleration of the deployment of renewable energy.³

While the EU's swift response through the REPowerEU plan and its related legislative amendments reflects a commitment to accelerate the green transition, this complex set of legislative changes needs careful analysis and implementation to avoid environmental degradation. Amidst the urgency of addressing energy security, crucial environmental considerations come to the forefront as the Union is facing a twofold challenge. Firstly, the direct consequences of the war, including pollution and destruction of nature and infrastructure in Ukraine,⁴ raised the imperative to align post-war reconstruction efforts with EU environmental standards. This monumental task necessitates comprehensive coordination and funding to rebuild infrastructure and restore natural ecosystems, and is essential in order to ensure Ukraine's path towards membership. Secondly, while addressing energy security is paramount, the EU faces the challenge of avoiding environmental deregulation. The response to the energy crisis, if not carefully managed, could undermine environmental protection, so the EU has to find the right balance to ensure that energy security measures align with its commitment to environmental sustainability.

This chapter analyses the impact of the REPowerEU plan and its related legislative initiatives, triggered by the Russian war of aggression against Ukraine, on EU environmental law. More specifically, the analysis will focus on Regulation (EU) 2023/435 regarding the addition of REPowerEU to the Recovery and Resilience Plans,⁵ Directive 2018/2001 on the promotion of energy from renewable sources⁶ and Council Regulation 2022/2577 laying down a framework to accelerate the deployment of renewable energy.⁷ The chapter will explore whether the introduced amendments of EU environmental legislation amount to an impermissible reversal of environmental standards.

12.2. The REPowerEU Plan

In May 2022, only three months after the Russian invasion of Ukraine, the European Commission presented the REPowerEU Plan in response to the disruption of the global energy market because of the war, which highlighted the vulnerability of Europe's energy

³'War and subsidies have turbocharged the green transition' *The Economist* (13 February 2023), available at www.economist.com/finance-and-economics/2023/02/13/war-and-subsidies-have-turbocharged-the-green-transition.

⁴OECD, 'Environmental impacts of the war in Ukraine and prospects for a green reconstruction' [2022] 4.

⁵Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, [2023] OJ L63/1.

⁶Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, [2023] OJ L2023/2413.

⁷Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, [2022] OJ L335/36.

supply. In summary, the plan represents a comprehensive strategy to enhance Europe's energy security and to end its reliance on Russian fossil fuels, while accelerating the green transition in light of the Union's commitments under the European Green Deal.⁸

The plan emphasises the importance of energy-efficiency measures as the quickest and most cost-effective way to address the energy crisis. It proposed increasing the binding energy efficiency target and implementing short-term measures to reduce gas and oil demand.⁹

The REPowerEU aims to swiftly diminish Europe's reliance on Russian fossil fuels, hastening the transition to cleaner energy and fostering a more resilient Energy Union. The plan, building upon the Fit for 55 proposals¹⁰ and addressing energy security and storage, outlines actions to significantly increase the production of energy from renewable sources. The overarching objective is to ensure the long-term sustainability, cost-effectiveness and security of the EU's energy supply by gradually reducing dependency from the Russian Federation.¹¹ To achieve these goals, the plan incorporates short-, mid- and long-term targets across four pillars: demand reduction; diversification of fossil fuel suppliers with infrastructure futureproofing; acceleration of the shift to renewable energy sources; and smart investments in order to fund the transition.¹²

The REPowerEU plan represents a pivotal moment in EU energy policy. It aims to accelerate the transition to renewable energy sources, reduce fossil fuel dependency, and achieve carbon neutrality by 2050. The plan encompasses several components, including substantial investments in renewable energy infrastructure and the promotion of clean technologies. Thus, it strives to balance immediate energy security needs with long-term environmental sustainability goals.

The implementation of this very ambitious plan required the introduction of multiple legislative measures. The following sections analyse Regulation 2023/435 regarding the REPowerEU chapters in Recovery and Resilience Plans, Directive 2023/2413 regarding the promotion of energy from renewable sources, and Council Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy.

12.3. Regulation 2023/435 Regarding the REPowerEU Chapters in Recovery and Resilience Plans

In order to finance the REPowerEU plan, Regulation 2023/435 was adopted to amend the Regulation establishing the Recovery and Resilience Facility¹³ (RRF Regulation).

⁸ REPowerEU Plan (n 3) 1–2.

⁹ The revised Energy Efficiency Directive (Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast), [2023] OJ L 231) increased the energy-efficiency target-setting goal of reducing energy consumption by 11.7% by 2030, compared to projected energy use for 2030.

¹⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee -and the Committee Of The Regions, 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality [2021] COM(2021)550 final.

¹¹ REPowerEU Plan (n 3) 1–2.

¹² *ibid.*

¹³ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, [2021] OJ L57/17.

Regulation 2023/435 requires Member States to seek financing for reforms and investments that promote the REPowerEU by adding a new chapter to their Recovery and Resilience Plans.

Regulation 2023/435 has generated considerable debate due to its exemption for oil and gas from the Do Not Significantly Harm (DNSH) principle. More specifically Article 21c(6) provides for an exemption for reforms and investments aiming to improve energy infrastructure and facilities to meet ‘immediate security of supply needs’ for gas, including liquified natural gas and in some exceptional cases oil from the DNSH principle.¹⁴ In order for the exemption to be granted the measure should be necessary and proportionate to meet ‘immediate security of supply needs’, it should not jeopardise the attainment of climate targets, it should be operational by 31 December 2026, and the Member State concerned should take appropriate mitigation measures.

This preferential exemption for only some specific projects which, by their very nature, are likely to harm the environment, seems to prioritise immediate energy security concerns over environmental protection. The current privileged treatment of oil and gas seems at odds with the obligation to aim at a high level of environmental protection and to integrate environmental protection requirements into all EU sectoral policies, as stipulated, respectively, in Articles 191(2) and 11 TFEU as well as in Article 37 of the Charter of Fundamental Rights. It is also questionable how a dedicated exemption to the benefit of fossil fuels could be considered as not jeopardising the climate targets.

The exemption discriminates against environmentally friendly projects, such as renewables or energy-efficiency projects that need to abide by the DNSH principle, in favour of environmentally harmful new fossil fuel infrastructure that is not required to respect the DNSH standard. This discriminatory clause establishes a negative precedent and runs counter to the fundamental goals of the RRF, including the pursuit of ‘smart, sustainable, and inclusive growth.’¹⁵ The preference for oil and gas, as opposed to renewable alternatives with inherently lower environmental impacts, lacks a clear and transparent justification. While it may serve as a short-term, pragmatic response to energy security threats, it should have been framed by much more stringent and clearer criteria.

Ambiguities in the Regulation, in particular concerning essential definitions, have generated legal uncertainty especially in Article 21c(6) of the Regulation.¹⁶ The vagueness of terms like ‘significant harm’ or ‘emergency situation’ leaves room for

¹⁴ Art 21c(6) Regulation 2023/435 (n 6).

¹⁵ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, [2021] OJ L57/17, Recitals 10 and 13, Art 3(c).

¹⁶ Article 21c(6) of Regulation 2023/345 (n 6) provides that: ‘By derogation from Article 5(2), Article 17(4), Article 18(4), point (d), and Article 19(3), point (d), the principle of “do no significant harm” shall not apply to the reforms and investments under paragraph 3, point (a), of this Article, subject to a positive assessment by the Commission that the following requirements are met: (a) the measure is necessary and proportionate to meet immediate security of supply needs in accordance with paragraph 3, point (a), of this Article taking into account cleaner feasible alternatives and the risk of lock-in effects; (b) the Member State concerned has undertaken satisfactory efforts to limit the potential harm to environmental objectives within the meaning of Article 17 of Regulation (EU) 2020/852, where feasible, and to mitigate harm through other measures, including the measures in the REPowerEU chapter; (c) the measure does not jeopardise the achievement of the Union’s 2030 climate targets and the objective of EU climate neutrality by 2050, based on qualitative considerations; (d) the measure is planned to be in operation by 31 December 2026.’

interpretation that can result in litigation and potential project implementation delays. The notion of ‘immediate security of supply needs’ seems to contradict the requirement of the measures to be operational by the end of 2026. Furthermore, using the expression ‘planned to be in operation’ means the actual operationalisation of the measures could occur many years later than 2026, undermining their urgent nature.

Regulation 2023/435 was initially framed as a response to immediate security of supply needs. However, the energy landscape has evolved, and the gas prices have considerably decreased.¹⁷ This changed context raises strong doubts about the continuation of the 2022 emergency situation and many concerns on the potential fossil fuels lock-in effect which could hinder the transition to sustainable energy sources. Thus, a reassessment of the Regulation’s relevance and alignment with current energy realities is crucial.

In conclusion, Regulation 2023/435 causes concerns, related especially to the exemption of oil and gas from the DNSH principle, which introduced legal uncertainties and inconsistencies with EU climate and environmental goals and legal requirements while not being based – at least no longer – on an energy security emergency.

12.4. The Revised Renewable Energy Directive (Directive 2023/2413)

Directive 2023/2413 seeks to simplify and accelerate the permit procedure for renewable energy projects, aiming to expedite their deployment. To this end, Article 1(2) raises the EU’s binding renewables target for 2030 to a minimum of 42.5 per cent, from the previous 32 per cent target, aiming to reach 45 per cent. However, while this primary goal is laudable, the implications of the simplification of permitting procedures require careful consideration.

The explanatory memorandum of the Directive’s proposal underlines the need to accelerate the permitting process, since the heavy administrative requirements hinder significantly the effective deployment of renewable energy.¹⁸ Pursuant to the Interim Report of the RES Simplify Study, administrative burdens are nearly half of the identified obstacles to the deployment of renewable energy.¹⁹

The following sub-sections will analyse the main amendments introduced by Directive 2023/2413.

¹⁷ ‘Eurostat, Electricity and gas prices stabilise in 2023’ Eurostat (26 October 2023), available at ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20231026-1#:~:text=After%20a%20significant%20increase%20in,and%20gas%20prices%20are%20stabilising.

¹⁸ Commission, ‘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’ [2022] COM(2022) 222 final, 1.

¹⁹ Commission, Directorate-General for Energy, ‘Technical support for RES policy development and implementation Simplification of permission and administrative procedures for RES installations’ (RES simplify: interim report) [2022] 36.

12.4.1. Designation of Renewable Acceleration Areas

The increase of areas dedicated to energy production sought by the REPowerEU Plan adds pressure on natural habitats and wildlife, creating a dilemma involving competing societal priorities. Spatial planning, accompanied by strategic environmental assessments, plays a crucial role in reconciling these interests by identifying areas on land and at sea where the environmental impacts would be lower and which could therefore be prioritised for renewable energy projects.

Directive 2023/2413 focuses on the importance of strategic planning in order to secure adequate land and sea areas for the deployment of renewable sources. More specifically, pursuant to Article 15b of the Directive, by 21 May 2025 Member States shall carry out a coordinated evaluation in order to identify areas in their territories that will be used for the deployment of renewable energy in order to meet the 2030 target, ensuring that there is sufficient land, inland water and sea space for renewable energy installations. The size of these areas should be determined based on the specific needs and characteristics of the technologies to be deployed. Article 15b provides concrete criteria that should be considered when identifying the areas to be used for renewable energy production in order to meet the 2030 target. These criteria encompass renewable resource availability, production potential, projected demand, and grid infrastructure and storage.

According to Article 15c of Directive 2023/2413, by 21 February 2026, Member States shall designate within the areas mapped pursuant to Article 15b, renewable acceleration areas ('go-to' areas) for one or more types of renewable energy sources. Article 15c provides guidance to Member States, emphasising the promotion of renewable energy integration with existing infrastructure while minimising the use of environmentally sensitive areas. This approach prioritises artificial and built surfaces and excludes areas designated as Natura 2000 sites, areas designated under national protection schemes for nature and biodiversity conservation, and 'major bird and marine mammal migratory routes'.²⁰ However, the language used in this provision is non-committal and does not create a clear prohibition for Member States to exclude environmentally sensitive areas from areas of accelerated renewable energy deployment. It also creates legal uncertainty by introducing undefined notions such as 'major birds and mammal migratory routes'. This expression seems to imply a quantitative element, but how many specimens should one count before a migratory route is considered 'major'?

Prior to their approval, plans that designate go-to areas must go through a strategic environmental assessment (SEA) in line with Directive 2001/42/EC (SEA Directive).²¹ If these plans are likely to have a significant impact on Natura 2000 sites, they must also undergo an appropriate assessment as specified in Article 6(3) of Directive 92/43/EEC (Habitats Directive).²² Essentially, Article 15c of Directive 2023/2413 aims to ensure compliance with Articles 11 and 191 of the TFEU by incorporating environmental

²⁰ Article 15c(1)(a)(ii) of Directive 2023/2413 (n 7).

²¹ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive), [2021] OJ L197.

²² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992], OJ L206.

concerns into strategic planning, thereby facilitating the attainment of a ‘high level of protection’ for the environment.²³ These plans need to be made public and be re-evaluated at least every two years, coinciding with the updates to the national energy and climate plans.

Additionally, pursuant to Article 15c(4), Member States have the option to start more rapidly the deployment of renewable sources by designating, by 21 May 2024, as ‘renewable acceleration areas’ those areas that have been already identified as suitable for the expedited deployment of renewable energy technologies if they are not within the Natura 2000 network or other protected zones, have undergone a SEA and, if applicable, an appropriate assessment under the Habitats Directive, and provided that suitable rules are implemented to mitigate any potential adverse environmental impacts.

12.4.2. Exemption from Environmental Assessments

Article 16a(3) introduces a very important exemption. In renewable acceleration areas, projects are exempted from the requirement for an environmental impact assessment (EIA),²⁴ provided that the relevant authority determines during the screening process that significant unforeseen adverse effects are unlikely, after considering the environmental sensitivity of the location. Moreover, in the same areas, renewable energy projects must not be subject to an assessment of their implications for Natura 2000 sites provided that appropriate mitigation measures have been taken.

This exemption is based on the rationale that the plans designating the renewable acceleration areas have already undergone a strategic environmental assessment (SEA). Additionally, if these plans were expected to significantly affect Natura 2000 sites, they would have undergone an appropriate assessment in line with Article 6(3) of the Habitats Directive. However, it is important to note that conducting a SEA at the plan level cannot replace the need for assessments at the project level, since SEA and EIA operate at different and complementary levels. While the SEA looks at plans which identify broadly the areas where future projects may be developed, the EIA concerns individual projects in specific locations, also looking into cumulative impacts from different individual projects in the same area. Therefore, the EIAs provide a more specific evaluation of the potential consequences of individual projects that can, by no means, be replaced by a SEA alone.²⁵

The new exemption does not make EIAs completely irrelevant for renewable energy projects. Following a screening process according to Article 16a(4), the EIA and appropriate assessment can still apply to projects that are deemed ‘highly likely to give rise to significant adverse effects’ that were not anticipated in the plan. However, the

²³ Art 191(2) TFEU provides that ‘Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union’.

²⁴ Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance (EIA Directive), [2014] OJ L124, Arts 2–4.

²⁵ B Dalal-Clayton and B Sadler, ‘Strategic environmental assessment: A rapidly evolving approach. A Directory of Impact Assessment Guidelines’ (1999) *Environmental Planning Issues* 2.

terminology used, ie ‘highly likely’ and ‘significant unforeseen adverse effects’, departs from the Habitats and EIA Directives, thereby limiting the possibility for the authorities to require an assessment only to exceptional cases.²⁶

Thus, Directive 2023/2413 introduced implicit amendments to key provisions of the Habitats and EIA Directives, which are an essential part of EU environmental legislation. This becomes even clearer when one looks at the legal bases for Directive 2023/2413, which include Article 192(1) TFEU, the environmental legal basis, in addition to Article 194(2), the energy legal base. The exemptions from the EIA and the appropriate assessment under the Habitats Directive put at risk the attainment of their respective goals. While streamlining permits could accelerate renewable energy projects, it remains to be demonstrated that environmental requirements are a key factor slowing down the approval process rather than the lack of administrative capacity of national authorities, the poor quality of the projects that are submitted for authorisation, or the opposition of local populations that do not wish to see wind and solar farms in their backyard.

Safeguards must be put in place to prevent hasty approvals that compromise environmental protection. Assessing the environmental impact of a project before its authorisation is vital to respect the principles of prevention and precaution enshrined Article 191(2) TFEU. In addition to the climate crisis, the world is facing a biodiversity crisis which is topical also in the EU. Most protected habitats and species in the EU are in poor conservation status²⁷ and habitat fragmentation is one of the key causes for this. Therefore, considering projects’ adverse environmental effects on nature during the authorisation phase is crucial. In addition, these amendments are a significant departure from the stringent approach followed by the Court of Justice, which favours case-by-case evaluations and does not allow pre-emptive exemption of entire categories of projects.²⁸

Moreover, excluding projects within acceleration areas from environmental assessments is likely to result in less predictability for project developers and investors. The Habitats and EIA Directives have a long history of application based on established case law, providing a reliable and well-understood legal framework. The above amendments are likely to disrupt this system, creating legal uncertainties because of the vague notions they introduce and increasing litigation during the project permitting process which would, in turn, lead to unnecessary delays.

While it is true that the environmental assessments can be time-consuming, the above almost complete exemption from an EIA and from an appropriate assessment is disproportionate and was not included as a proposal to reduce the administrative complexities of permitting in the RES Simplify Study²⁹ nor in the Fitness Check of the Birds and Habitats Directives.³⁰

²⁶ Art 6(3) of the Habitats Directive (n 23) and Art 2(1) of the EIA Directive (n 25) use the terms ‘likely’ and ‘significant effects’.

²⁷ European Environmental Agency Report No 10/2020 (2020) ‘State of nature in the EU’ (Luxembourg, Publications Office of the European Union).

²⁸ Case C-66/06 *Commission v Ireland* [2008] ECR I-00158, [65].

²⁹ RES simplify: interim report’ (n 20) 36.

³⁰ Commission Staff Working Document Fitness Check of the EU Nature Legislation (Birds and Habitats Directives) Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [2016] SWD(2016) 472 final, ch 6.2.7.

These concerns are further increased by the introduction of Article 16a(6) which allows, for renewable projects in acceleration areas, permitting applications to be authorised without an explicit decision from the competent authority, unless the project would be subject to an EIA or where the principle of positive administrative silence does not exist in the national legal system of the Member State concerned. This automatic granting of permits without the express approval of a competent authority raises legal and environmental concerns since, potentially, the projects at stake could have significant impacts. Considering the 45-day timeframe in Article 16a, there is a significant risk for competent authorities to be unable to come to a decision within that timeline and for major projects to – tacitly – get very close to final approval. This concern is partly mitigated by the clause in Article 16a(6) stating that tacit approval ‘shall not apply to final decisions on the outcome of the permit-granting procedure, which shall be explicit’. Alternatively and less likely, competent authorities might choose to require an environmental assessment provided they can argue that the project is ‘highly likely to give rise to significant adverse effects’.

Thus, Directive 2023/2413 effectively leads to the almost automatic authorisation of renewable projects in acceleration areas, marginalising the significance of environmental assessments, which are considered by the Court of Justice one of the ‘fundamental environmental protection mechanisms’.³¹

12.4.3. Short Screening Deadlines

Article 16a(4) outlines a requirement for Member States to conduct a screening of permit applications for renewable projects in designated acceleration areas. As mentioned above, this screening aims to identify if the project is ‘highly likely’ to lead to unforeseen significant adverse environmental effects that were not previously considered during the designation of these renewable areas. Furthermore, this Article suggests that such screening should be completed within a very short timeframe of 30 or 45 days, depending on the project type.

From a practical standpoint, these short deadlines may pose challenges for public authorities, which are often under-resourced.³² These tight timelines could create an incentive to expedite the process, potentially leading to the oversight of significant environmental impacts of a project. Therefore, this provision is likely to generate complexities and uncertainties, which could be avoided if the screening process were integrated into the standard EIA procedure. It is essential to ensure that these assessments are conducted thoroughly so that the potential environmental impacts can be identified.

Article 16a(4) specifies that the project developer is obliged to provide, inter alia, details regarding the project’s characteristics and its adherence to the rules and measures outlined in Article 15c(1b) and (1c). Supplying the competent authority with

³¹ Case C-261/18, *Commission v Ireland (Derrybrien Wind Farm)* [2019] ECLI:EU:C:2019:955, [116].

³² It should be noted that the proposal provided even tighter deadlines of 15 and 30 days depending on the project type (see Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 (n 18), Art 16a(4)).

sufficient information to effectively screen the project is crucial, primarily because the request for additional information is limited to what already exists. This approach does not consider the potential gaps, lack of biodiversity or other environmental data in the information provided by the developer. It also deviates from the interpretation offered by the Court of Justice concerning the Habitats Directive, which calls for the use of ‘the best scientific knowledge in the field’.³³

12.4.4. Presumption of Compliance of Mitigation Measures with the Birds and Habitats Directives and the Water Framework Directive

Article 15c(1b) creates a presumption that mitigation measures against the potential detrimental effects of renewable energy projects to the environment would automatically ensure projects’ compliance with key environmental obligations related to the preservation of species, habitats and surface water bodies. More specifically, it provides that if appropriate and timely mitigation measures are taken and applied in a proportionate manner to ensure compliance with the Habitats and Birds Directives (Nature Directives) and the Water Framework Directive and to avoid deterioration of the environment, these measures are sufficient to presume that the projects to which they apply are compliant with the environmental law obligations stemming from these legislative instruments.

Mitigation measures refer to actions taken to reduce the potential adverse environmental impact of a project. These measures operationalise the principle of prevention, which calls for actions to minimise environmental harm from the outset, rather than addressing it after it has occurred. Integrating mitigation measures into plans and projects ensures that the development of renewable energy sources is carried out in a way that minimises environmental harm.

However, the presumption bypasses requirements set by the Nature Directives and the Water Framework Directive and risks to be used as means to circumvent important protective provisions outlined in these legislative instruments.

12.4.5. Compensation or ‘Pay to Kill’ Provisions

Article 16a(5) provides that wind and solar photovoltaic installations, which are expected to provide most of the renewable electricity by 2030³⁴ can, in the event of justified circumstances (including to accelerate the deployment of renewable energy to achieve the climate and renewable energy targets), be put in place without assessments under the EIA and the Habitats Directives, even if potential adverse environmental consequences were identified during the screening process, provided that the developer adopts proportionate mitigation measures. If such measures are deemed unavailable,

³³ Case C-254/19, *Friends of the Irish Environment* [2020] ECLI:EU:C:2020:680, [50] and [51].

³⁴ See Recital 35 of Directive 2023/2413 (n 6).

the developer should adopt compensatory measures which, if other compensatory measures are unavailable, can take the form of monetary compensation to be paid, in case of impacts on species protection, into species protection programmes during the whole plant's operation, in order to ensure or improve the conservation status of the species affected.

Regarding plans to designate dedicated areas for grid and storage projects, pursuant to Article 15e, they should as a rule exclude Natura 2000 sites since there are fewer limitations on their placement. In such areas, Member States should be able to exempt projects from assessments under the EIA and the Habitats and Birds Directives under justified circumstances, including where needed to accelerate the grid expansion to support the deployment of renewable energy to achieve the climate and renewable energy targets. Should Member States choose to rely on such exemptions, the designated projects should undergo an efficient screening process, akin to the process outlined for areas dedicated to accelerating renewable energy projects, and this process should rely on existing data. If the screening reveals projects with a high likelihood of causing significant unforeseen adverse effects, the competent authority must ensure the adoption of appropriate and proportionate mitigation measures. When it is not possible to adopt such measures, the mitigation might take form of a 'monetary compensation for species protection programmes' in order to ensure or improve the conservation status of the species affected.

In relation to the above-described special regime for both wind/solar photovoltaic installations and grid/storage projects, it is to be recalled that monetary compensation is an ex-post measure and does not align with the principle of prevention which underscores EU environmental law. Moreover, monetary compensation does not qualify as compensatory measure under the Habitats Directive.³⁵ Thereunder, compensatory measures must be measures of an ecological nature that address the specific habitats and species affected by the project in order to ensure the overall coherence of the Natura 2000 network of protected areas.

In both projects related to grid and storage infrastructure under Article 15e as well as for exceptional cases regarding wind and photovoltaic projects under Article 16a, it is emphasised that mitigation measures have to be proportionate. However, the Directive does not provide guidance on what would constitute a proportionate mitigation measure in these cases. This lack of clarity in the terminology could lead to legal disputes if mitigation measures are rejected on the grounds of being disproportionate. Moreover, further uncertainties are likely to arise regarding the definitions of 'monetary compensation' and 'species protection programmes' and what constitutes an amount consistent with the goal of ensuring or improving the conservation status of the species. Lastly, regarding the timeframe of these measures for wind and solar photovoltaic projects, Article 16a(5) limits compensation to 'the duration of the operation of the renewable power plant', which could be problematic as projects may have long-lasting effects even after the plant ceases operation, and nature might need more time and support to restore after the end of the projects' activities.

³⁵ See European Commission, Directorate-General for Environment, *Managing Natura 2000 sites – The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC*, Publications Office [2019] 62.

12.4.6. ‘Deliberate Killing or Disturbance’ and ‘Novel Mitigation Measures’

Pursuant to Article 16b, outside renewable acceleration areas, if ‘appropriate mitigation measure’ has been ‘adopted’ for a specific project, the killing or disturbance of species protected under the Nature Directives would not be considered ‘deliberate.’ It is worth noting that the term ‘adopted’ may suggest that mere adoption is enough and effective implementation is not required. Moreover, this approach seems to depart from the case law of the Court of Justice, which underlines that the mere acceptance of the possibility of capture, disturbance or killing is enough to qualify the action as ‘deliberate’ and stands at odds with the precautionary and prevention principles which underscore the Habitats Directive.³⁶ This is particularly so if the authorities and/or project developer have no obligation to implement and monitor the effectiveness of the mitigation measures in question and to impose/take additional measures in case they prove ineffective.

Both in renewable acceleration areas (Article 15c) and outside of them (Article 16b), the Directive allows the temporary use of ‘novel mitigation measures’ in pilot projects if they have not been ‘widely tested’ and their effectiveness is ‘closely monitored’ before implementation, with appropriate steps taken immediately if they are proven ineffective. It remains to be seen how these mitigation measures will be considered when determining if the project adversely affects the integrity of the site or the species. The case law of the Court of Justice suggests that the precautionary principle should be applied in a strict manner and has underlined that only measures whose effectiveness has been confirmed through ‘definitive data’ can guarantee the integrity of the protected site or species.³⁷

12.4.7. Presumption that Renewables Projects Constitute an Overriding Public Interest

Article 16f introduces a presumption that the development of renewable energy projects is considered an ‘overriding public interest’ and ‘serving public health and safety’ for the purpose of the Nature Directives and the Water Framework Directive. However, these Directives already include an ‘overriding public interest’ test, which allows certain activities, plans or projects to proceed for reasons of public interest when their harmful impacts have been extensively assessed.³⁸ Any application of such test should be done through a case-by-case evaluation, to ensure that projects that cause significant adverse environmental effects that cannot be avoided or mitigated are only authorised when, balancing environmental protection with another public interest, the latter prevails.

³⁶ Case C-221/04 *Commission v Spain* [2006] ECLI:EU:C:2006:329, [71].

³⁷ Case C-142/16 *Commission v Germany* [2017] ECLI:EU:C:2017:301, [37]–[45].

³⁸ See, eg, Art 6(4) Habitats Directive (n 22), which provides for an ‘overriding public interest’ test and requires the Member State to prove that there are no ‘alternative solutions’ to the proposed development.

The rationale for proposing this presumption is to simplify the assessment process for renewable projects by facilitating their approval. Yet, there is a concern that this provision may not actually simplify the assessment but could instead lead to confusion in the application and interpretation of existing EU legislation. The concept of ‘overriding public interest’ within the context of the Nature Directives is already subject to a substantial body of case law and Commission guidance.³⁹ Most importantly, given the current case law, according to which the security of energy supply has been accepted as an ‘overriding public interest’,⁴⁰ renewable projects that aim at generating a substantive amount of energy are already likely to be considered as in the overriding public interest. On the other hand, small projects with a big impact on nature should not benefit from such a generous presumption which is, therefore, either unnecessary or potentially damaging to the environment for no good reason, depending on the project to which it will apply.

12.4.8. The Lack of an Impact Assessment

Impact assessments are required for all legislative instruments and their amendments which are expected to have significant economic, environmental and social impacts and are part of the legislators’ obligation to state reasons. This obligation derives from the Aarhus Convention,⁴¹ Regulation 1367/2006,⁴² Article 41 of the EU Charter of Fundamental Rights and Article 296 TFEU, and is stipulated in Paragraph 13 (Chapter III) of the Inter-institutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making.⁴³

Reasons of political sensitivity and urgency were invoked to justify the lack of an impact assessment for the proposal for the revision of Directive 2018/2001.⁴⁴ However, it is precisely due to the political sensitivity of the amendments introduced and of their potentially significant environmental impact that an impact assessment was essential.

The invoked urgency reasons are not persuasive since conducting an impact assessment should not result in undue delays in the legislative process⁴⁵ and resources can be shifted to face the urgency and develop the assessment more quickly. Furthermore,

³⁹ Commission Notice, Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC [2021] OJ C437/01, ch 3.3.2.

⁴⁰ See, eg, Case C-411/17 *Inter-Environnement Wallonie et Bond Beter Leefmilieu Vlaanderen* [2019] ECLI:EU:C:2019:622, [159].

⁴¹ UNECE Convention on Access to Information, Public Participation in Decision-Making And Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 (Aarhus Convention), Art 5.

⁴² Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (Aarhus Regulation), [2006] OJ L264, Art 4.

⁴³ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, [2016] OJ L123, paras 12–18.

⁴⁴ See Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 (n 18).

⁴⁵ Case C-128/17 *Poland v Parliament and Council* [2019] ECLI:EU:C:2019:194, [83]; Interinstitutional Agreement on Better Law-Making (n 43), para 12.

when considering the overall duration of the ordinary legislative procedure and the proposal's long-term goals, the additional time required for completing an impact assessment seems insignificant,⁴⁶ especially as the effects of the proposal had been largely anticipated through the 'emergency regulation' discussed in section 12.5 below. Bypassing the impact assessment is hardly justifiable, especially since the Directive is intended for long-term application.

12.4.9. Scarce Public Participation

The limited consultation process for the adoption of the legislative framework to implement the REPowerEU plan has raised concerns regarding the lack of inclusivity, the potential hindering of well-informed decision-making on environmental legislation and the need to uphold the principles of the Aarhus Convention.

More specifically, Articles 6–8 of the Aarhus Convention apply to the preparation of 'generally applicable legally binding normative instruments' that may significantly affect the environment.⁴⁷ Moreover, Article 9 of Regulation 1367/2006⁴⁸ and paragraph 19 of the Inter-institutional Agreement outline a public consultation process intended to ensure the broadest possible participation.⁴⁹

Concerning the REPowerEU plan, various activities, including a call for evidence and a public consultation,⁵⁰ were conducted to gather input from competent authorities and the public on potential modifications to permit-granting procedures. While these actions align with the Interinstitutional Agreement on Better Law-Making, non-governmental organisations (NGOs) have expressed reservations about their comprehensiveness.⁵¹ They argued that, due to the urgency of the situation, the public consultation was notably limited. Environmental NGOs and civil society organisations were not considered part of the 'target audience' and were not consulted during the creation of the RES Simplify Study.⁵² The primary stakeholder group that had significant opportunities for involvement consisted mainly of the energy sector, including renewable energy companies, energy communities and industry associations. Consequently, the feedback gathered from the consultation lacks comprehensiveness, and the process failed to capture diverse input from stakeholders with varying interests.⁵³

Regarding the substance of the Directive, it addresses public participation in Article 15d, providing that Member States shall comply with the public participation requirement outlined in Article 6 of the SEA Directive by granting 'early and effective

⁴⁶ Directive 2023/2413 (n 6) entered into force on 20 November 2023 and the proposal (n 18) was published on 18 May 2022.

⁴⁷ Aarhus Convention (n 41), Arts 6–8.

⁴⁸ Aarhus Regulation (n 42), Art 9.

⁴⁹ Interinstitutional Agreement between the European Parliament on Better Law-Making (n 43), para 19.

⁵⁰ Factual Summary Report of the Stakeholder Consultation on 'Renewable energy projects – permit-granting processes & power-purchase agreements', Ref. Ares(2022)8484514 –7 December 2022, available at eur-lex.europa.eu/legal-content/EN/TXT/?uri=pi_com%3AAres%282022%298484514.

⁵¹ Client Earth, Briefing: RePower EU Proposal for a REDII amendment Expediting renewable technologies' permitting procedures (June 2022), available at www.clientearth.org/media/itejqaby/clientearth_repowereu-permitting-amendments-briefing_july-2022.pdf.

⁵² Factual Summary Report (n 50).

⁵³ Client Earth, Briefing (n 51).

opportunities' for public participation. While public consultation is an obligation pursuant to the SEA Directive, the lack of public participation at a project level due to the exemption from the obligation to conduct an EIA in renewable acceleration areas coupled with the short assessment deadlines may negatively affect the possibility for meaningful public participation.

In conclusion, and given the fundamental role of effective public participation in projects with potentially significant environmental effects, these gaps constitute a major flaw in the adoption of the proposal and raise serious doubts about its compatibility with the Aarhus Convention principles and the duty to ensure transparent and inclusive environmental decision-making processes.

12.5. Council Regulation (EU) 2022/2577: Accelerating Renewable Energy Deployment

Council Regulation (EU) 2022/2577⁵⁴ aims to urgently tackle the need to end dependency on Russian fuels by expediting renewable energy deployment and was adopted under Article 122(1) TFEU, which provides for an emergency legislative procedure when there are severe difficulties regarding energy supply. The Regulation entered into force originally for 18 months (ie, until July 2024), but its duration was extended to 30 June 2025 by virtue of Council Regulation (EU) 2024/223.⁵⁵

Regulation 2022/2577, similarly to the Directive analysed in the previous section, introduces the overriding public interest presumption (Article 3), provisions for accelerating the permitting process for solar energy equipment (Article 4), fast-track procedures for the repowering of renewable energy projects (Article 5), exemptions from environmental assessments for renewable energy projects and related grid infrastructure, essential for integrating renewables (Article 6), and provisions regarding the acceleration of the deployment of heat pumps (Article 7). In essence, it introduced the main amendments of Directive 2023/2413 before the enactment of the Directive, in view of the urgent need to accelerate the deployment of renewable energy and the lengthy negotiations between the co-legislators that the ordinary legislative procedure entails. The substantive concerns regarding these amendments are analysed in the previous section of this chapter.

While the objective of the Regulation is to deal with the situation in an urgent manner, concerns emerge about its scope of application, as the Regulation covers renewable projects whose impacts will only materialise many years beyond its expiry, prompting questions about whether an emergency situation will still exist at that time.

In addition, environmental NGOs have raised concerns regarding the respect of the prerogatives of the European Parliament in light of the use of Article 122(1) TFEU as the legal base.⁵⁶ Pursuant to this Article, an act can be adopted by the Council upon

⁵⁴ Council Regulation (EU) 2022/2577 (n 7).

⁵⁵ Council Regulation (EU) 2024/223 of 22 December 2023 amending Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy, [2023] OJ L2024/223, Art 8.

⁵⁶ *CEE Bankwatch Network z.s., Ökobüro – Allianz der Umweltbewegung v Council of the European Union* (Case T-535/23) (C/2023/221).

a proposal by the Commission without the participation of the European Parliament when there are severe difficulties regarding the supply of energy products. Since the emergency Regulation significantly alters legislative acts of paramount importance in EU environmental law, ie, the EIA, the Nature and the Water Framework Directives, all adopted through the ordinary legislative procedure, the exclusion of the European Parliament and the reliance on Article 122(1) should be truly exceptional. Instead, and as we have seen, there are strong doubts about the correspondence between the need to ensure immediate security of energy supply and the effect of the measures included in the Regulation. Therefore, compliance with democratic principles is questionable due to the limited public participation and the disrespect of the European Parliament's prerogatives. Striking the right balance between expeditious energy measures and environmental integrity is a difficult exercise that requires mechanisms for parliamentary scrutiny and robust public participation.

The emergency Council Regulation 2022/2577 was challenged by two environmental organisations⁵⁷ under the internal review procedure provided in Article 10 of the Aarhus Regulation.⁵⁸ The environmental organisations argued that the contested Regulation would result in environmental degradation which is not permitted pursuant to a combined reading of Articles 191 and 194 since these provisions suggest that existing environmental protection levels should not be decreased. In this context, Article 191 of the TFEU outlines the objectives of EU policy on the environment, which include preserving and protecting, but also improving, environmental quality. Additionally, Article 194 of the TFEU highlights the importance of 'preserving and improving' the environment in the context of the energy sector. The NGOs argue that the EU's policy is designed to achieve a high level of protection and automatically prohibits the reversal of environmental standards. To this end, the exemptions of certain renewable projects from EIAs under Article 5 of the contested Regulation contradicts the objective of 'improving the quality of the environment'.

In addition, the NGOs argued that Article 3 of the contested Regulation effectively presumes that all renewable energy projects requiring derogations from the EIA and the Nature Directives are automatically in the overriding public interest, regardless of the extent of harm they may cause to protected habitats, species or water quality. They contend that this provision primarily benefits the most environmentally damaging renewable energy projects. In addition, since even before the Regulation renewable energy projects could be recognised on case-by-case basis as being of overriding public interest and approved in spite of their significant impacts,⁵⁹ the NGOs maintain that the introduction of this presumption was not necessary.

They also argue that the Regulation breaches the Aarhus Convention by excluding the affected public from participating in the procedure due to the exemption of certain

⁵⁷ *ibid.*

⁵⁸ Aarhus Regulation (n 42), Art 10.

⁵⁹ CEE Bankwatch Network *vs*, Ökobüro – Allianz der Umweltbewegung *v* Council of the European Union Request for Internal Review under Title IV of the Aarhus Regulation ch 5.1.1. The NGOs referred the Schwarze Sulm and Gratkorn hydropower plants in Austria as examples of projects that received derogations under these Directives, available at bankwatch.org/wp-content/uploads/2023/03/Request-for-an-Internal-Review-of-Council-Regulation-EU-2022_2577-of-22-December-2022_consolidated.pdf.

projects from EIAs, and by failing to grant access to courts for challenging the procedure's outcomes.⁶⁰

The NGOs also consider that legal basis of the Regulation is inappropriate since, as mentioned above, the Regulation was adopted via a procedure that excludes the European Parliament, instead of relying on Article 192 TFEU, which constitutes the legal basis to adopt environmental legislation and provides for the ordinary legislative procedure, except in some instances that are not relevant in the case at hand. The NGOs also claim that the Regulation is a non-legislative act and is hierarchically inferior to legislative acts; and, therefore, it cannot introduce amendments to other legislative acts such as the EIA and the Nature Directives.⁶¹

On 13 June 2023, the Council dismissed the complaint. The environmental organisations proceeded to two actions for annulment before the General Court arguing that their main arguments for the legal challenge were not refuted in a meaningful way by the Council. The actions would challenge the Council's response rather than the Regulation itself but would likely have a significant impact on the discussion of fast track permitting. At the time of writing the cases are still pending.

12.6. Is Environmental Deregulation Permitted?

Notwithstanding the urgent need to accelerate the energy transition towards the use of renewable sources in order to end the dependency on Russian fossil fuels, the introduced amendments present a backward step regarding their environmental ambition. Undoubtedly legitimate goals should not come at the expenses of environmental protection through environmental deregulation.⁶² The amendments to EU environmental legislation, to the detriment of nature and broader environmental protection, may be characterised as a reversal of environmental protection standards and it is worth examining whether such regression is permitted under EU law.

According to one international definition of the non-regression principle, public authorities should 'refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law'.⁶³ The principle is gaining recognition in international environmental law and a non-regression or progression obligation is included in the Paris Agreement.⁶⁴ Moreover, non-regression has been recognised as a general principle by the Court of Justice regarding the protection of the rule of law.⁶⁵

Various terms are employed to describe the concept of non-regression, creating a diversity of potential definitions for the same principle. Some refer to it as

⁶⁰ *ibid*, chs 5.1.2.1 and 5.2.2.

⁶¹ *ibid*, ch 5.1.2.

⁶² CJ Durá-Alemañ et al, 'Climate change and energy crisis drive an unprecedented EU environmental law regression' (2023) 16 *Conservation Letters*.

⁶³ Definition of the International Group of Experts for the Pact (IGEP), 'Draft Global Pact for Environment' (2017), Art 17.

⁶⁴ Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, TIAS No 16-1104, Art 3s and 4(3).

⁶⁵ Case C-896/19 *Repubblika* [2021], ECLI:EU:C:2021:311, [64].

‘non-regression,’ while others call it ‘standstill principle’⁶⁶ or even the ‘principle of progression’⁶⁷ This array of terminology underpins a variety of definitions, leading to a central question: should the principle be interpreted in a factual sense, encompassing any tangible environmental degradation, or solely in a legal sense, addressing rollbacks in the level of protection?

It needs to be noted that non-regression is not an explicit principle of EU environmental law and is not enshrined in the Treaties. Some argue that introducing a non-regression principle is necessary to maintain the high level of protection the EU aims to achieve.⁶⁸

Despite progress on the global stage in the recognition of ‘non-regression,’ the only new environmental principle incorporated into Article 191 TFEU through the years has been the precautionary principle, introduced by the Maastricht Treaty.⁶⁹ This prompts the question of whether one can draw additional environmental principles from EU environmental law beyond the explicit provisions outlined in the Treaties.

The notion of non-regression is not entirely new in EU environmental law since non-regression clauses appear in various pieces of sectoral legislation with environmental significance. Factual non-regression clauses are incorporated in Article 4(1) Water Framework Directive, Article 4(4) Birds Directive and Article 6(2) Habitats Directive. The Court of Justice refers to these clauses as ‘prohibition of deterioration.’⁷⁰ The Strategic Plans Regulation for the Common Agricultural Policy introduced a legal non-regression obligation in Article 105(1), obliging Member States to increase ambition regarding environmental and climate-related objectives.⁷¹

It can be argued that a combined reading of Articles 11 (principle of integration) and 191(2) TFEU, Article 37 and Recital 6 of the Charter of Fundamental Rights referring to ‘responsibilities and duties with regard to ... future generations’ suggests that the reversal of environmental protection standards is prohibited, since the concept of progressivity is inherent in environmental protection.⁷²

More specifically, Article 11 TFEU provides for the obligation of the EU to take into account environmental considerations in its policies and activities with a view to promoting sustainable development. The choice of the word ‘must’ – the most imperative wording possible for an obligation by the Treaty drafters – demonstrates

⁶⁶ J Hachez, ‘Le principe de standstill dans le droit des droits fondamentaux : une irréversibilité relative’ in M Prieur and G Sozzo (eds), *La non régression en droit de l’environnement* (Brussels, Bruylant, 2012) 484–88.

⁶⁷ N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, 2nd edn (Oxford, Oxford University Press, 2020) 69.

⁶⁸ M Prieur, ‘Plaidoyer pour un principe de non régression environnementale’ in C Cournil and AS Tabau (eds), *Politiques climatiques de l’Union européenne et droits de l’homme* (Brussels, Bruylant, 2013) 303–09.

⁶⁹ L Krämer, ‘The Genesis of EC Environmental Principles’ in R Macrory, I Havercroft and R Purdy (eds), *Principles of European Environmental Law* (Groningen, Europa Law Publishing, 2004) 38.

⁷⁰ Case C-346/14 *Commission v Austria* [2016] ECLI:EU:C:2016:322, [45]; Case C-504/14 *Commission v Greece* [2016] ECLI:EU:C:2016:847, [100].

⁷¹ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013, [2021] OJ L435.

⁷² M Prieur, ‘Plaidoyer pour un principe de non régression environnementale’ in Cournil and Tabau (n 68) 304.

that there is, undoubtedly, a clear obligation to ensure the integration of environmental objectives in sectoral policies. Nevertheless, the presence of this provision alone is evidently inadequate in ensuring environmental integration across all EU policies and activities. For environmental integration to play a substantial role in achieving policy coherence, it needs to possess a well-defined objective. To this end, an interpretation of Article 11 TFEU, considering natural science and more specifically using the planetary boundaries⁷³ as non-negotiable ecological limits which must be respected, is crucial in rendering Article 11 TFEU truly effective.⁷⁴

In principle, environmental considerations should be integrated in energy policy, including the REPowerEU plan. However, while it is generally accepted that Article 11 is legally binding, the wording of the Article does not give the full picture regarding its legal effects and, most importantly, its potential limits. This is why the principle of proportionality plays a crucial role in the balancing exercise between ensuring energy security and safeguarding environmental standards. Within this context, the conceptual framework for planetary boundaries calls for a precautionary approach by setting the boundary value at the lower end of the uncertainty range.⁷⁵ In the case at hand, an interpretation using the limits set by the planetary boundaries as a starting point would suggest that legislative amendments that undermine the role of the EIA and introduce unjustified presumptions is in breach of the obligation to integrate environmental considerations in other sectoral policies.

The principle of coherence, as enshrined in Article 13(1) TEU and Article 7 TFEU, should be applied in this context, ensuring that energy and environmental policies are implemented in a coherent manner. Consistency in policy goals can help the EU reconcile energy security and environmental protection, and the effective integration of environmental considerations into energy policy can ensure a harmonious approach in tackling emergency situations.

Regarding Article 37 of the EU Charter, although it can be seen as a repetition of Article 3(3) TEU, which is part of the general provisions setting forth core objectives of the Union, and of the environmental integration clause of Article 11 TFEU, it can also be seen as an additional ‘persuasive authority’⁷⁶ for the obligation to effectively integrate environmental considerations in other sectoral policies. It should be noted, however, that Article 37 falls within the ‘principles’ category of the Charter and thus it does not confer any independently justiciable entitlement to environmental protection.⁷⁷

⁷³The concept of planetary boundaries refers to a set of nine Earth system processes or ‘boundaries’ that, if exceeded, could lead to abrupt and irreversible environmental changes, negatively impacting the stability and resilience of the Earth’s systems. These boundaries were proposed by a group of scientists led by Johan Rockström and Will Steffen in 2009. See: M Leach, K Raworth and J Rockström, ‘Between social and planetary boundaries: Navigating pathways in the safe and just pathway for humanity’ World Social Science Report 2013: Changing Global Environments (OECD, 2013) 84–90.

⁷⁴B Sjäffell, ‘The Environmental Integration Principle: A Necessary Step Towards Policy Coherence for Sustainability’ in F Ippolito, ME Bartolino and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Abingdon, Routledge, 2019) 105–08.

⁷⁵*ibid.*

⁷⁶G Marin-Duran and E Morgera ‘Commentary on Article 37 of the EU Charter of Fundamental Rights – Environmental Protection’ (2013) *Europa Working Paper* No 2013/2, 26.

⁷⁷Art 52(5) Charter of Fundamental Rights, See also: Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303, which explicitly mention Art 37 as a Charter principle and not a right.

This Article provides for an absolute obligation to integrate a high level of environmental protection and the improvement of the quality of the environment in the sectoral policies of the EU. The concept of a ‘high level’ of environmental protection holds significant importance as a fundamental principle in EU environment policy which is enshrined in Article 191(2) TFEU.

The Court of Justice has clarified that the level of protection does not have to be the utmost technically achievable,⁷⁸ but this does not imply adopting the lowest common denominator in environmental standards.

This perspective aligns with the possibility granted to Member States under Article 193 TFEU to implement more stringent environmental protection measures than those at the EU level. Consequently, the EU legislator is not obligated to adopt the highest environmental protection standard found within a specific Member State. Overall, the ‘high level’ principle embodies a dynamic objective, constantly advancing environmental protection within the EU. The notion of ‘improvement of the quality of the environment’, which is also present in Article 191(1) TFEU, is comparatively more straightforward as it suggests that any action leading to environmental deterioration contradicts the spirit of Article 37 of the Charter.

In the case at hand, given that the level of environmental protection does not need to be the highest possible, one could argue that a short and temporary lowering of environmental standards is not in breach of the Treaties and the Charter. However, one should recall that the amendments to the Renewable Energy Directive are not temporary and that even the changes introduced by the ‘emergency’ Regulation (EU) 2022/2577 amount to a partial deregulation of renewable energy projects, with long-lasting effects that extend beyond the duration of the adopted provisions. Arguably, the presumptions and the exemptions introduced by these legislative changes can be characterised as a reversal of environmental standards that would be prohibited under the principle of non-regression underscoring the EU Treaties.

12.7. Conclusion

The Russian invasion of Ukraine brought to the fore the intrinsic links between energy security and environmental sustainability. The EU’s swift response through the REPowerEU plan and legislative amendments has been presented as a commitment to accelerating the green transition. However, striking the right balance between energy security and environmental protection is essential for a resilient and sustainable European future. Instead, the REPowerEU plan accentuates the silos between biodiversity protection and climate change mitigation.

The REPowerEU plan brings many opportunities but also challenges in the context of energy security and environmental sustainability. While short-term deviations may be necessary in times of crisis, they must be approached with caution. Continuous review, adaptation and monitoring of emergency measures are essential to avoid prolonged deregulation, reaching a level of impermissible environmental regression.

⁷⁸ Case C-284/95 *Safety High-Tech v S & T Srl* (Safety High-Tech) [1998] ECR I-4301, [49].

Thus, measures should focus on the very difficult exercise of balancing immediate security needs with long-term environmental objectives, ensuring a harmonious coexistence. The rigorous application of the principle of proportionality in compliance with the TFEU and the Charter to integrate environmental protection in other sectoral policies is key in this regard.

To this end, the DNSH principle should be fortified with clear criteria to guide decision-making. The funding of new fossil fuel infrastructure risk creating long-term carbon dependencies and hindering the energy transition in the long term. Therefore, exemptions, when granted, should be well justified and should not compromise environmental standards. Moreover, EIAs should remain a key element of permitting processes, as they provide transparency and accountability, even in fast-track permitting procedures. Expedited permitting demands clear definitions and guidance, public participation and justification of decisions, in order to be truly efficient. Finally, emergency measures introduced during crises should be monitored and revised continuously to assess their relevance and alignment with constantly evolving situations, since adaptation and recalibration are essential to avoid lock-in effects. In this regard, parliamentary oversight is paramount in order to enhance democratic accountability. The amendments introduced by the REPowerEU plan result in a deregulation of the energy sector, creating risks for environmental backsliding if not monitored cautiously.

The complex relationship between the fight against climate change and the halting of biodiversity loss is evident in the REPowerEU plan, which could have been an opportunity to break the silos and bridge the gap between energy and the environment, combining renewable energy sources with robust environmental conservation frameworks. Biodiversity conservation and climate change mitigation should be seen as goals that support each other. In this direction, the new EU Strategy on Adaptation to Climate Change recognises the need to increase synergies with areas like biodiversity for creating a climate resilient Europe.⁷⁹ Policy coherence is crucial, even within various environmental realms and it is essential to recognise that biodiversity and climate change mitigation are inextricably linked. Climate change is a significant driver of biodiversity loss, jeopardising protected species by destroying their habitats and threatening their extinction. At the same time, preserved nature plays a fundamental role in climate change mitigation, through carbon sequestration, and adaptation, eg through the prevention/reduction of floods' damage exacerbated by climate change.⁸⁰

While it can be argued that the introduced amendments serve the goal of ensuring a 'high level of environmental protection' since they accelerate the deployment of renewable energy contributing to climate change mitigation, the very purpose of environmental assessments is to identify the basis to deliberate on trade-offs between various public interests, including opposing environmental goals. Thus, curtailing those assessments can only lead to ill-based decisions.

Renewable energy installations are essential in fighting climate change, but they can also lead to biodiversity loss in the areas where they are implemented. This creates a

⁷⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Forging a climate-resilient Europe – the new EU Strategy on Adaptation to Climate Change [2021] COM(2021) 82 final, 2.

⁸⁰ M Fitzmaurice, 'Biodiversity and Climate Change' (2021) 23 *International Community Law Review* 230.

contrast between the benefits of such projects for climate change mitigation and the potential harm they may cause to biodiversity. The best way to maximise such benefits and reduce harm is to conduct solid environmental impact assessments for these projects. The REPowerEU plan has chosen the opposite direction, potentially leading to more policy and social conflict in the local communities that will host the projects, which in turn may lead to projects' delays.

The EU should move away from compartmentalised thinking acknowledging climate change and biodiversity as 'two sides of the same coin'. In this regard, the Nature Restoration Law⁸¹ should be implemented alongside REPowerEU to restore and rehabilitate degraded ecosystems, enhancing their resilience to climate change and bolstering their ability to sequester carbon.

In conclusion, the application of EU environmental law during emergencies should not be seen as an obstacle but as an opportunity to address immediate challenges and end silos between different environmental policies without compromising long-term sustainability. By addressing immediate energy security concerns while upholding long-term environmental commitments, the EU can emerge as a global leader in both energy resilience and environmental sustainability.

⁸¹ Proposal for a Regulation of the European Parliament and of the Council on nature restoration [2022] COM(2022)304 final.