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At full speed:

Policy brief on the EU emergency regulation to accelerate renewable energy

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Lack of real political will, understaffed permitting authorities leading to lengthy and complex administrative procedures are key obstacles for investments in renewables and related infrastructure in Europe. Further causes include a lack of digitalisation in the overall process, lack of resources within competent authorities, delays caused by legal challenges following poor permits, and overlap of responsibility amongst different authorities.

On 19 December, EU governments formally adopted[i] an **Emergency Council Regulation**[ii] **aimed at accelerating the deployment of renewable energy in the short and medium term**. The Regulation will enter into force on 1 January 2023 and will be directly applicable for 18 months in all EU countries, supposedly to cover the time needed for the adoption and transposition of the Renewable Energy Directive, currently discussed by the co-legislators[iii]. Both legislative processes are meant to streamline and accelerate the permitting of renewable energy installations and infrastructure in the EU.

Here are some takeaways worth highlighting:

1. Overriding public interest with flexibility options

The emergency regulation stipulates that the deployment and operation of renewable energy plants is presumed to be of **overriding public interest (OPI)**. Therefore, when balancing different legal interests in individual cases, renewable energy projects will be presumed to have relative priority over environmental concerns[iv]. The efficiency of this measure in advancing renewables is difficult to predict given that other criteria still need to be met on a case-by-case basis under the EU Nature Directives and the Water Framework Directive and considering that multiple authorities are involved in the relative assessments.

In addition, there appears to be legal uncertainty around the application of the OPI presumption. The flexibility clause that will allow EU governments to limit the application of this provision to certain parts of their territory, types of technology, or projects may exacerbate this uncertainty, depending on how it is used. The provision could be used to quickly and efficiently exclude some environmentally sensitive areas or disruptive technologies (i.e. hydropower, biomass) from the OPI presumption. However, EU governments may also abuse this derogation to exclude large areas or technology classes thereby potentially making renewables development even more difficult without any justification.

Hence, due to these elements of uncertainty, **guidelines from the European Commission** on the correct implementation of the OPI presumption are needed as soon as possible. This will not only allow to ensure compliance with existing EU environmental legislation – thereby minimising the environmental risks that the application of this provision might result in – but also to uphold accountability of public authorities for decisions taken by applying this

presumption, and to avoid an unclear or fragmented application of the OPI principle across different EU countries. The recent European Parliament plenary vote on renewables permitting procedures in the Renewable Energy Directive has confirmed this principle by adopting an amendment[v] that mandates the European Commission to issue guidelines to provide clarity on OPI as soon as one month after the entry into force of the Directive.

2. New rules are also applicable to pending applications

The Council also expanded the scope of the emergency regulation to be applied to **ongoing permit granting processes** which have not resulted in a final decision before the entry into force of the Regulation, provided that the application of the Regulation would accelerate the procedure and pre-existing third-party legal rights are preserved[vi]. Multiple gigawatts of proposed renewable capacity are currently awaiting approval in several EU countries due to lengthy administrative procedures that, for instance, frequently result in delays with building or grid connection permits. However, some of the projects currently pending approval in the EU are foreseen to have significant environmental impacts[vii]. The inclusion of ongoing permitting procedures under the scope of the emergency regulation must not translate in a blank cheque to authorise any pending project independent of their sustainability profile. Rather, this provision must be used to ensure that win-win projects – i.e. those that are simply delayed because of administrative reasons – are permitted quickly, while environmentally sensitive projects continue to be fully assessed.

3. Exemptions for heritage and defence risk reinforcing current barriers

The Council has agreed on changes to the European Commission's proposal including, inter alia, the possibility for EU countries to exclude projects affecting **cultural heritage or national defence interests** from the scope of shorter deadlines and simplified authorisation processes for solar energy equipment and heat pumps. These new exceptions risk reinforcing some of the more prominent regulatory barriers currently hindering renewables deployment unrelated to nature protection. EU governments and the European Parliament will have to address these issues in the upcoming negotiations on permitting procedures in the Renewable Energy Directive. In the midst of the current ecological collapse and climate crisis, it is important to strike a balance between protecting cultural heritage and developing renewables. This balance is not incompatible with a faster permitting.

4. Shorter timeframes for permitting are a gamble

The European Council has agreed to shorten the maximal duration for **competent authorities to assess permits** for small-scale solar installations, repowering of existing projects, and heat pumps. Shorter deadlines for permitting could accelerate these much-needed projects, especially regarding renewables self-consumption.

Shorter deadlines could also force EU countries to employ much-needed additional staff in permitting authorities. Member States should swiftly complement these provisions by

allocating funds – e.g. from the REPowerEU chapters in their National Recovery and Resilience Plans – to improve their administrative capacity and make sure that those short deadlines can actually met without undermining environmental obligations. Otherwise, short permits will either mean that projects are simply denied authorisation to avoid the risks of non-compliance with environmental obligations or that the project's environmental impacts are overlooked due to lack of time and administrative resources.

The adoption of the emergency regulation **could accelerate the uptake of renewable energy installations in the short-term**, thereby allowing to relieve part of the pressure on the EU's energy system and avoid spending millions in fossil fuels imports. However, this requires legal certainty and needs to be done in a nature-friendly and people-centric way. The emergency regulation includes highly **complex provisions and flexibility clauses which could also hamper the acceleration** this act seeks. Thus, additional guidance is needed as explained above.

The emergency regulation will cease to apply after 18 months (plus a potential extension). It is important to ensure that there is no legal uncertainty after those 18 months that would undermine any possible acceleration of renewables. The upcoming **interinstitutional negotiations on the REPowerEU proposal to amend the Renewable Energy Directive (REDIV)** will have to address this issue. The European Parliament and EU governments must address the key barriers that are not directly tackled by the Emergency Regulation. In particular, staffing in permitting authorities needs to be increased, public participation in both planning and ownership of renewables must be ensured, and strategic spatial planning should direct the deployment of new renewable plants and infrastructure to areas where they pose less risks to the surrounding ecosystems.

Slow renewables deployment will only exacerbate the current cost and security crisis the EU's energy sector is facing, further adding to the impact of climate change. At the same time, undermining biodiversity protection jeopardises our ecosystems and the services they provide to us and further exacerbates the climate crisis[viii]. In turn, rapid expansion of these technologies in a nature-friendly and people-centric way will help the EU replace expensive and uncertain fossil fuel imports with clean and secure sources of energy, whilst also reducing energy prices.

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Background notes

[i] Political agreement among EU countries was reached in the extraordinary meeting of Energy ministers held on 24 November. Formal adoption was however kept on hold until EU governments had reached an agreement on the gas market correction mechanism (also referred to as gas price cap) as part of a package of emergency measures.

[ii] On 9 November 2022, the European Commission published a proposal for an emergency Council regulation on accelerating the deployment of renewable energy following the conclusions of the European Council held on 20-21 October. The proposal, based on article 122 TFEU – which allows the EU to take emergency measures "in a spirit of solidarity between Member States" – aims at tackling the economic and social implications of the current energy crisis through fast-tracking the simplification of renewables permitting procedures. This procedure only requires the agreement of the Council and does not provide for any legislative role for the European Parliament nor any form of public consultation on the contents of the Commission's proposal. This has raised questions about whether resorting to the article 122 legal basis on such overarching objectives (i.e. the acceleration of renewable energy deployment, entailing substantial changes to existing environmental legislation) endangers the democratic nature of EU legislative processes.

[iii] As part of the REPowerEU plan, the Commission proposed a targeted revision of the Renewable Energy Directive. This revision aims at simplifying permitting procedures for renewable energy installations, overlapping to some extent with the Emergency Council Regulation on accelerating the deployment of renewables. While negotiations on the longer-term revision of the RED are currently ongoing, the Regulation is seen as a temporary emergency measure responding to the need to achieve some of the REPowerEU objectives faster in the light of the worsening energy crisis, in particular the objective to accelerate the roll-out of renewables.

[iv] Pursuant to the OPI presumption, the concern for renewable energies will generally prevail over:

- a negative assessment of the implications for special areas of conservation (provided that there is no alternative solution), pursuant to Article 6(4) of Directive 92/43/EEC (Habitats Directive);
- rules on the protection of animal and plant species, provided that (1) there is no satisfactory alternative, and (2) the derogation is not detrimental to the maintenance of the populations of the species concerned at a favorable conservation status in their natural range, pursuant to Article 16(1) of the Habitats Directive, and other specific rules on the protection of birds (provided that there is no other satisfactory solution) pursuant to Article 9(1)(a), of Directive 2009/147/EC (Birds Directive);
- a deterioration in the condition of a body of surface water under EU water policy, provided that (1) all practicable steps are taken to mitigate the adverse impact on the status of the body of water, (2) reasons for those modifications are set out in a specific river basin management plan and the objectives are reviewed every six years, and (3) objectives served by modifications of the water body cannot be achieved by better environmental options for reasons of technical feasibility or disproportionate cost, pursuant to Article 4(7) of Directive 2000/60/EC (Water Framework Directive).

[v] On 14 December 2022, the European Parliament's plenary adopted an amendment (AM 17) to the Renewable Energy Directive mandating the European Commission to issue guidance on how to implement the OPI presumption "in line with existing requirements under Union law and with relevant rulings of the Court of Justice of the European Union."

[vi] E.g. landowners' or fishing rights

[vii] For instance:

- Mokrice hydropower plant (28 MW), planned on the lower Sava River (Slovenia). This hydropower plant could damage Natura 2000 sites in both Slovenia and Croatia, as eleven fish species protected under the EU Habitats Directive are endangered by the project. The Slovenian government decided that the public interest of producing renewable energy overrides the public interest of nature conservation, even though alternative solutions exist.
- Kaliakra wind farms (Bulgaria). A total of 113 wind turbines were built within and next to the Kaliakra Natura 2000 site. These were authorised without adequate assessments of their environmental effects on birds in the region. The European Court of Justice ruled against Bulgaria over its failure to protect the birds, finding that the conditions to justify overriding public interest were not satisfied. The Bern Convention also opened a case.

[viii] The overall impact on carbon uptake, and thus climate change, differs between regions and ecosystem types. However, recent scientific literature has shown that e.g. "cascading trophic effects triggered by top predators or the largest herbivores propagate through food webs and reverberate through the functioning of whole ecosystems, changing productivity and net carbon storage significantly." The excerpt is taken from: IPCC-IPBES 2021 Joint Report on Biodiversity and Climate Change (available here).