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Towards a Green Energy Transition: REPowerEU Directive vs Environmental Acquis?

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Abstract

The article provides a brief overview and assessment of the proposed measures against the respective political and legal background. It shows that the proposed measures, while generally guided by legitimate objectives, were not properly balanced with the other EU environmental policies. In this context it claims lack of a profound debate regarding the scope and means for such balancing and considers this as a fundamental issue to be addressed before submitting any concrete measures. It then compares the proposed measures with some of the official proclamations in the European Green Deal and shows issues of concern in relation to some of the concrete proposed measures. Finally, it assesses some of the proposed measures as being not controversial and presents proposals for other possible measures to be used for the purpose.
The article is based on a presentation given 24th November 2022 in the context of the annual general meeting of the Environmental Law Network International.

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Towards a Green Energy Transition: REPowerEU Directive vs Environmental Acquis?

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1 Introduction

In December 2019, the newly appointed EU Commission issued a Communication in which it announced a strong shift in policy priorities and a policy roadmap towards environmental sustainability labelled the 'European Green Deal'[1]. With the European Green Deal (EGD) the Commission pledges to "*reset its commitment to tackling climate and environmental-related challenges that is this generation's defining task*", and to pursue "*a new growth strategy*" that aims to transform the EU into a sustainable, resource-efficient, carbon-neutral economy by a 2050 horizon[2].

The EGD Communication announced a number of measures to be undertaken in order to achieve its policy objectives. Following the EU's ambitious climate and energy targets for 2030 and the objective of climate neutrality by 2050, the Commission issued in March 2022 the 'REPowerEU Communication'[3]. It was followed in May by the 'RePower EU Plan'[4], in which speeding up the transition to renewable energies and reducing the dependency on Russian fossil fuel imports were considered as urgent tasks. To this end, also in May 2022, the Commission issued a proposal for a so-called REPowerEU Directive[5], a major aim of which is to facilitate and shorten the permitting procedures for renewable energy plans.

In the light of the above proposal for the Re-Power Directive, this article provides a brief overview and assessment of the proposed measures against the respective political and legal backgrounds. It shows that the proposed measures, while generally guided by legitimate objectives, were not properly balanced with the other EU environmental policies. In this context, it claims a lack of a profound debate regarding the scope and means for such balancing and considers this a fundamental issue to be addressed before submitting any concrete measures. It then compares the proposed measures with some of the official proclamations in the EGD and shows issues of concern in relation to some of the concrete proposed measures. Finally, it assesses some of the proposed measures as not being controversial and presents proposals for other possible measures to be used for the purpose.

The article is based on a presentation given by the leading author and the following discussions during the online webinar 'Towards a Green Energy Transition: REPowerEU Directive vs environmental acquis?' held on 24th November 2022 in the context of the annual general meeting of the Environmental Law Network International[6].

2 Fundamental Question: does green energy transition require resignation from other ambitious environmental policies?

Firstly, the background for the proposed measures needs to be explained. Climate change is commonly perceived as a fundamental threat to the entire globe, and the urgent need for a green energy transition is not in doubt. There is also no doubt that the EU's ambitious climate targets for 2030 and reducing the dependency on Russian fossil fuel imports would require significant acceleration of the transition to renewable energies, and that an important step to this end is facilitation of the respective decision-making procedures, including speeding up permitting. The question, however, is whether this can be done without affecting other environmental policies. The issue is not specific to the EU only and merits a comprehensive evaluation based on both scientific and political debate. Such a debate seems to be carried on in the United States, where both scientists and policymakers are discussing whether successfully addressing the challenges related to climate change would require giving priority to green energy transition at the expense of other environmental policies. Quite influential are the views that we are "*in an era of triage, where we save what we can but recognize that there are things we'll have to give up"*[7] *and consequently*" and that "*we must accept difficult trade-offs, sacrificing some of what we consider precious in order to avoid far worse impacts*"[8]. In this context, the legal requirements related to protection of biodiversity, water protection, public participation, and access to justice are mentioned, which, while absolutely legitimate in themselves, are considered to stand in the way of faster permitting for green energy projects. Following this, a number of solutions in this respect are being proposed in the US academic literature and discussed by both academics and practitioners. These views are confronted not only with the views of pro-fossil fuel advocates and various

1 COM (2019) 640 fin (EGD Communication).
2 Jendrośka, Reese and Squintani (2021).
3 COM(2022) 108 fin.
4 COM (2022) 230 fin.
5 COM(2022) 222 fin.
6 Find more information at https://www.elni.org/elni/events/by-elni/elni-webinar-2022-repower.
7 Gerrard (2022), p. 40
8 Ibidem, p. 38

anti-renewables organisations but also with the views of environmentalists proposing business-as-usual environmental regulation[9]. Thus, the debate in the United States is vivid and far from being finalised.

The situation in the EU looks different, as there seems to be no serious debate among academics and practitioners about whether indeed a green transition requires sacrificing other environmental policies and, if yes, to what extent it is needed. Furthermore, in the case of the EU, there are also some international obligations that generally do not apply in the case of the United States but that must be considered when proposing measures affecting legal requirements related to other environmental policies.

The measures proposed by the European Commission in the proposal for the REPowerEU Directive do not seem to be based on any serious consideration of the impact they may have on the legal requirements of the environmental aquis, including those stemming from international obligations related to protection of biodiversity, water protection, public participation, and access to justice, nor to the proclamations made in the European Green Deal. Furthermore, they seem to have been hastily drafted within the DG Energy without a careful discussion with the environmental experts. The hope that the above deficiencies will be somehow compensated as a result of a thorough debate to be taken in the European Parliament seems to have not fully materialised, as the final version of the draft Directive, as adopted on December 14, 2022 after the first reading in the Parliament, provides only little progress in this respect and, as will be shown, seems to leave many issues of concern unaddressed[10].

3 The proposal for the REPowerEU Directive and the main implementation principles under the Green Deal

The proposal for the REPowerEU Directive is part of the package of proposals submitted under the European Green Deal and must be seen in light of it. The following three principles have been identified in the EGD Communication as conditions for its successful implementation:

1. Active public participation.
2. Effective enforcement by facilitating access to justice for NGOs and the general public.
3. A green oath: no significant harm should be done in achieving these goals.[11]

As far as active public participation is concerned, there is a prominent role assigned in the EGD Communication to the public's involvement in designing and implementing the respective policies. Thus, the EGD Communication states that "*active public participation and confidence in the transition is paramount if policies are to work and be accepted*" (p. 2). Following this, the Commission claims that the "*involvement and commitment of the public and of all stakeholders is crucial to the success of the European Green Deal*" and that "*game-changing policies only work if citizens are fully involved in designing them*" therefore "*Citizens are and should remain a driving force of the transition*" (p. 22). The particular attention in this respect is focused on engaging with the public in climate action within a European Climate Pact (p. 22).

Regarding effective enforcement by facilitating access to justice for NGOs and the general public, the Commission announced in the EGD Communication that it would "*consider revising the Aarhus Regulation to improve access to administrative and judicial review at EU level for citizens and NGOs who have concerns about the legality of decisions with effects on the environment*" and take "*action to improve their access to justice before national courts in all Member States*" (p. 23). Following this, the Commission adopted Communication (2020)643 on improving access to justice, in which it states that the "*public is and should remain a driving force of the green transition and should have the means to get more actively involved in developing and implementing new policies*" (para 2) and that "*[i]ndividuals and NGOs play a crucial role in identifying potential breaches of EU law by submitting complaints to administrations or taking cases to courts*" (para 9). In this context, the Communication also calls on "*the co-legislators to include provisions on access to justice in EU legislative proposals made by the Commission for new or revised EU law concerning environmental matters*" (para 33) which is commonly understood as a promise to include such provisions in the respective proposals by the Commission.

This Communication was accompanied by a Commission proposal to amend Regulation (EC) No 1367/2006 (Aarhus Regulation) with the aim of improving the internal review of administrative acts at the EU level in line with the requirements of the Aarhus Convention[12]. Negotiations to this end were quite difficult and protracted, but ultimately successful with the adoption of Regulation (EU) 2021/1767[13].

9 Ibidem, p. 44.

10 Amendments adopted by the European Parliament on 14 December 2022 on the proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency (COM (2022)0222 – C9-0184/2022 –2022/0160(COD).

11 Jendrośka (2022)

12 Bechtel (2021)

13 Regulation (EU) 2021/1767 amending Regulation (EC) No. 1367/2006 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 (OJ L 356, 2021, pp. 1-7)

As far as the green oath is concerned, the Commission has promised in its EGD Communication that all "*EU initiatives live up to a green oath to "do no harm*" (p. 19) which in the official EU documents, specifying its application, was somehow limited to "*significant harm*" only. Thus, despite critical opinions regarding this limitation[14], it is commonly referred to as "do no significant harm" (DNSH) principle. Article 17 of the Taxonomy Regulation 2020/852 provides in paragraph 1 detailed criteria in relation to each of the six environmental objectives specified in Article 9 to ascertain whether a particular economic activity shall be considered to cause significant harm to these environmental objectives. Following this, the Commission, in its Delegated Regulation 2021/2139 of 4 June 2021, established the technical screening criteria for determining whether the economic activities that contribute substantially to climate change mitigation or climate change adaptation cause no significant harm to any of the other environmental objectives. These criteria, according to its Preamble (para 49,) "*should take into account and build upon the relevant requirements of existing Union law*" with the aim to ensure "*that contribution to one of the environmental objectives is not made at the expense of other environmental objectives*".

4 Main issues of concern

Considering the above implementation principles under the Green Deal, the compliance of the proposal for the RepowerEU Directive with these principles is doubtful.

Regarding generally the involvement of the public, very problematic was the reference to the Aarhus Convention[15], which despite being binding for the European Union[16], in the proposal was meant to "*remain applicable, where relevant*". While fortunately in the above-mentioned version of the draft Directive as adopted after the first reading in the Parliament the words "*where relevant*" were deleted, nevertheless a general reference to the applicability of the Aarhus Convention does not release a piece of secondary EU law from the obligation to fully implement its respective concrete provisions. In this respect, some improvements were made in the Parliament, but some doubts remain regarding some concrete arrangements proposed in the draft Directive (see below).

The approach to the DNSH principle raises similar doubts. As already mentioned, the draft REpowerEU Directive envisages a preferential treatment for renewable energies by somehow limiting the existing requirements regarding some other environmental policies. Neither however in the proposal from the Commission nor in the draft Directive as adopted after the first reading in the Parliament there is a clear obligation to apply the DNSH principle when implementing the measures proposed in the draft RepowerEU Directive.

In this context, three concrete issues in the proposal for the RepowerEU Directive are raising particular concerns, namely:

- legal scheme for 'renewables go-to areas'
- simplification of the permitting procedures
- relations with the tools protecting biodiversity and water.

4.1 Renewables go-to areas

Regarding 'renewables go-to areas' (renamed 'renewables acceleration areas' in the draft Directive as adopted after the first reading in the Parliament), while the very idea of establishing such an instrument could be welcome as it would indeed accelerate the development of renewable energy, however, the proposed procedure for adopting plans designating such areas does not seem appropriate. The proposal mentioned only making the plans public when adopted (proposed Art. 15 c (3) in Directive 2018/2001) but did not envisage any specific requirement for public participation during their preparation, despite the clear obligation under Art. 7 of the Aarhus Convention to ensure public participation during the preparation of plans or programmes "*relating to the environment*". The requirement (proposed Art. 15 c (2) in Directive 2018/2001) to make such plans subject to strategic environmental assessment (SEA) in accordance with the SEA Directive[17] (which provides for mandatory public participation when carrying SEA) would not compensate for this, bearing in mind that the exceptions envisaged in the SEA Directive allowing not to carry out a SEA in certain situations (small areas at local level and minor modifications) are not envisaged by Art. 7 of the Aarhus Convention. This omission was somehow rectified by the Parliament by adding to the draft REpowerEU Directive the entire new article (Article 15d to be inserted into Directive 2018/2001) devoted to public participation in the preparation of such plans. It remains to be seen, however, whether the final wording of this provision would be sufficient to fully comply with the requirements of Art. 7 of the Aarhus Convention.

In the context of the requirement to make plans designating 'renewables go-to areas' subject to SEA, the respective obligation is put on the member states,

[14] Ten Brink (2022), p. 2.

[15] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in Aarhus, Denmark in 1998 ("Aarhus Convention").

[16] Council Decision 2005/370/EC on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ L 124, 2005, p. 1).

[17] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment OJ 2002 L 197.

and there is no mention of any consideration of the cumulative effect that could be exerted by such plans on the environment. This approach reflects a general shortcoming of the SEA system in the EU, which is limited to conducting SEA procedures at the member states level but does not include any instrument to provide a comprehensive assessment of the combined environmental impact of the plans and programmes required by EU law to be undertaken. Lack of SEA procedures at the EU level, despite being required by the UNECE Protocol on SEA (to which the EU is also a Party), has been criticised quite some time ago in official meetings[18], and in some cases related to EU compliance with the Aarhus Convention[19].

4.2 Simplification of the permitting procedures

As for the simplification of the permitting procedures, a couple of issues are raising concerns. The first issue was the proposal to exempt generally (except for odd situations of transboundary impact under Article 7 of the EIA Directive) the renewable energy projects in already designated 'renewables go-to areas', as well as a number of co-related activities, from the requirement to be subject to environmental impact assessment under the EIA Directive[20], provided that they would comply with the rules and measures set out in the plans designating respective areas. This would mean not only replacing an assessment focused on a single project (EIA) by a strategic assessment (SEA) related to the entire plan, which itself is doubtful, but also releasing such individual projects from the requirement to obtain an individual environmental authorization and depriving the public from the possibility of challenging such an authorization. Bearing in mind that the SEA Directive (as opposed to the EIA Directive) does not include a requirement for access to justice, replacing EIA under the EIA Directive with SEA under the SEA Directive also means lack of providing access to justice to the public. This is clearly not in line with the promise made by the Commission to include "*access to justice provisions in legislative proposals for new or revised EU law concerning environmental matters*". In fact, it is even a step back in this respect. More generally, the resignation from requiring an EIA procedure, also means (under paragraph 20 of Annex 1 to the Aarhus Convention) that permitting renewable energy projects in already designated 'renewables go-to areas' (as well as a number of co-related activities) would no longer be subject to the strict requirements regarding public participation under Article 6 nor to access to justice requirements under Article 9.2 of the Aarhus Convention.

The second issue mentioned in this context was the proposed arrangements regarding a screening to identify possible „*significant unforeseen adverse effects*" that were not identified during SEA (Art. 16a (4) and (5)). According to the proposal, if a project is "*highly likely*" to have such affects the screening decision would be made available to the public and a project would require an EIA procedure, otherwise the projects "*shall be authorised from an environmental perspective without requiring any express decision*". In the latter case, there is not even a clear requirement in the proposal to make the decision public. Thus, the entire scheme lacks transparency and public participation in determining compliance with the rules and does not envisage sufficient mechanisms to prevent possible abuses, in particular, it does not include any requirement to provide access to justice for the public. The above shortcomings have been only marginally improved in the draft Directive as adopted by the Parliament.

4.3 Relations with tools protecting biodiversity and water

Relations with tools protecting biodiversity and water were not sufficiently addressed in the proposal for the Directive. It exempted in Art. 16a (3) the renewable energy plants in the 'renewable go-to areas' not only from the requirement to undergo EIA but also from the appropriate assessment under the Habitat Directive[21] , and envisaged the appropriate assessment only for plans "*including artificial and built surfaces located in Natura 2000 site*" (Art. 15c (2)). These provisions if adopted, would heavily limit the application of the appropriate assessment and thus seriously weaken the protection of biodiversity. Furthermore, the proposal did not clarify whether and how to apply, in the absence of EIA and appropriate assessment, the assessment under the Water Framework Directive (WFD)[22]. Finally, providing (in Art. 16d) that the renewable energy plants and related activities "*are presumed as being in the overriding public interests and serving public health and safety*" under WFD, Habitats[23] and the Birds Directive[24], could have significant consequences, which should have been carefully considered.

The above-mentioned shortcomings related to the application of the appropriate assessment in the preparation of the plans and permitting seem to have been rectified in the draft Directive as adopted by the Parliament, but the relation to the assessment under the WFD remains still unclear. It remains to be seen

[18] Jendrośka (2018).
[19] Anapyanova (2021).
[20] Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance, OJ 2012 L 26/1.
[21] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ 206/7.
[22] Directive 2000/60/EC establishing a framework for Community action in the field of water policy, OJ L 327/1.
[23] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ 206/7.
[24] Council Directive 2009/147/EC on the conservation of wild birds, OJ L 20/7.

also if adding by the Parliament a requirement for the Commission to issue a guidance on how to apply Article 16d would indeed reduce legal uncertainty and assist in providing a right balance in individual cases between the various environmental concerns.

5 Legitimate methods

The proposal for the REPowerEU Directive includes a number of measures to facilitate the green transition to renewable energies. Some of them are not controversial but rather quite legitimate and very welcome. These include proposals for providing relatively short and strict time limits for the decision-making procedures, including for permitting, as well as measures to increase respective administrative capacity in the member states. On the other hand, measures resulting in limiting environmental assessment under the EIA Directive and appropriate assessment under the Habitat Directive would negatively affect the other environmental policies and would require careful consideration and a larger debate. Furthermore, resignation from undertaking such assessments would result in reducing transparency and public scrutiny which in turn could be counterproductive and undermine public support for the green transition to renewable energies.

Instead, some other measures should be considered, such as, for example, strengthening the technical expertise available to the courts, providing concrete time-limits for respective judicial procedures, or even establishing specialised bodies to deal with the transition to renewable energies.

6 Conclusion

The current proposal of the REPowerEU Directive includes measures that are controversial and not in line with the promises under the European Green Deal to foster environmental democracy and keep up with the green oath 'do no significant harm'.

The issue furthermore needs to be seen in a wider context, as similar but even more radical measures to be applied temporarily were accepted in the Emergency Regulation adopted by the Council in December 2022[25]. In this case, additionally, the legality of making it on the basis of Art. 122.1 TFEU may be questioned to such an extent that it could be considered a means to bypass parliamentary scrutiny.

The entire package would require a thorough debate and improvement in order to serve the purpose of accelerating the green transition without compromising the fundamental values of the EU and its other environmental policies.

[25] Council Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy, OJ L 335/36.

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, Technische Hochschule Bingen (TH Bingen) and sofia, the Society for Institutional Analysis, located at the Darmstad University of Applied Sciences. The person of contact is Prof. Dr. Roller at TH Bingen.

elni Review

The elni Review is an English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review (info@elni.org) in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut, TH Bingen and sofia.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled “Publications of the Environmental Law Network International”. Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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