Council of the European Union
General secretariat
175 rue de la Loi
1048 Bruxelles

By email : access@concilium.europa.eu

22 February 2023

REQUEST FOR INTERNAL REVIEW

under article 10 of regulation 1367/2006

Dear Madam/Sir,

The associations : Föreningen Svenskt Landskapsskydd, Nederlandse Vereniging Omwonenden Windturbines, Vent de Colère! Fédération nationale, Vent de Raison – Wind met Redelijkheid, Bundesinitiative VERNUNFTKRAFT. e.V., Fédération Environnement Durable and Sites et Monuments – SPPEF (further the "Associations") respectfully request the Council of the European Union (further the "Council") to conduct an internal review of *Council regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy* (OJUE, 29 December 2022, L 335, p. 36) (further the "Regulation").

The present request for internal review (further the "Request") is submitted under article 10 of regulation 1367/2006 on the application of the provisions of the Aarhus Convention[1] (as amended by regulation 2021/1767 of 6 October 2021) (further the "Aarhus Regulation").

[1] Convention on access to information, public participation in decision-making and access to justice in environmental matters, as ratified by *Council Decision (2005/370) of 17 February 2005 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* (OJEU, 17 May 2005, L 124, page 1), further the "Aarhus Convention".

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I - Conditions of the Aarhus regulation

(i) Conditions relevant to the Associations

The Associations satisfy the conditions of Article 11 (1) of the Aarhus regulation to submit a request for internal review.

For the sake of legal certainty, the documents establishing the standing of the Associations to submit the Request to conduct an internal review of the Regulation are attached in corresponding individual annexes, each annex containing :

- a copy of the Associations' statutes showing, in particular, that each association has the objective of promoting environmental protection in the context of environmental law;
- a copy of the publication or registration as non-profit Association;
- statements and reports of the Association activities.

The admissibility of the Associations under the Aarhus regulation was also confirmed by Commission decisions of 6 July 2022 (fisma.b.2(2022) 5340198) (Ares (2022)4952619 – 07/07/2022) and of 9 December 2022 (ENER/DJ/VK(2022)9367850 – (Ares (2022)8575980 – 09/12/2022).[2]

Separately, the Associations are part of the '*public concerned*' defined as "*the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, nongovernmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.*" (Article 2(5) of the Aarhus Convention)

Should any additional information be deemed necessary in this respect, please communicate with the contact person identified as the first signatory of the Request.

(ii) Conditions relevant to the Regulation

The Regulation is an *administrative act*, defined as "*any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1)*" (article 2 1. (g) of the Aarhus Regulation).

With respect to the distinction between legislative and non-legislative acts of the Union, the Court has provided the following interpretation:

"*58 In the words of Article 289(3) TFEU, legal acts adopted by legislative procedure are to constitute legislative acts. Accordingly, non-legislative acts are those that are adopted by a procedure other than a legislative procedure.*

59 The distinction between legislative and non-legislative acts is undoubtedly significant, since it is only on the adoption of legislative acts that certain obligations must be complied with, relating, inter alia, to the participation of national parliaments in

[2] Commission replies to, respectively, requests #63 and #68 accessible on the Commission Aarhus requests page

accordance with Articles 3 and 4 of Protocol (No 1) and Articles 6 and 7 of Protocol (No 2) and also to the requirement that the Council is to meet in public when considering and voting on a draft legislative act, which arises from Article 16(8) TEU and Article 15(2) TFEU.

60 In addition, it is clear, on reading Article 289(1) TFEU in conjunction with Article 294(1) TFEU, that the ordinary legislative procedure, which is characterised by the joint adoption of an act of EU law by the Parliament and the Council on a proposal from the Commission, applies only where the provision of the Treaties forming the legal basis for the act in question '[makes] reference' to that legislative procedure.

61 As regards the special legislative procedure, which is characterised by the fact that it envisages the adoption of an EU act either by the Parliament with the participation of the Council or by the Council with the participation of the Parliament, Article 289(2) TFEU provides that it is to apply 'in the specific cases provided for by the Treaties'.

62 It follows that a legal act can be classified as a legislative act of the European Union only if it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure.

63 A systemic approach of that kind provides the requisite legal certainty in procedures for adopting EU acts, in that it makes it possible to identify with certainty the legal bases empowering the institutions of the European Union to adopt legislative acts and to distinguish those bases from bases which can serve only as a foundation for the adoption of non-legislative acts."

(6 September 2017, *Slovak Republic and Hungary / Council*, C-643/15 and C-647/15, EU:C:2017:631).

Separately, Article 288, second paragraph, TFEU provides that "[a] *regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*"

It follows that as it was adopted on the basis of Article 122 (1) TFEU, the Regulation is a non-legislative act that has *legal and external effects* in the meaning of the Aarhus regulation.

The Associations consider that the Regulation contravenes "*environmental law*" defined as " *legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems* " (article 2 (1) f) of the Aarhus regulation).

Therefore, the Associations respectfully ask the Council to consider the Request admissible and to address it on the merits.

II - Legal provisions

The following provisions of Union law are relevant to the present context.

Article 37 of the Charter[3] :

"*Environmental protection*

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

Article 3 (3) TEU :

"*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.*
(…)"

Article 11 TFEU :

"*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.*"

Article 122 TFEU :

"*1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.*

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken."

Article 191 TFEU :
"*1. Union policy on the environment shall contribute to pursuit of the following objectives:*
— preserving, protecting and improving the quality of the environment,
— protecting human health,
— prudent and rational utilisation of natural resources,
—promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
2. 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. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

[3] Charter of fundamental rights of the European Union

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:

— available scientific and technical data,

— environmental conditions in the various regions of the Union,

— the potential benefits and costs of action or lack of action,

—the economic and social development of the Union as a whole and the balanced development of its regions."

(…)

Article 192 (1) and (2) TFEU:

"*1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.*

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

(b) measures affecting:

— town and country planning,

— quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,

— land use, with the exception of waste management;

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph."

Article 193 TFEU:

"*The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.*"

Article 194 (1) and (2) TFEU:

"*1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:*

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)."

The Aarhus Convention[4] provides :

Article 6

"*1. Each Party:*

(a) shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in Annex I;

(b) shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in Annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

(c) may decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

(a) the proposed activity and the application on which a decision will be taken;

(b) the nature of possible decisions or the draft decision;

(c) the public authority responsible for making the decision;

(d) the envisaged procedure, including, as and when this information can be provided:

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[4] Convention on access to information, public participation in decision-making and access to justice in environmental matters, as ratified by *Council Decision (2005/370) of 17 February 2005 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* (OJEU, 17 May 2005, L 124, page 1).

(i) the commencement of the procedure;

(ii) the opportunities for the public to participate;

(iii) the time and venue of any envisaged public hearing;

(iv) an indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

(v) an indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

(vi) an indication of what environmental information relevant to the proposed activity is available; and

(e) the fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.
(…)"

Article 7

"*Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, Article 6(3), (4) and (8), shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.*"

Article 8

"*Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.*

To this end, the following steps should be taken:
(a) time-frames sufficient for effective participation should be fixed;
(b) draft rules should be published or otherwise made publicly available; and

(c) the public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible."

The Regulation contains the following provisions:

Recital (20)

The provisions of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus Convention') regarding access to information, public participation in decision-making, and access to justice in environmental matters, and in particular, the obligations of Member States relating to public participation and to access to justice, remain applicable.

(…)

Article 3

Overriding public interest

1. The planning, construction and operation of plants and installations for the production of energy from renewable sources, and their connection to the grid, the related grid itself and storage assets shall be presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in the individual case, for the purposes of Article 6(4) and Article 16(1)(c) of Council Directive 92/43/EEC [5]*, Article 4(7) of Directive 2000/60/EC of the European Parliament and of the Council* [6] *and Article 9(1)(a) of Directive 2009/147/EC of the European Parliament and of the Council* [7]*. Member States may restrict the application of those provisions to certain parts of their territory as well as to certain types of technologies or to projects with certain technical characteristics in accordance with the priorities set in their integrated national energy and climate plans.*

2. Member States shall ensure, at least for projects which are recognised as being of overriding public interest, that in the planning and permit-granting process, the construction and operation of plants and installations for the production of energy from renewable sources and the related grid infrastructure development are given priority when balancing legal interests in the individual case. Concerning species protection, the preceding sentence shall only apply if and to the extent that appropriate species conservation measures contributing to the maintenance or restoration of the populations of the species at a favourable conservation status are undertaken and sufficient financial resources as well as areas are made available for that purpose.

(…)

Article 5

Repowering of renewable energy power plants

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[5] *Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora* (OJEC, 22 July 1992, L 206, page 7), as amended, further the "Habitats directive" or "Directive 92/43".

[6] *Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy* (OJEC, 22 December 2012, L 327, page 1), as amended (further the "Water directive" or "Directive 2000/60").

[7] *Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds* (OJEU, 26 January 2010, L 20, page 7), as amended (further the "Birds directive" or "Directive 2009/147").

1. The permit-granting process for the repowering of projects, including the permits related to the upgrade of the assets necessary for their connection to the grid where the repowering results in an increase in capacity, shall not exceed 6 months including environmental impact assessments where required by relevant legislation.

2. Where the repowering does not result in an increase in the capacity of the renewable energy power plant beyond 15%, and without affecting the need to assess any potential environmental impacts pursuant to paragraph 3 of this Article, grid connections to the transmission or distribution grid shall be permitted within 3 months following application to the relevant entity unless there are justified safety concerns, or there is technical incompatibility with the system components.

3. Where the repowering of a renewable energy power plant, or the upgrade of a related grid infrastructure which is necessary to integrate renewables into the electricity system, is subject to a determination whether the project requires an environmental impact assessment procedure or an environmental impact assessment pursuant to Article 4 of Directive 2011/92/EU[8]*, such prior determination and/or environmental impact assessment shall be limited to the potential significant impacts stemming from the change or extension compared to the original project.*

4. Where the repowering of solar installations does not entail the use of additional space and complies with the applicable environmental mitigation measures established for the original installation, the project shall be exempted from the requirement, if applicable, of being subjected to a determination whether the project requires an environmental impact assessment pursuant to Article 4 of Directive 2011/92/EU.

5. All decisions resulting from the permit-granting processes referred to in paragraphs 1 and 2 of this Article shall be made public in accordance with existing obligations.

Article 6

Acceleration of the permit-granting process of renewable energy projects and for related grid infrastructure which is necessary to integrate renewables into the system

Member States may exempt renewable energy projects, as well as energy storage projects and electricity grid projects which are necessary to integrate renewable energy into the electricity system, from the environmental impact assessment under Article 2(1) of Directive 2011/92/EU and from the species protection assessments under Article 12(1) of Directive 92/43/EEC and under Article 5 of Directive 2009/147/EC, provided that the project is located in a dedicated renewable or grid area for a related grid infrastructure which is necessary to integrate renewable energy into the electricity system, if Member States have set any renewable or grid area, and that the area has been subjected to a strategic environmental assessment in accordance with Directive 2001/42/EC of the European Parliament and of the Council [9]*. The competent authority shall ensure that, on the basis of existing data, appropriate and proportionate mitigation measures are applied in order to ensure compliance with Article 12(1) of Directive 92/43/EEC and Article 5 of Directive 2009/147/EC. Where those measures are not available, the competent authority shall ensure that the operator pays a monetary compensation*

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[8] *Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment* (OJEU, 28 January 2012, L 26, page 1) as amended in particular by directive 2014/52, (further the "EIA directive" or "Directive 2011/92").

[9] *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* (OJEC, 21 July 2001, L 197, page 30) (further the "SEA directive" or "Directive 2001/42").

for species protection programmes in order to secure or improve the conservation status of the species affected.

(…)

Article 9

Review

By 31 December 2023 at the latest, the Commission shall carry out a review of this Regulation in view of the development of the security of supply and energy prices and the need to further accelerate the deployment of renewable energy. It shall present a report on the main findings of that review to the Council. The Commission may, based on that report, propose to prolong the validity of this Regulation.

Article 10

Entry into force and application

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

It shall apply for a period of 18 months from its entry into force.

III - Scope and arguments of the Request

(i) Legal basis of the Regulation

The rules applicable to the determination of acts of the Union are defined as follows.

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. (…) (Article 5 TEU)

The Court has found that the choice of legal base of acts of the Union "*must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure*" (29 April 2004, *Commission / Council*, C-338/01, EU:C:2004:253, point 54 and 5 May 2015, *Spain / Council*, C-147/13, EU:C:2015:299, point 68).

Separately, if an act "*reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component*" (29 April 2004, *Commission / Council*, C-338/01, EU:C:2004:253, point 55).

However, if "*it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases*" (idem, point 56). Nevertheless, "*no dual legal basis is possible where the procedures laid down for each legal basis are incompatible with each other*" (idem, point 57).

The Associations consider that the legal basis of the Regulation, that is to say Article 122 (1) TFEU, in and of itself affects and contradicts Union environmental law in the following manner.

Given that the Regulation introduces derogations to, and exemptions from, Union environmental law any defect in the Regulation legal basis should be held as contrary to environmental law itself. Article 122 (1) TFEU is a provision for situations of economic emergency. More specifically, it is meant to not be used in place of other Treaty provisions and to only result in temporary measures, in line with the principles of subsidiary and proportionality.

Furthermore, the use of Article 122 (1) TFEU raise the following additional issues with regard to the Regulation.

- Stated vs actual subject matter and scope of the Regulation

First, the stated "*subject matter and scope*" of the Regulation is to establish "*temporary rules of an emergency nature to accelerate the permit-granting process applicable to the production of energy from renewable energy sources, with a particular focus on specific renewable energy technologies or types of projects which are capable of achieving a short term acceleration of the pace of deployment of renewables in the Union*" (Article 1, first paragraph).

Recitals (5) to (9) refer in fact to energy policy, including the selection of specific energy sources and technologies, and to environmental protection, both regarding the derogation from environmental directives and the objective of decarbonation.

The above wording suggests that the stated scope of the Regulation does not correspond to its actual subject matter which covers both the field of energy policy and of an alleged environmental protection hence the choice of Article 122 (1) TFEU over Article 192 and 194 TFEU does not seem justified.

- No established necessity or urgency regarding the content of the Regulation

Also, the claim that the Regulation contains a justification regarding necessity and urgency (serious difficulties) which corresponds to Article 122 (1) TFEU is not established with regard to the contents of the Regulation.

First, the ostensible motivation of the necessity and urgency of the Regulation is presented at recitals (1) to (6), (22) and (23) of the Regulation does not relate to the content of the Regulation but in fact address the situation resulting from the war in Ukraine, i.e. economic considerations.

The Regulation does not specify which "*severe difficulties*" have justified relying on Article 122 (1) TFEU.

Supposing even that such severe difficulties be demonstrated – *quod non* – the Regulation does not explain how its provisions affecting Union environmental law (in particular Article 3, 5 and 6), may either as a matter of urgency or ultimately, help alleviate such severe difficulties. Also the Regulation does not refer to the other regulations recently adopted by the Council on the

basis of Article 122 (1) TFEU and for the stated purpose of measures in the field of energy as a result of the war in Ukraine.

The review should also consider if, and to what extent, the use of the procedure of Article 122 (1) TFEU (instead for instance of the ordinary legislative procedure) has consequences for environmental protection and Union environmental law, including regarding the publicity of proceedings, transparency, public access to information and other safeguards related to environmental protection.

Second, and in any event the link between the stated urgency in the above quoted recitals of the Regulation, regarding in fact the Union access to internal energy supply as a result of the war in Ukraine (starting in February 2022), and the actual provisions of the Regulation, and in particular its Article 3, 5 and 6, is alleged at recitals (6) and (7) but, in the Associations' view, is not established.

- Article 192 (1) and Article 194 TFE

The Associations submit that the legal basis of the Regulation should be Article 192(1) TFEU which provides for the use of the ordinary legislative procedure for "*action is to be taken by the Union in order to achieve the objectives referred to in Article 191*" and Article 194(2) "*which provides the legal basis for proposing measures to develop new and renewable forms of energy and promote energy efficiency which are the goals of the Union's energy policy set out in Article 194(1)c TFEU*".

The Associations consider that the above provisions are the appropriate legal basis for the Regulation for the following reasons.

Although it is not expressly stated, the above quoted provisions of the Regulation indicate that it pursues two inseparable objectives of environmental protection and energy policy.

The Regulation should therefore be based on the relevant legal provisions of the Treaty FEU which are Article 192 (1) and 194 (2) (see by analogy 8 September 2009, *Commission / Parliament* e.a., C-411/06, EU:C:2009:518, points 46-47 and 6 November 2008, *Parliament / Council*, C-155/07, EU:C:2008:605, point 36).

In this respect, the Associations refer to the Commission proposal to amend directive 2001/2018 on renewable energy (COM (2022) 222 of 18 May 2022, 2022/0160 (COD)) to amend (further the "Proposal") which contains essentially similar provisions to Article 3, 5 and 6 of the Regulation (draft articles 16d, 16a and 16b respectively), is precisely based on Article 192 (1) TFEU and Article 194 (2) TFEU.

The Proposal is about to be adopted as an amendment to directive 2018/2001 on renewables.

The review should examine why the provisions of the Regulation, in particular its Article 3, 5 and 6, corresponding to the existing wording of the Proposal, would have become more necessary and urgent between May and December 2022.

It follows that, on the one hand, the conditions of necessity and urgency required by Article 122 (1) TFEU are not established while, on the other hand, the appropriate legal basis of the Regulation in substantive terms ought to have been Article 192 (1) and 194 (2) TFEU.

The Associations therefore request the Council to reexamine the legal basis of the Regulation in light of Article 191, 192 and 194 TFEU.

(ii) Article 37 of the Charter, Article 3 TEU, 11 TFEU and 191 TFEU

Separately, the Associations consider that the Regulation does not satisfy the requirements of a high level of protection, and of improvement, of the environment as well as that of sustainable development contained in Article 37 of the Charter, Article 3 TEU and Article 11 and 191 TFEU.

The Court of Justice has provided the following interpretation:

128 It should be borne in mind in this regard that, under Article 191(2) TFEU, EU policy on the environment is to aim at a 'high level of protection' taking into account the diversity of situations in the various regions of the European Union. Similarly, Article 3(3) TEU provides that the European Union is to work in particular for a 'high level of protection and improvement of the quality of the environment' (judgment of 21 December 2016, Associazione Italia Nostra Onlus, C-444/15, EU:C:2016:978, paragraph 42).

129 As for Article 37 of the Charter, this states that a 'high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

130 Article 52(2) of the Charter provides that rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties. Such is the case with Article 37 of the Charter, which is essentially based on Article 3(3) TEU and Articles 11 and 191 TFEU (judgment of 21 December 2016, Associazione Italia Nostra Onlus, C-444/15, EU:C:2016:978, paragraph 62).

131 Consequently, the Republic of Poland's arguments relating to the Charter must be examined in the light of the conditions and limits flowing from Article 191 TFEU.

132 Whilst it is common ground that Article 191(2) TFEU requires EU policy in environmental matters to aim for a high level of protection, such a level of protection, in order to be compatible with that provision, does not necessarily have to be the highest that is technically possible (judgment of 21 December 2016, Associazione Italia Nostra Onlus, C-444/15, EU:C:2016:978, paragraph 44).

133 Article 191 TFEU lays down a series of objectives, principles and criteria which the EU legislature must respect in implementing environmental policy (see, to that effect, judgment of 14 July 1998, Safety Hi-Tech, C-284/95, EU:C:1998:352, paragraph 36).

134 In particular, it is apparent from Article 191(3) TFEU that, in preparing its policy on the environment, the European Union is required to take account of available scientific and technical data, environmental conditions in the various regions of the European Union, the potential benefits and costs of action or lack of action as well as the economic and social development of the European Union as a whole and the balanced development of its regions.

135 However, in view of the need to strike a balance between certain of those objectives and principles, and in view of the complexity of the implementation of those criteria, review by the Court must necessarily be limited to the question whether the EU legislature committed a manifest error of assessment as regards the conditions for the application of Article 191 TFEU (judgments of 14 July 1998, Safety Hi-Tech, C-284/95, EU:C:1998:352, paragraph 37, and of 21 December 2016, Associazione Italia Nostra Onlus, C-444/15, EU:C:2016:978, paragraph 46).

(13 March 2019, *Poland / Parliament and Council*, C-128/17, EU:C:2019:194)

Separately from of the legal basis of the Regulation, the Associations consider that the Council in adopting the Regulation was subject to the requirements contained in Article 37 of the Charter as well as in Article 3 TEU and 11 TFEU, including the duty to ensure the high level of protection and improvement of the environment as well as the connected principle of non-regression of environmental protection, the precautionary principle and the principle of energy solidarity.

The provisions of the Regulation contravene the above requirements for the following reasons.

- Lowering of key Union environmental directives

By introducing derogations from the Habitats, Water and Birds directives (at Article 3 and 6) from the IEA directive (at Article 5 and 6), the Regulation significantly reduces the existing level of protection of the environment under the Habitats, Water, Birds, and EIA directives in favor renewable energy projects.

- Possible further lowering of environmental standards

Second, the Regulation allows for diverging national regimes of environmental protection (on the basis of Article 3 (3), last sentence, and (4)) which, in addition to the above-mentioned derogations and exemptions, result in a possible further lowering of standards of environmental protection. In fact, the Regulation even allows for the absence of any environmental protection at all, subject to "*monetary compensation*" (on the basis of Article 6, third sentence).

- Alleged but uncalculated environmental upside

Recital (9) states, apparently referring to the Regulation, that "[t]*his reflects the important role that renewable energy can play in the decarbonation of the Union's energy system*".

While it is common ground that renewable energy can play a role in the decarbonation of energy, the Associations argue that, in the present context where the Regulation expressly sets aside key Union environmental rules (and also allows their further weakening by national authorities), the Regulation has to establish concretely how and to what extent the "*targeted measures*" regarding "*specific technologies and types of projects*" (recital (3) and (5) respectively) do bring, or at least maintain, a high level of protection and of improvement of the environment.

- No remedy for lack of public consultation and environmental assessment

Fourth, the Commission proposal leading to the adopted Regulation states that "[d]*ue to the urgency to prepare the proposal so that it can be adopted on time by the Council, a formal stakeholder consultation could not be carried out*" and that "[g]*iven the temporary and urgent nature of the measures that respond to an emergency situation, an impact assessment could not be carried out.*" (COM(2022)591 of 9 November 2022, page 5). Yet, no part of the Regulation provides a remedy for the lack of impact assessment.

- Extension foreseen without due regard to environmental performance or impact

While the extension of the Regulation beyond its application of "*18 months*" (Article 10) is due to be reviewed "*in view of the development of the security of supply and energy prices and the need to further accelerate the deployment of renewable energy*" (Article 9). The criteria of the review of the Regulation, and of its possible extension, include no consideration of the protection of the environment.

The Associations therefore call on the Council to conduct a review of the Regulation in order to introduce a "*high level of protection*" of the environment, abide the precautionary principle as well as consider appropriate environmental criteria with regard to the possible extension of the application of the Regulation.

- The principle of energy solidarity

The Regulation refers the Court ruling in Case C-848/19 P (15 July 2021, *Germany / Poland*, EU:C:2021:598) and its interpretation of the principle of energy solidarity (at recital (21)) but does not demonstrate how the actual reduction of environmental protection under Article 3, 5 and 6 of the Regulation, including the opening to further lowering of standards at the discretion of the Member States, corresponds to the principle of energy solidarity.

The Court has defined the principle of energy solidarity in its ruling in Case C-848/19 P as follows:
"*the principle of energy solidarity requires that the EU institutions, including the Commission, conduct an analysis of the interests involved in the light of that principle, taking into account the interests both of the Member States and of the European Union as a whole*",

and

"*the EU institutions and the Member States must take into account the principle of energy solidarity, referred to in Article 194 TFEU, in the context of the establishment and functioning of the internal market and, in particular, the internal market in natural gas, by ensuring security of energy supply in the European Union, which means not only dealing with emergencies when they arise, but also adopting measures to prevent crisis situations. To that end, it is necessary to assess whether there are risks for the energy interests of the Member States and the European Union, and in particular to security of energy supply, before going on to conduct the analysis to which reference is made in paragraph 53 of the present judgment*"
(points 53 and 69, respectively).

The fundamental role of the principle of solidarity in the European Union is also common ground. Moreover, the Associations consider that the protection of the environment should be held as inseparable from the principle of energy solidarity.

In this respect, the Associations present the following concerns.

On the one hand, recitals (21) and (22) of the Regulation refer to the principle of energy solidarity and state that it "*applies to all Member States*", that the Regulation would allow "*for cross-border distribution of the effects of faster deployment of renewable energy projects*" and that "*any increase in renewable energy deployment in a Member State should be beneficial also to other Member States in terms of security of supply and lower prices.*"

On the other hand, the above statements are not supported by evidence or further demonstration. Whereas it appears that the provisions of the Regulation are likely to be contrary to the principle of solidarity for the following reasons.

First, the principle of energy solidarity applies not only "*to all Member States*" but also to actions of the Union. This means that the principle of energy solidarity is not limited to the absence of discrimination between Member States but extends to ensuring that the Union does not create, including indirectly or potentially, discrepancies of environmental protection among Member States in the name of energy solidarity.

Second, the lowering of environmental standards by the Regulation (in particular Article 3, 5 and 6) and the fact that the Regulation allows national authorities to further reduces such rules (in particular Article 3 (2) and 6) opens the door, on the contrary, to the delocalization of renewable energy projects to certain Member States having reduced environmental standards. That is to say that the Regulation is introducing the possibility of a race to the bottom in terms of environmental protection and the appearance of energy solidarity. Therefore, energy integration is not in and of itself equivalent to energy solidarity and, crucially, should not come at the cost of reduced environmental protection, in addition unevenly allocated among Member States.

Third, as renewable energy projects remain essentially conditioned by the availability of State aid from national authorities, it is not certain that Article 3, 5 and 6 of the Regulation would really result in "*lower prices*".

It is therefore submitted that the principle of energy solidarity was not duly taken into account and that the Regulation should be reviewed also in this respect.

(iii) Contradiction with Article 193 TFEU

The Regulation raises specific issues regarding the right of Member States, under Article 193 TFEU, to maintain or introduce stricter standards for the protection of the environment.

Under Article 193 TFEU, the right of Member States to adopt stricter measures protecting the environment is predicated on the relevant Union provisions having been adopted on the basis of Article 192 TFEU.

On the one hand, Article 3, 5, 6 and 9 of the Regulation are provisions directly affecting environmental law, specifically the directives quoted, and derogated from, therein and were adopted on the basis of Article 122 TFEU.

On the other hand, the Habitats, Water, Birds, EIA and SEA directives, from which Articles 3, 5, 6 and 9 of the Regulation derogate, are all based on Article 192 (1) TFEU (or previous versions of that provision, i.e. Article 175 (1) TCE and Article 130 S TCE).

This creates serious legal uncertainty for the regime of environmental protection under Union law.

Member States may be prevented from relying on Article 193 TFEU to adopt or retain stricter measures for the protection of the environment. This also relates to Member States simply concluding, for instance after an assessment of the impact of the Regulation on the environment, that they want to retain Union rules existing prior to the Regulation.

However, Member States should retain the ability to rely on Article 193 TFEU to adopt stricter measures regarding the Habitats, Water, Birds, EIA and SEA directives for the protection of the environment in relation to the Regulation subject matter and scope.

The Associations therefore request the Council to review the Regulation, including its legal basis, in order to ensure legal certainty with regard to the possibility for Member States to rely on Article 193 TFEU in the scope of the Regulation.

(iv) Non conformity with Article 8 of the Aarhus Convention

Recital (20) to the Regulation provides that the provisions of the Aarhus Convention "*regarding access to information, public participation in decision-making, and access to justice in environmental matters* (…) *remain applicable.*"

Whereas the Commission proposal, leading to the Regulation, states:

"***3. STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS***
• Stakeholder consultations
On 20 and 21 October 2022, the European Council, in its conclusions, called for a fast-tracking of the simplification of permitting procedures in order to accelerate the rollout of renewables and grids including by means of emergency measures. Due to the urgency to prepare the proposal so that it can be adopted on time by the Council, a formal stakeholder consultation could not be carried out. However, the Commission plans to engage with stakeholders, and notably renewable energy producers, representatives of civil society and of national administration, for ensuring a successful implementation of this Regulation. The proposal also builds on extensive discussions with stakeholders, Member States and the European Parliament in the context of the preparation of the proposal for a revision of Directive (EU) 2018/2001 of 18 May 2022, and the subsequent co-decision negotiations, as well as the RES Simplify project2.
• Impact assessment
Given the temporary and urgent nature of the measures that respond to an emergency situation, an impact assessment could not be carried out."
(COM (2022)591 final, 9 November 2022, page 5)
(emphasis added)

The Associations consider that the Regulation was prepared and adopted in a manner not compatible with Article 8 of the Aarhus Convention and that neither the justification of "*urgency*" nor that of "*temporary*" nature of the Regulation are convincing.

The Aarhus Convention was introduced in the Union legal order by Council decision 2005/370 of 17 February 2005 which is accompanied by an annex stating in particular that :

"*the European Community declares that it has already adopted several legal instruments, binding on its Member States, implementing provisions of this Convention and will submit and update as appropriate a list of those legal instruments to the Depositary in accordance with Article 10(2) and Article 19(5) of the Convention. In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.*

Finally, the Community reiterates its declaration made upon signing the Convention that the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention.

The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force.

The exercise of Community competence is, by its nature, subject to continuous development."

The above wording has broad and wide-ranging implications and raises legal issues of which the Council is well aware.

In this respect, the Associations make the following observations.

First, the Habitats, Water, Birds, IEA and SEA directives are provisions of Union law which, within their respective scope, implement the Aarhus Convention provisions on the information and consultation of the public, in particular its Articles 6 and 7.

Second, recital (20) of the Regulation states that the Aarhus Convention "*remains applicable*", that is to say also applies to the Regulation, its scope and provisions. The Associations consider that such wording leads to two conclusions.

On the one hand, the Regulation must be applied in conformity with the Aarhus Convention, including its Article 8. The Union was therefore bound to conduct, an assessment of the Regulation's environmental impact along with subsequently informing and consulting the public, prior to its adoption. And in any event following its adoption or in advance of any possible extension of the Regulation.

On the other hands, the Council should clarify in the context of the internal review in response to the present Request whether the wording "*remains applicable*" has the implied meaning that the Council could have suspended the Aarhus Convention or otherwise made it *not* applicable.

On the above basis, the Associations consider that the Regulation is not in conformity with Article 8 of the Aarhus Convention for the following reasons.

- Absence of information and of consultation of the public

It is plain from the above wording despite the express reference to the Aarhus Convention, the Regulation was adopted without information and consultation of the public.

However, as the provisions introduced by the Regulation (as proposed on 9 November 2022 and adopted on 22 December 2022) are in fact essentially similar to the provisions of a Commission Proposal to amend of the renewable energy directive 2018/2001 dated 18 May 2022, there was ample time, in advance but also following the Council's conclusions of 20 and 21 October 2022, to provide information and consult the public prior to the adoption of the Regulation.

- No remedy after the adoption of the Regulation

In addition, the Regulation contains no provision, nor has the Commission taken into step since the entry into force of the Regulation, in order to remedy this gap in public information and consultation.

- Information or consultation of the public on the extension of the Regulation

Similarly, the temporary nature of the Regulation, supposing that it may be considered as a valid justification for not informing and consulting the public, seems far from certain given the conditions under which the Regulation may be extended.

The duty of the Commission to conduct a review of the Regulation at the latest by 31 December 2023 still does not include an environmental assessment nor related information and consultation of the public.

The Associations request that the contradiction between the statement of recital (20) and the actual lack of conformity of the Regulation with Article 8 of the Aarhus Convention be remedied.

(v) Article 3 of the Regulation contradicts the Habitats, Water and Birds directives

Article 3 of the Regulation provides for an overriding presumption of public interest of renewable projects as well as for a reduction of the safeguards for protected species.

The Associations consider that Article 3 of the Regulation raises major concerns and uncertainties on the application of the Union environmental directives, in particular the Habitats, Water and Birds directives.

- Rebuttable presumption of public interest

Article 3 (1) in effect reverses the burden of proof whereas it is now for associations or the public (affected individual persons) to collect and provide evidence

First, this new burden proof is directly dependent on whether and to what extent interested parties are in a position to have access to the relevant information necessary to assess and reverse the said presumption. In the respect, the Regulation introduces no provision which would remedy the disadvantage created for the public concerned.

Second, while Article 3 (1) of the Regulation refers to, and introduces derogations from, specific provisions of the Habitats, Water and Birds, the Associations consider that the said derogations put at risk also other provisions of the said directives as interpreted by the Court of Justice.

As an illustration of the above legal uncertainty, the reversal of the burden of proof under Article 6 (4) of the Habitats directive calls in question both whether the protection previously available under the whole of Article 6 of that directive remains and whether the public concerned may even have access to the relevant information at all stages of the application of Article 6 of the Habitats directive – which would be now of fundamental importance in order to submit arguments with regard to the new presumption introduced by the Regulation (see for instance 16 July 2020, *WWF Italia Onlus* e.a., C-411/19, EU:C:2020:580).

The same questions arise with regard to the Water directive (see for instance 5 May 2022, *Association France Nature Environnement* e.a., C-525/20, EU:C:2020:350) and to the Birds directive (see for instance 17 March 2021, *One Voice* e.a., C-900/19, EU:C:2021:211).

Third, the Associations consider that Article 3 (1) of the Regulation cannot be held to satisfy the requirements of the Article 6 and 7 of the Aarhus Convention on the information and the participation of the public in projects affecting the environment since it suppresses Union rules implementing the said Aarhus Convention provisions.

Fourth, the reversal of the burden of proof raises specific concerns with regard to its conformity with Article 9 of the Aarhus Convention and in particular its paragraph (4) (in particular the notion of "*fair, equitable, timely and not prohibitively expensive*" access to justice and its paragraph (5).

- *De facto* non-rebuttable presumption of public interest

The wording of Article 3 (2) of the Regulation is unclear but seems to provide that if the rebuttable presumption of paragraph (1) stands, then Member States authorities are bound to ensure that such projects "*are given priority when balancing legal interests in the individual case.*"

In other words, the competent authorities would under (2) have no option but to authorize a given renewable energy project under the Habitats, Water or Birds directives.

Furthermore, the second sentence of paragraph (2) of Article 3 of the Regulation suggests that provisions applicable to protected species may be ignored "*if and to the extent that appropriate species conservation measures contributing to the maintenance or restoration of the populations of the species at a favourable conservation status are undertaken and sufficient financial resources as well as areas are made available for that purpose*".

Such broad wording contains no objective criteria subject to judicial control and manifestly creates the possibility that existing provisions of Habitats and Bird directives be easily circumvented including as a result of monetary compensation by the operators of a renewable project.

The Associations request that the above provisions be subject to review and be adjusted so as to ensure that, beyond the provisions quoted in Article 3(1) of the Regulation, the effectiveness of the Article 6 (2) to (4) as well as Article 12 to 16 of the Habitats directive, the whole Water directive and Article 5 to 8 of the Birds directive be confirmed.

(vi) Article 5(3) of the Regulation on repowering contradicts the EIA directive

Article 5 of the Regulation introduces binding deadlines of 6 or 3 months for the environment impact assessments of the "*repowering*" of renewable project (paragraph (1) and (2)) and reduces the scope of the IEA directive on such projects to the "*potential significant impacts stemming from the change or extension compared to the original project*" (paragraph (3).

These provisions raise several concerns with regard to Union environmental law.

As a preliminary point, the Associations note that the above derogations are ostensibly justified on economic grounds (contested as discussed above) and without consideration to environment protection or impact.

- Consequences of binding deadlines

The binding deadlines of 6 months (where the repowering increases capacity) and 3 months (where the increase of capacity is limited to 15%) introduced by paragraph (1) and (2) of Article 5 of the Regulation are contrary to the requirement of a high level of protection of the environment and without provision for the requirement to inform and consult the public prior to autorising projects under Article 6 and 7 of the Aarhus Convention.

- Circumvention of the EIA directive

The environmental impact assessment of Article 4 of the EIA directive of a repowering project is now limited to the "*potential significant impacts stemming from the change or extension compared to the original project*" (paragraph (3)).

This provision raises significant issues.

First, the Regulation does not define what the new criteria of "*potential significant impacts*" may entail which leave that notion open to contradicting interpretations and the further lowering of environmental standards across Member States.

Combined with binding deadlines of 6 or 3 months under paragraph (1) and (2) of Article 5, it is clear that the main risk is a systematic finding of <u>no</u> potential significant impacts thus avoiding the environmental impact assessment provided under Article 4 of the EIA directive.

Second, the possible exemptions for the repowering of renewable projects raises considerable uncertainties regarding wind energy projects, given that the repowering of such projects systematically result in increased capacity (more powerful turbines) which in turn requires building new infrastructure (new masts as well as new interconnection cables) of increased dimensions (higher and larger masts, longer and wider blades) which cannot be addressed under the "*potential significant impacts*" of the repowered project compared to the initial equipments.

The following issues call for an action by the Union, not the authorities of the Member States:

1) On the other hand, the increase in equipment size and volume (turbines, masts, blades) leads, essentially, to a full new construction – except perhaps access roads – and therefore has a disproportionate impact on the environment which cannot relate to the environmental impact assessment conducted many years earlier, on the basis of information and scientific knowledge available at the time;

2) On the other hand, and in particular the increase of acoustic emissions of repowered wind energy projects have no relation to that existing projects, given the above described features.[10] In particular, the increase of the capacity and the height of wind turbines results in exponential increases of low frequency acoustic emissions.

It follows that repowering of wind energy projects comes with added consequences and systemic risks to protected habitats and species as well as to human health which, contrary Article 5 (1), (2) and (3) of the Regulation, call for removing the binding deadlines and maintaining the full scope of Article 4 of the EIA directive.

The requirement for a more robust evaluation and the updating of data is also required by the Court case law (see for instance, 10 November 2022, *Dansk Akvakultur* e.a., C-278/21, EU:C:2022:864).

The Associations therefore request the Council to review Article 5 of the Regulation.

(vii) Article 6 of the Regulation and possible derogations from environmental directives

The provisions of Article 6 of the Regulation introduce several regressions of Union environmental law which the Associations request the Council to review.

- Designated areas for renewable projects are a regression of environmental law

First, the possible derogation from Article 2(1) of EIA directive, from Article 12(1) of the Habitats directive and from Article 5 of the Birds Directive introduced by the first sentence of Article 6 of the Regulation relies on the designation of "*dedicated renewable or grid*" areas identified following a strategic environmental assessment provided under the SEA directive.

If exercised, the above exemptions would contravene the objectives and *effet utile* of the EIA, Habitats and Birds directives.

In addition, and contrary to its recital (20) stating that the requirements of the Aarhus Convention remain applicable, such a derogation from the assessments required under the IEA, Habitats and Birds directives is also not in conformity with Article 6 and 7 of the Aarhus Convention.

[10] Whereas the WHO has already concluded that "[t]*here are serious issues with noise exposure assessment related to wind turbines*" and that "[i]*n many instances, the distance from a wind farm has been used as a proxy to determine audible noise exposure. However, in addition to the distance, other variables – such as type, size and number of wind turbines, wind direction and speed, location of the residence up- or downwind from wind farms and so on – can contribute to the resulting noise level assessed at a residence.*" (Environmental Noise Guidelines for the European Region (2018), pages 85 et 86).

The above contradiction is all the more serious, given the lack of conformity of the Regulation with Article 8 of the Aarhus Convention already noted.

- Mitigation measures would allow for deliberate killing of protected species

The second sentence of Article 6 of the Regulation, on possible mitigation measures, far from being a safeguard, seems bound to water down the requirements of Article 12 (1) of the Habitats directive and of Article 5 of the Birds directive.

On the one hand, the notion of "*existing data*" does not guarantee and, in fact, allows to circumvent the requirement to collect additional data and ensure the strict protection provided under Article 12(1) of the Habitats directive and Article 5 of the Birds directive.

On the other hand, the criteria of "*appropriate and proportionate mitigation measures*" and is a qualification of the quoted provisions which may in practice result in reducing the protection provided under Article 12(1) of the Habitats directive and Article 5 of the Birds directive.

Separately, the notion of "*appropriate and proportionate mitigation measures*" is overly vague should be further defined in Union law and not be left open to potentially contradicting interpretation by national authorities.

- Monetary compensation would favor the deliberate killing of protected species

Article 6, third sentence, of the Regulation on the requirement of monetary compensation is presented as a safeguard clause to the measures of the second sentence of the said Article.

By contrast, the Associations consider that the alleged safeguard of Article 6, third sentence, of the Regulation opens a further lowering of the level of protection provided by Article 12(1) of the Habitats directive and Article 5 of the Birds directive.

Moreover, the fact that renewable energy projects may be relieved from the requirement of the said provisions of the Habitats and Birds directives, or even from any mitigation measures, on the mere basis of unspecified "*monetary compensation*" raises serious concerns and constitutes a dangerous precedent.

In practical terms, Article 6 of the Regulation removes the key distinction between *deliberate* and *accidental* killing of protected species contained in the Habitats and Birds directive as broadly interpreted by the Court of Justice.

It follows that, in addition to the contraventions of the second sentence of Article 6 of the Regulation already indicated, the ultimate option to replace all protection measures by monetary compensation is in direct contravention with the objectives and the letter of Article 12 (1) of the Habitats directive and of Article 5 of the Birds directive.

(viii) Article 9 allows the Regulation extension in breach of environmental law

The Regulation applies for 18 months and provides for its possible extension as follows. At latest by 31 December 2023, the Commission conducts a review of the Regulation "*in view of the development of the security of supply and energy prices and the need to further accelerate the deployment of renewable energy*" (Article 9, first sentence). A "*report on the main findings*

of that review" is then presented to the Council (*idem*, second sentence). Based on that report, the Commission may propose to extend the Regulation (*idem*, third sentence).

The Associations consider that the above provisions raise the following questions.

- Review of the Regulation not including environmental assessment

First, the review entrusted to the Commission under the first sentence of Article 9 of the Regulation does not include an environmental impact assessment and is exclusively based on economic considerations whereas the extension of the Regulation would prolong derogations to key provisions of the environmental law introduced by Articles 3, 5 and 6 of the Regulation.

The absence of any impact assessment of the Regulation prior to considering its extension is contrary to the high level of protection of the environment provided under Article 37 of the Charter, Article 3 TEU and 11 TFEU as well as to the precautionary principle.

- Extension of the Regulation without information and consultation of the public

The possible extension of the application of the Regulation should also be preceded, in light of Article 7 and 8 of the Aarhus Convention, by the information and the consultation of the public on the review of the Regulation conducted by the Commission, or at least of the content of the report presented to the Council.

- Excessive Commission discretion in proposing to extend the Regulation

The fact that the Commission would have the discretion to decide, on the basis of its own review, to propose the extension of the Regulation does not seem compatible with the principles of subsidiarity and of proportionality.

Contrary to the third sentence of its Article 9, whether or not to envisage the extension of the Regulation should be a decision of the Council to, as the case may be and on the basis of the report presented by the Commission, ask the Commission to prepare a proposal "*to prolong the validity*" of the Regulation.

Such review of Article 9 of the Regulation and the resulting alternative provisions of Article 9 would further contribute to a high level of protection of the environment. The Associations request the Council to review the Regulation accordingly with regard to the provisions of its Article 9.

The Associations thank you in advance for your consideration of the present Request for the internal review of Regulation 2022/2577.

Yours sincerely,