ANNEX

The Council's reply in relation to the requests for internal review under Title IV of the Aarhus Regulation in relation to Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy

1. This reply sets out the Council's decision with regard to your requests of 20 February[1] ("the first request") and 22 February 2023[2] ("the second request") for internal review of Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy[3] ("the contested Regulation"). It explains why the Council considers that your request for review is inadmissible. In the alternative, and after careful consideration of your arguments, the reply also explains why the Council considers that the contested Regulation did not contravene environmental law and sees no need to amend it.

2. As both requests for internal review are directed against the same act, the Council considers it appropriate to combine them and treat them as one, in accordance with Article 10(2) of Regulation 1367/2006[4] ("the Aarhus Regulation").

3. The present reply is divided into 6 parts. The first part reviews the admissibility of the requests. The second part reviews the scope of the requests. The third parts recalls the context of the adoption of the act. The fourth part reviews the elements specific to the legal basis of the contested Regulation to the extent that they are relevant for addressing the substantive arguments put forward in the requests. The fifth part reviews whether the contested Regulation contravenes environmental law. The sixth part sets out the conclusion of the Council as regards your requests for internal review.

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1 Request submitted by CEE Bankwatch Network and ÖKOBÜRO.

2 Request submitted by Foreningen 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

3 OJ L 335, 29.12.2022, p. 36.

4 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13.

2. Admissibility of your requests

4. The Council does not contest the admissibility of the requests as regards your quality as non-governmental organisations under Article 11 of the Aarhus Regulation.

Furthermore, the Council agrees that the contested Regulation, adopted on the basis of Article 122 TFEU, is not a legislative act within the meaning of the Treaties. However, the Council considers that the contested Regulation, which introduces targeted and temporary derogations to applicable legislative acts, is not an administrative act within the meaning of the Aarhus Regulation. The amendment of the definition of "administrative act" under the Aarhus Regulation sought to abolish the limitation to individual administrative acts (see recital 8 of the amending regulation) but did not seek to include acts that under the Aarhus Convention are to be regarded as "legislative acts". Since the contested measures, by virtue of their content and effects, are intrinsically linked to legislative acts, the latter being clearly excluded from the scope of review, it would run counter to the balance struck in the last revision of the Aarhus Regulation if the contested measures were considered to fall within the scope of review. Indeed, Article 122 TFEU constitutes a very specific legal basis which allows the Council to adopt exceptional and urgent measures appropriate to the economic situation. Such measures may also – as in the present case -, derogate from other acts, including other legislative acts, on a temporary basis and "without prejudice to any other procedures provided for in the Treaties". The contested measures do nothing more than temporarily modifying the scope and content of existing legislative acts through derogations and cannot, therefore, be subject to review.

Consequently, allowing the introduction of requests for internal review of the contested Regulation would be against the meaning of "administrative act" as intended by the Aarhus Regulation under Article 2(g).

The Council therefore considers the requests as inadmissible.

However, the Council has provided below a reply on the merits of your requests, in the alternative.

4. Scope of your requests

5. As regards their scope, both requests concern Articles 3, 5 and 6 of the contested Regulation. The first request also contests Article 1 of the contested Regulation, while the second request concerns also Articles 9 and 10 of the contested Regulation.

6. The different grounds and arguments for review that you put forward under both requests have been grouped under two main grounds for the purpose of the present reply. The first ground is the alleged erroneous legal basis of the contested Regulation. Although it considers that such ground falls outside of the scope of requests for internal review, the Council will demonstrate that the conditions for adopting temporary measures appropriate to the economic situation on the basis of Article 122 TFEU were fulfilled.

The second ground is the alleged contravention of environmental law. This second ground has been further divided in two sub-grounds: the alleged infringement of primary Union law and international obligations of the Union and the contravention of secondary Union law. In this regards, it should also be underlined from the outset that when acting on the basis of Article 122 TFEU, the Council may derogate from the rules adopted under other legal bases, including from other legislative acts.

7. Those two grounds will be addressed in turn and are only presented by the Council in the alternative should the requests be considered admissible.

5. Context of the adoption of the act

8. The contested Regulation was adopted by the Council in an exceptional context. In February 2022, Russia's unjustified military aggression against Ukraine provoked an unprecedented energy crisis in the EU. The sudden and unpredictable new geopolitical tensions have dramatically aggravated the Union's energy security and triggered a sharp rise in energy prices across the continent. In this respect, on 10 and 11 March 2022, EU Heads of State and Government adopted a declaration in Versailles setting the objective "*to phase out EU's dependency on Russian gas, oil and coal imports as soon as possible*", in particular "*by speeding up the development of renewables and the production of their key components, as well as streamlining authorisation procedures to accelerate energy projects*".

9. In May 2022, the Commission submitted to the colegislators, as part of the REPowerEU plan, a legislative proposal to amend 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 in order to accelerate the green transition towards renewable energy and increased energy efficiency. The proposal introduced, among others, measures to further simplify and streamline the administrative permit-granting procedures applicable to renewable energy projects in a coordinated and harmonised manner across the Union. Already at this stage, the Commission indicated that a fast deployment of renewable energy sources could play an essential role in mitigating the effects of the current energy crisis, by strengthening the Union's security of supply, reducing volatility in the market and lowering energy prices.

10. However, in Summer of 2022, the energy situation in Europe aggravated further. New reduction of Russian gas supplies to the Union triggered further sharp increases in energy prices in the Union. All-time highs in gas and electricity prices substantially contributed to the general inflation in the Euro area, slowing down economic growth across the Union and placing a heavy burden on citizens. Against this background, it appeared evident that there was a need for urgent action to complement existing legislation and pending initiatives.

11. In this context, on 20 and 21 October 2022, the European Council called on the Council and the Commission, among other measures, to "*urgently submit concrete decisions on (...) fast-tracking of the simplification of permitting procedures in order to accelerate the rollout of renewables and grids including with emergency measures on the basis of Article 122 TFEU*".

12. On 10 November 2022, the Commission therefore presented, a proposal for what became the contested Regulation, with further immediate and temporary actions to accelerate the deployment of renewable energy sources, in particular by means of targeted measures which are capable of accelerating the pace of deployment of renewables in the Union in the short term. Those urgent measures were selected by the Commission in light of their nature and potential to contribute to solutions for the energy emergency in the short term. In particular, the contested Regulation introduced urgent and targeted measures applicable to specific technologies, such as heat pumps and solar energy equipment, and types of projects, such as repowering of energy infrastructures and, under certain conditions, ongoing permit granting processes, which have the highest potential for quick deployment and immediate effect on the objectives of reducing price volatility and reducing the demand for natural gas.

13. At its meeting of 21 December 2022, the Council adopted three high impact emergency measures in the form of three regulations based on Article 122 TFEU: Council Regulation (EU) 2022/2576[5], Council Regulation (EU) 2022/2578[6] and the contested Regulation. The contested Regulation was adopted by written procedure. In line with its temporary and exceptional nature, the contested Regulation will remain applicable for a limited period of 18 months.

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5 Council Regulation (EU) 2022/2576 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders, O.J. L 335, 29.12.2022, p. 1.

6 Council Regulation (EU) 2022/2578 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices, O.J. L 335, 29.12.2022, p. 45.

6. First ground: The alleged incorrect legal basis

14. In point 5.2 of the first request, you submit that the contested Regulation contains elements of environmental law and contravenes existing environmental laws. You submit that the conditions for using Article 122 TFEU were not fulfilled, and that the adoption of the act is disproportionate. According to you, the contested Regulation should therefore have been adopted on the basis of Article 192 TFEU under the ordinary legislative procedure.

15. In the second request, you submit that the contested Regulation should have been adopted on the basis of Article 192(1) and 194 of the TFEU. You submit that the conditions for relying on Article 122 TFEU were not met, in particular as regards the necessity and urgency of the measure. You also contend that Article 193 TFEU, which allows Member States to adopt more stringent measures when the Union adopts measures on the basis of Article 192 TFEU, should be applicable to the measures adopted under the contested Regulation.

16. It should be noted that requests for internal review should be limited to contravention of environmental law, i.e. "*Union legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Union policy on the environment as set out in TFEU: 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;*"[7].

On the basis of your requests, the Council understands that you are not contesting the competence of the Union to act, but rather the procedure followed, i.e. that the Council should not have adopted the contested Regulation on the basis of Article 122 TFEU, and that the ordinary legislative procedure should have been used. The same reasoning is applicable to your argument as regards the consequential applicability of Article 193 TFEU.

[7] Article 2(1)(f) of the Aarhus Regulation.

17. You seem to argue that the alleged error in the choice of the legal basis constitutes an contravention of environmental law. The Council considers that the object of the requests for internal review may only be limited to the infringement of environmental law itself, as set out in Article 2(1) point (f) of the Aarhus Regulation mentioned above. The Council does not consider that rules on the attribution of competences, including the choice of the legal basis and related procedure to follow for adopting an act, fall under the mentioned definition of environmental law. Consequently, should your request be found admissible, the first ground of the request cannot be raised under Article 10(1) of the Aarhus Regulation and the Council does not consider itself obliged to reply to it.

18. Nevertheless, despite this ground falling outside the scope of a review, the Council will also briefly address below why it sees no merit in the main arguments you have raised under this ground.

19. In this section, the Council will therefore explain that the conditions for having recourse to the specific crisis legal basis in Article 122 TFEU were fulfilled, to the extent that this is relevant for determining the compliance of the contested Regulation with environmental law, in particular as regards the necessity and proportionality of the contested measures, having regard to the broad margin of discretion available to the Council under that legal basis. In that context, the Council will also explain how the reasons for the adoption of the measures under the contested Regulation were sufficiently stated.

a. <u>The conditions for the use of Article 122 TFEU are fulfilled and the contested measures are proportionate to the situation</u>

20. Article 122 TFEU allows the Council to decide, on a proposal of the Commission, upon the measures appropriate to the economic situation. Acting on this basis, the Council can adopt measures in any sector of the economy, provided that the conditions for the adoption of such measures are fulfilled, in particular, that the measures are temporary and appropriate. Measures adopted on that basis can derogate from the rules applicable in "normal times".[8]

[8] See, by analogy, Judgment of the Court of 24 October 1973, Case Balkan Import Exports GMBH, C-5/73, ECLI:EU:C:1973:109, para 13.

22. The adoption of measures under Article 122 TFEU does not exclude that more general legal bases for the adoption of the measures are available. The formulation "*without prejudice to any other procedures provided for in the Treaties*" underscores the exceptional and temporary nature of measures under Article 122(1) TFEU, to ensure that recourse to that provision does not undermine or circumvent the use of other legal bases laid down in the Treaties for use in "normal times". It also follows that, once it is demonstrated that recourse to that legal basis is justified, then it is not relevant to examine whether other legal bases were appropriate for the adoption of the measures.[9]

23. The main conditions for the adoption of measures under this Article are the following: first, the measures must address an exceptional or urgent situation. Second, the measures must be temporary. Third, the measures must be economic in nature and must also be adopted in a spirit of solidarity between the Member States. Finally, the measures must be commensurate to the gravity of the situation. It follows from the use of the words "in particular" under Article 122 TFEU that the scope of the situations that may lead to the adoption of measures under this Article is very broad and is not limited to "*severe difficulties in the supply of products*". The Council considers that the conditions for having recourse to Article 122 TFEU were met in the present case and that the measures adopted were necessary and commensurate to the very difficult context explained in the second part of the present reply.

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[9] See, by analogy, Judgment of the Court of 24 October 1973, Case Balkan Import Exports GMBH, C-5/73, ECLI:EU:C:1973:109, para 15.

24. First, as regards the emergency and exceptional nature of the situation, the Council considers that the reasons stated throughout the contested Regulation and in particular in recitals 2 and 4 clearly reflect how the context of high volatility on the energy markets and the situation of a war of aggression created a situation of an exceptional nature that justifies the urgent adoption of measures including the ones that were adopted in the contested Regulation. The serious energy situation triggered by Russia's war of aggression against Ukraine and Russia's attempt to use energy as a political weapon laid bare vulnerabilities and dependencies of the Union and its Member States and necessitated a swift breaking free from Russian fossil fuel dependency. A crucial element of that is to speed up the roll-out of renewable energy sources. In that context, as explained in the contested Regulation, permitting procedures created a bottleneck slowing down such roll-out. The contested Regulation is only one part of a comprehensive and targeted package of measures adopted to address the critical situation.

Russia's actions have triggered price volatility in the context of already high energy prices. In particular, the instability and subsequent halt of Russian gas supply have exposed the Union electricity market to considerably higher prices and very high volatility, leading to high inflation. The energy situation was particularly acute in the Summer of 2022, due to new reduction of Russian gas supplies to the Union and further sharp increases in energy prices in the Union. The inclusion of additional renewable energy sources in electricity production is a means for reducing the need for fossil fuels to produce electricity with possible beneficial impacts in terms of energy prices. This is due to the so-called marginal pricing system which ensures that all generation dispatched is remunerated according to the price of the most expensive source dispatched in order to meet the demand. In the context of the energy crisis, this meant that wholesale electricity prices were largely set by the price of natural gas.

25. Second, as regards the temporary nature of the measures, the Council notes that the measures adopted under the contested Regulation only apply for a limited period of time of 18 months. That period of time does not go beyond what is reasonable and necessary to enable a targeted signal to urgently address volatile energy markets in favour of renewable energy deployment. Even though the permits granted during the period of application of the contested Regulation will have effects for a period of time exceeding the duration of the measures, the signal to the market and the facilitation of the deployment of renewable energy projects by means of accelerated permitting procedures under the contested Regulation will only take effect in the course of its period of application. This also follows from recital 7, which underlines that it is necessary to provide for a targeted and time-limited boost to the permit-granting process both as regards pending permitting decisions and newly developed projects.

26. Third, the economic nature of the measures and their spirit of solidarity is demonstrated by the fact that the deployment of renewables will protect European consumers and businesses against the volatility of prices and ensure the security of supply on the energy markets, as underlined by recital 3 of the contested Regulation. In that context, the Council underlines that the historically high and volatile energy prices contributed to inflation and created a risk for the economy of the Union as a whole. This effect was exacerbated by the fact that the energy markets, and in particular the electricity market, are already deeply integrated. Considering the structure of the energy markets and, in particular, the high degree of integration of the Union's electricity market, a coordinated Union approach was necessary in a spirit of solidarity between Member States. Indeed, electricity generated by renewable energy projects in one Member States can contribute to price stability and security of supply in another Member State, as is underlined in recital 21. Due to the high degree of integration of the Union's electricity market and free flowing electricity, affordable renewable energy will therefore benefit all citizens in all Member States.

27. Due to the wide wording of Article 122 TFEU "measures appropriate to the economic situation", the Council enjoys a broad margin of discretion as to which measures are appropriate to the specific exceptional situation. However, the measures adopted under Article 122 TFEU need to be proportionate and respect fundamental rights set out in the Charter.

28. In addition, the Court of Justice has consistently held that the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices.[10] As a consequence, "*the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue*".[11] Action based on Article 122 TFEU therefore falls within the scope of these areas in which the Council must be recognized broad discretion.

29. The faster deployment of renewable energy sources offers Member States the possibility to stabilise the energy prices and reduce the demand for natural gas. To facilitate and accelerate the deployment of renewable energy, the permit granting processes for renewable energy projects and related grid infrastructure needed to be streamlined in order to reduce existing bottlenecks. This is done, among other things, by establishing a presumption that renewable energy projects are in the overriding public interest and serving public health and safety when balancing legal interests in individual cases, and by exempting, under specific circumstances, certain projects from the need to carry out an impact assessment under Directive 2011/92/EU. The measures are therefore necessary to face the exceptional and urgent situation.

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[10] Judgement of the Court of 8 December 2020, Poland v Parliament and Council, C-626/18, ECLI:EU:C:2020:1000, para. 95.
[11] Judgement of the Court of 2 September 2021, Irish ferries Ltd, C-570/19, ECLI:EU:C:2021:664.

30. In addition, the Council has explained that the chosen measures are the ones that "have the highest potential for quick deployment and immediate effect" on the deployment of renewables.[12] They focus on the renewable energy technologies that have the highest potential of fast development and on what has been identified as some of the core bottlenecks in relation to the deployment of renewable energy projects.

The Council acknowledges that the measures also have an ancillary effect as regards environment and climate policy of the Union. As reflected in the recitals and the explanatory memorandum of the Commission proposal, this element has been carefully considered by the Commission when proposing the act and by the Council when opting for the measures in question. In particular, the assessment of Articles 3, 5 and 6 of the contested Regulation, and the associated balancing of competing interests has been conducted taking into account these balancing effects.

The Council therefore concludes that the conditions for recourse to Article 122 TFEU are fulfilled and that the contested measures are appropriate and commensurate to the situation, having regard to the wide margin of discretion available to the Council under that legal basis as referred to above.

b. <u>The statement of reasons allows the persons concerned to ascertain the reasons for the measure</u>

31. In point 5.2.3 of the first request, you maintain that the statement of reasons is not satisfactory and does not demonstrate the proportionality of the measure. According to you, it should have been based on scientific evidence and technical data, as required under Article 296 TFEU.

[12] Recital 5 of the contested Regulation.

32. The settled case law of the Court of Justice does not require the statement of reason "*to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question*".[13]

33. Having regard to the requirements of the case law of the Court of Justice on the content of the obligation to state reasons, the Council considers that the reasons for the adoption of the contested measures clearly enable interested parties to understand how the Council exercised its wide margin of discretion. Thus, the reasons for Article 3 are stated in the preamble to the contested Regulation, including recital 8 of the contested Regulation. The reasons underpinning Article 5 are stated in recitals 13 to 16. Finally, Article 6 was adopted for the reasons stated in recital 6. In particular, the Council is of the view that the recitals of the contested Regulation contain a precise and detailed reasoning showing how the Council carefully balanced the objectives sought by the contested Regulation against important environmental considerations. Those justifications allow interested parties to understand the Council's reasoning also in respect of environmental considerations.

34. By way of consequence, the Council is of the opinion that the reasons for the adoption of the contested Regulation are sufficiently stated in its preamble.

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[13] Judgement of the Court of 29 September 2022, ABLV Bank AS v. SRB, C-202/21, ECLI:EU:C:2022/734, para 193. The Court judged that *"(t)he requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations*" - Judgement of the Court of 2 September 2021, Commission v. Tempus Energy Ltd., C-57/19 P, ECLI:EU:C:2021/663, para 198.

7. Second ground: The alleged contravention of environmental law

35. Both requests for internal review consider that the contested Regulation infringes international obligations of the Union, as well as environmental principles enshrined in the Treaties and the Charter, and secondary environmental legislation.

36. Before entering into the review of compliance with the specific environmental rules, the Council would once again underline that it was acting under a legal basis which leaves it wide discretion to adopt "*measures appropriate to the economic situation*". In this context, the Council adopted measures of a primarily economic nature. However, in light of the effect of the measures on the environment, the Council carefully weighed the pressing need of speeding up permitting with a view to a faster roll-out of renewables against the need to maintain a high level of environmental protection. This delicate balancing exercise is reflected throughout the recitals, which show how the Council took due account of environmental objectives and limited any exemptions to what is necessary and appropriate, hence ensuring the proportionality of the interventions from an environmental perspective. In particular:

- the "overriding public interest" presumption introduced in Article 3 is a rebuttable presumption (recitals 4 and 8) and only applies to the balancing of legal interests falling within the discretion of competent authorities under the assessments referred to in Article 3; in addition, Member States may restrict its application to certain parts of their territories or certain technologies or projects in accordance with their national priorities (recital 8);
- the contested measures focus both on sources which can be rolled out quickly and therefore have the highest immediate impact and on those where the environmental impact is smaller (recitals 5 and 8 and recitals 10, 11 and 12 for solar and small-scale projects respectively as well as recitals 13 and 14 in respect of repowering);

- the possibility for Member States to introduce exemptions to certain assessment obligations in Union environmental legislation for renewable energy projects, as well as energy storage projects and electricity grid projects is subject to precise conditions, in particular: (1) the project is located in a dedicated renewable or grid area, and (2) such area has been subject to a strategic impact assessment. In addition, proportionate mitigation measures or, where not available, compensation measures have to be adopted to ensure compliance with Article 12(1) of the habitats Directive[14] and Article 5 of the birds Directive[15] (see Article 6 and recital 6);
- Exemptions related to storage projects and the electricity grid are limited to projects that are necessary for the integration of renewable energy into the electricity system (recital 6);
- Member States are allowed to restrict the application of the contested Regulation to certain parts of their territories or certain technologies or projects (recital 8);
- mandatory exemptions from environmental impact assessments are limited to very targeted technologies with little scope and little environmental risks (i.e solar energy equipment and co-located energy storage assets and repowering of solar installations which do not entail use of additional space) (Articles 4 and 5).

37. The Council would also like to underline that it took into consideration benefits for the climate and the environment brought about by a fast roll-out of renewable sources leading to a faster decarbonisation and reducing dependency on fossil fuels. Indeed, an accelerated deployment of renewable energy production capacity not only serves energy objectives (including lower and less volatile prices, ending dependence on Russian fossil fuels), but also serves the environmental objectives of less greenhouse gas emissions and tackling climate change. As a final, important general remark, the Council points out that Article 122 TFEU enables the adoption of a wide range of measures where necessary to address the severe difficulties which have arisen. This also includes the power to derogate from other pieces of legislation applicable outside of exceptional circumstances. The Council therefore cannot agree with what is stated in point 5.1.2 of the first request. In that respect, the Council recalls that measures adopted under Article 122 TFEU are, by their very nature, limited in time.

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14 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992.

15 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L 20, 26.1.2010.

Below, the Council will address the specific environmental rules you refer to in the requests, keeping in mind the principles explained above and the balancing carried out.

a. The contested Regulation complies with international obligations of the Union, as well as Treaty and Charter provisions

i. Conformity with international obligations

38. Under point 5.1.2.3 of the first request, you argue that the contested Regulation breaches the Alpine Convention. Under point 5.2.2 of the same request, you argue that Article 8 of the Aarhus Convention[16] is also breached. Under point 5.1.2.1.1 of the same request, you also maintain that Article 6(4) of the Aarhus Convention cannot be complied with anymore due to the short time frames included in the contested measures. Each of these arguments will be examined in turn.

39. On page 18, under point III, (iv), of the second request, you also consider that Article 8 of the Aarhus Convention is breached by the adoption of the contested Regulation without a prior public consultation.

1. Conformity with the Alpine Convention

40. In point 5.1.2.3.1 and 5.1.2.3.2 of the first request, you argue that the contested Regulation, in particular its Article 6, breached the Energy protocol and the Soil Conservation protocol to the Alpine Convention because of the absence of an environmental impact assessment.

[16] United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

41. As regards, first, Article 2(2) of the Energy Protocol, it states that:

"In the event of the construction of new, large power plants and a significant increase in the capacity of existing ones, the Contracting Parties, in accordance with current law, shall proceed to evaluate the impact on the Alpine environment and to evaluate the territorial and socioeconomic effects of this in accordance with Article 12. The Parties shall recognise the right to consultation at international level on projects with cross-border effects."

42. Article 6 of the contested Regulation does not infringe this obligation but establishes what is "current law" within the meaning of Article 2(2). As a consequence, the assessment of the impacts of projects falling in the scope of the contested Regulation carried out in accordance with Article 6 of the contested Respect complies with Article 2 of the Energy Protocol.

43. In addition, Article 6 of the contested Regulation introduces the possibility for Member States to introduce an exemption to the obligation to carry out certain environmental impacts assessments (namely the environmental impact assessment under Article 2(1) of Directive 2011/92/EU and assessments related to species protection rules under Article 12(1) of the habitats Directive and under Article 5 of the birds Directive) for renewable energy projects, energy storage projects and electricity grid projects which are necessary to integrate renewable energy into the electricity systems, subject to certain conditions. In particular, the relevant project has to be located in a renewable or grid area, and that area must have has been subjected to a strategic environmental assessment under in accordance with Directive 2001/42/EC. The designation of such renewable or grid area therefore requires an assessment (including a proportionality assessment) by the authorities of whether it is appropriate to designate such an area.

Under such conditions, the impacts on the Alpine environment, if any, will be assessed at the time of the designation of the renewable or grid area, where such designation has taken place following a strategic environmental assessment in accordance with Directive 2001/42/EC.

44. In addition, and in any case, the contested Regulation does not exempt Member States from respecting the obligation to comply with the Alpine Convention and its protocols. When assessing whether to apply Article 6 of the contested Regulation to the alpine areas and whether to designate renewables or grid areas to areas falling within the scope of the Alpine Convention, Member States would therefore have to ensure that it does not breach their obligations under the Convention.

45. You also argue that the Alpine Convention and its protocol have not been taken into account in the adoption of the measure, contrary to Article 3(2) of the Energy Protocol.

46. According to the Case law of the Court of Justice, the obligation to state reasons does not include an obligation to state all the relevant facts and point of law (see point 31 above and cited case law). It follows that the Council, in adopting the contested Regulation, did not have to state all the reasons for the adoption of the act, including the inclusion of the Alpine Convention under the contested act.

47. Consequently, the adoption of the contested Regulation does not breach Article 3(2) of the Energy protocol.

48. In your request, you also consider that Article 6(1) of the Energy protocol has been breached.

Article 6(1) of the Energy protocol provides that:

"The Contracting Parties shall undertake, within the limits of their financial resources, to promote and give preferential treatment to renewable energy resources which are environmentally friendly and do not harm the countryside."

49. The contested Regulation does not infringe this provision, as it does not prejudge the renewable energy technologies and other projects that will be deployed in the Alpine environment, if any. The contested Regulation does not prevent or undercut the respect of these obligations at project level.

50. In your request, you also argue that the contested Regulation breaches Article 7 of the Energy protocol, which provides for obligations on the contracting parties as regards the deployment of hydroelectric power, and their impact on the ecological function of watercourses. Article 6 of the contested Regulation does not change any of the obligations under Article 7 of the Energy protocol: its scope is limited to the assessment and derogations expressly mentioned in it, and in particular the environmental impact assessment under Article 2(1) of Directive 2011/92.

51. The same reasoning is applicable to Article 10 of the Energy protocol on energy transport and distribution.

52. Article 12(1) of the Energy protocol also is not impacted by Article 6 of the contested Regulation. As explained under point 42 above, this Article allows to replace specific environmental assessments carried out at the level of the individual projects by compliance with certain strict conditions, including the obligation to designate a specific area and to carry out a strategic environmental assessment in accordance with Directive 2001/42/EC.

53. In addition to the Energy protocol, point 5.1.2.3.2 of the first request contends that Article 6 of the contested Regulation breaches the Soil Conservation protocol to the Alpine Convention. Article 7 of the Soil Conservation protocol imposes prudent use of the soils in the Alpine region when assessing the compatibility of projects with the Alpine region.

54. The Council considers that the adoption of Article 6 of the contested Regulation does not in any way interfere with the obligations under or affect compliance with the provisions of the Soil Conservation protocol. The assessment of the impact on soils of projects benefitting from Article 6 of the contested Regulation in the Alpine region would still need to demonstrate that the obligation is complied with, as the derogation is targeted exclusively at the environmental impact assessment under Article 2(1) of Directive 2011/92/EU.

2. Conformity with the Aarhus Convention

55. As regards Article 8 of the Aarhus Convention on public participation during the preparation of generally applicable legally binding normative instruments, you consider, in point 5.2.2 of the first request, that the contested Regulation should be considered "*legally binding rules that may have a significant effect on the environment*". Consequently, you argue that public participation should have been ensured in the course of the adoption of the contested Regulation.

You consider in the second request, on pages 15 and 18 of the second request, that there was no prior information and consultation of the public before the adoption of the contested Regulation. There is also, according to you, no possibility after the adoption of the measure to remedy the gap in public information and consultation as well as for the lack of impact assessment.

56. The Council does not contest that the contested Regulation contains rules that fall within the scope of Article 8 of the Aarhus Convention. However, as stated by the Commission in the explanatory memorandum to its proposal, "*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.*" The Commission went on to say that:

"*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 project."*

57. Since Article 8 of the Aarhus Convention underlines that Parties "*shall strive to promote effective public participation at an appropriate stage*", the Council considers that, due the urgency of the situation, underlined by the call of the European Council in its conclusions on 22 October 2022 and further established under Part 3 of the present reply, it was reasonable to proceed with the adoption of the contested Regulation without public participation under Article 8 of the Aarhus Convention.

58. As regards compliance with Article 6 of the Aarhus Convention, you consider that the contested Regulation makes it impossible to ensure effective public participation at project level as required under Article 6(4) of the Aarhus Convention, and that it does not allow for such public participation to be duly taken into account in accordance with Article 6(8) of the Aarhus Convention, due to the timeframe provided under Article 5 of the contested Regulation.

59. First, the Council considers, as is underlined in recital 20, that the Aarhus Convention remains applicable within the entire scope of application of the contested Regulation. Member States have to ensure, when applying the provisions of the contested Regulation, and in particular the timeframes provided under Article 5 and the exemption from an environmental impact assessment under Article 6, that the procedures established for granting permits do respect the Aarhus Convention and that effective public participation at project level is ensured.

Second, it should be underlined that the timeframe established under Article 5 is the result of a careful policy assessment by the Council, which considered that the obligations related to effective public participation could be complied with under the set timeframes. It does not prejudge the applicability of the Aarhus Convention's provision on public participation at project level, in particular in the phase of the environmental impact assessments for the repowering as provided under paragraph 1 of that article. Equally, the application of the exemption from an environmental impact assessment established under Article 6 of the contested Regulation does not allow Member States, when exempting specific projects, to disregard their obligations as regards effective public participation at project level.

60. It follows that the contested Regulation, and in particular its Article 5 does not contravene Article 6 of the Aarhus Convention.

61. As a consequence, the Council does not consider it necessary to review the proposed regulation in light of the Aarhus Convention.

ii. Conformity with the Treaty provisions and the Charter

62. In point 5.1.1 of the first request, you consider that the contested Regulation is contrary to the goal of improving the quality of the environment enshrined in Article 191 TFEU. You consider, in particular, that the precautionary principle, the principles of prevention, the principle of rectification at source would be impossible to apply because of the absence of an environmental impact assessment under Article 5(4) of the contested Regulation. In addition, you consider that Article 3 of the contested Regulation "is almost certain" to deteriorate the quality of the environment because it "prioritises the most damaging renewable energy projects in the most sensitive natural areas".

In the second request, on pages 14 to 16, you consider that Article 37 of the Charter, along with Article 191(2) TFEU are breached by the adoption of the contested Regulation, as it does not ensure a high level of protection of the environment.

63. On the one hand, the Council considers that, when acting on the basis of Article 122 TFEU, it is not bound by the requirements specific to Article 191 TFEU as regards the elements to be considered in the preparation of the Union's environmental policy.

64. On the other hand, Article 11 TFEU provides that environmental protection requirements must be integrated in the Union's policies and activities. Article 37 of the Charter provides that a high level of protection and the improvement of the quality of the environment must be integrated in the policies of the Union.

65. The Council will therefore demonstrate that the adoption of the contested Regulation integrates environmental protection requirements and a high level of protection of the environment.

66. As the second request underlines under point III, (ii), the Court of Justice has clarified that the review of acts of the legislature as regards the respect of the requirement to achieve a high level of protection should be limited to manifest errors of assessment, "in view of the need to strike a balance between certain of [the] objectives and principles" of the Union's environmental policy[17], also taking into consideration the required economic and social choices.

First, as is underlined in Part 4 of the present reply, the Council enjoys a broad margin of discretion in the adoption of measures under Article 122 TFEU as is the case with the contested Regulation. In the case, in particular, of repowering of installations, the Council balanced the advantages of repowering installations, which can deliver a rapid increase in the generation of renewable energy, and the upgrade of related grid infrastructures which is necessary to integrate renewable energy in the electricity system against the limited downsides of a more limited impact assessment under Directive 2011/92/EU pursuant to paragraph 3 of Article 5. In this context, and taking into account the fact that the measures would be temporary, the Council considered that Article 5 of the contested Regulation is proportionate.

In addition, as regards the conformity of Article 5 of the contested Regulation with the Article 11 TFEU and Article 37 of the Charter, the Council considers that the obligation to integrate a high level of protection and environmental protection requirements remain ensured where determination of whether the projects necessitate an environmental and related assessment is limited to the impact stemming from the change or extension of the original project.

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17 See Judgment of the Court of 13 March 2019, Poland v. Parliament and Council, C-128/17, ECLI:EU:C:2019:194.

In particular, the Council considers that the combination of the initial and the subsequent assessments, in the cases that fall within Article 5, are sufficient to ensure that the principles of integration of a high level of protection and environmental protection requirements are respected.

67. It therefore follows that the Council did not undermine the requirement for a high level of protection of the environment in adopting Article 5 of the contested Regulation.

68. Second, as regards Article 3 of the contested Regulation, it should be underlined, as is also established in both requests, that this Article establishes a presumption for the projects at stake of "being in the overriding public interest and serving public health and safety when balancing legal interests" for the purpose of the derogations foreseen in specific provisions listed in that Article.

This presumption is rebuttable, as also confirmed in recital 8. This means that, when the competent authority or national court is confronted with clear evidence submitted by third parties, such as environmental NGOs, that a project is not in the public interest or does not serve public health or that the interests in the development of the project do not outweigh the conflicting environmental interests at stake, in view, for example, of the major effects of the project on the environment, the authority should consider the presumption rebutted and the project should not be authorised.

Additionally, while the presumption applies to the balancing of interests in the framework of the analysis under the provisions listed in Article 3, it does not allow for any derogations from binding requirements under the existing environmental acquis.

69. It is therefore the Council's view that Article 3 of the contested Regulation does not undermine the requirement to integrate a high level of protection of the environment and environmental protection requirements.

70. As regards the review clause under Article 9 of the contested Regulation, the Council underlines that, if the Commission were to propose to prolong the validity of the contested Regulation pursuant to its Article 9, it would have to ensure the integration of a high level of protection of the environment and environmental protection requirements when drafting its proposal.

71. In addition, in the second request, on page 16, you consider that the adoption of the contested Regulation breaches the principle of energy solidarity in introducing discrepancies in the environmental protection and risks resulting in a race to the bottom and that the energy integration supported by the adoption of the contested Regulation does not ensure the principle of energy solidarity.

As you underlined, the principle of energy solidarity applies to all Member States and requires the Union to take into account the interests of all stakeholders liable to be affected by the exercise of the Union's competence and to take into account the interdependence.[18]

72. In recital 21 of the contested Regulation, the Council set out the manner in which it took the principle of energy solidarity into consideration. In this respect, it should be noted that the energy market integration is not a consequence of the adoption of the contested Regulation but a cause for it. Indeed, the contested Regulation aims to ensure the flow of affordable renewable energy between Member States, facilitating the diversification of the sources of supply, as is required under the case law.[19]

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18 Judgement of the Court of Justice of 15 July 2021, Germany v Poland, C-848/19 P, ECLI:EU:C:2021:598, paras 70 and 71

19 Ibid.

73. It follows that the contested Regulation has been adopted in conformity with and with due regard to the principle of energy solidarity.

b. The contested Regulation is consistent with secondary legislation

74. First and foremost, it should be underlined that temporary measures adopted on the basis of Article 122 TFEU can derogate from the rules applicable in "normal times". Where a situation falls within the scope of the measures adopted under Article 122 TFEU, derogations to secondary legislation in general, and the environmental acquis, in particular, are possible.

Therefore, the Council did under no circumstances breach any of the applicable environmental directives mention when adopting the contested Regulation.

Nevertheless, the Council will demonstrate that the measures you contest in your requests are not inconsistent with the Directives you mention in your requests.

i. Conformity with habitats and birds Directive

75. In point 5.1.2.2 of the first request, you argue that Article 3 of the contested Regulation is highly unlikely to create a simplified assessment but creates a change in the derogation assessment under Articles 6(4), 16(1)c), of the habitats Directive as well as Article 9(1), a) of the birds Directive in favour of the developers. You argue that the generalisation of a derogation under the habitats and birds Directives is contrary to the principle of overriding public interest.

Under point III, (v) of the second request, you also consider that the contested Regulation breaches the habitats, water and birds Directives, because the presumption created under Article 3 of the contested Regulation puts the interested parties in an unfavourable position as regards the development of renewable energy projects.

76. Article 3 of the contested Regulation introduces a rebuttable presumption that the projects within its scope are "in the overriding public interest and serving public health and safety when balancing legal interests". This Article therefore, as you contend, shifts the burden of proof for demonstrating compliance with the conditions foreseen in the relevant provisions that it refers to. However, as is underlined under point 67 above, it does not prejudge the possibility, for the assessment at project level, that it is demonstrated that the public interest is not overriding and that the environmental interests should prevail.

The Council also considers, as you mention in your request, that the other elements required by the Directives to which this presumption applies remain fully applicable. Among others, the analysis whether there are alternative satisfactory solutions under Article 16(1) of the habitats Directive and Article 9(1) of the birds Directive and the necessity to demonstrate that there is no detrimental effect to the favourable conservation status of the affected species under Article 16(1) of the habitats Directive remain in force.

In addition, contrary to what you argue in the second request, Article 3 of the contested Regulation does not prejudge the application of the other provisions of the habitats and birds Directives, and in particular Article 6 of the habitats Directive.

It also follows from the wording of the contested Regulation that the presumption remains rebuttable under Article 3(2) of the contested Regulation, which establishes that where a project benefits from the presumption under Article 3(1), this project needs to be accompanied by conservation measures to maintain or restore the population of the affected species at a favourable conservation status in the affected area for which sufficient financial resources must be made available.

77. As a consequence, the Council does not consider that the adoption of Article 3 of the contested Regulation is inconsistent with environmental law, and in particular the birds and habitats Directives.

ii. Conformity with the water framework Directive [20]

78. The same reasoning applies, *mutatis mutandis* to the water framework Directive.

79. In point 5.1.2.2 of the first request, you argue that Article 3 of the contested Regulation is incompatible with Article 4(7) of the water framework Directive. You contend that the public participation in the assessments under Article 4(7) of the water framework Directive will not be ensured.

80. As regards Article 4(7) of the water framework Directive, the Council underlines that the presumption established under Article 3 of the contested Regulation applies only to the overriding interest reason established under Article 4(7) and does not extend to the entirety of the conditions established under that paragraph. It follows that the rest of the assessment, to which you refer in your request, is not affected by the presumption of overriding public interest established under Article 3 of the contested Regulation.

81. In addition, it is the Council's view that, having regard to the applicability of the Aarhus Convention to all the procedures falling within the scope of the contested Regulation and considering that the procedure established under Article 4(7) of the water framework Directive remains applicable, effective public participation is not questioned by the adoption of the contested act.

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[20] 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, O.J L 327, 22.12.2000, p.1.

iii. Conformity with directive 2011/92/EU[21]

82. In point 5.1.2.1.1 of the first request, you argue that the deadlines established under Article 5 of the contested Regulation are incompatible with carrying out an environmental impact assessment. You consider that the authorities would therefore exempt the renewable energy project from carrying out an environmental impact assessment. You also consider that even if an environmental impact assessment was carried out, it would not be of a sufficient quality and would not take due account of the public consultations.

In point 5.1.2.1.2 of the first request, you also consider that Article 5 of the contested Regulation amounts to requiring salami slicing and runs counter to the case law of the Court of Justice in this respect.

You contend, in point 5.1.2.1.3 of the first request, that Article 6 of the contested Regulation breaches Articles 1, 2, 3, 4, 5, 6, 8, 8a, 9, 10a, and 11, of Directive 2011/92/EU by creating an alternative decision-making framework and prevents both public participation and access to justice as regards the projects benefitting from the exemption provided under that Article. You consider that a strategic environmental assessment under Directive 2001/42/EC does not substitute environmental impact assessments under Directive 2011/92/EU. You also consider the absence of definition of the notion of "dedicated renewable or grid area" to create legal uncertainty in relation to the application of Directive 2011/92/EU. Finally, you consider that Article 6 broadly widens the scope of the exemptions from the obligation to carry out an environmental impact assessment provided under Article 1(3) of Directive 2011/92/EU.

[21] 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, O.J. L 26, 28.1.2012, p. 1.

In the second request, under point III, (vi), you argue that Article 5 of the contested Regulation contradicts Directive 2011/92/EU by setting binding deadlines that are incompatible with carrying out an environmental impact assessment and that the limitation of the scope of the additional environmental impact assessment is contrary to Article 4 of Directive 2011/92/EU.

83. The Council does not consider these arguments to be well founded.

84. As regards the deadline established in Article 5(1), it should be underlined that for the reasons stated above under point 58 of the present reply, the deadline established under that Article is considered appropriate and does not make it impossible to comply with applicable environmental protection rules.

85. For the reasons stated in point 65 above, the Council considers the requirement to limit the determination and environmental impact assessment to the potential significant impacts stemming from the change or extension to the original project established under Article 5(3) of the contested Regulation to be appropriate. Concretely, the concept of repowering of an installation is limited to full or partial replacement of the installation in order to replace the capacity or to increase the efficiency or the capacity of the installation[22]: it is therefore limited in scope to the cumulation of the impact assessment carried out initially for the existing project and the new impact assessment. Any new and additional environmental impact still have to be assessed, asthe new impact assessment would demonstrate with a sufficient precision the impact of the project. The concept of salami slicing to which you refer is also not relevant in this context, as the renewable energy projects falling in the scope of Article 5(3) are not split in different projects, but are rather subject to renewal and potential change or extension, the impact of which needs to be assessed pursuant to that Article. Consequently, the limitation under Article 5(3) of the contested Regulation is proportionate.

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22 See Article 2(10) of Directive (EU)2018/2001of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328, 21.12.2018.

86. As regards Article 6, the Council considered it appropriate to allow for an exemption from the requirement to carry out an environmental impact assessment under Article 2(1) of Directive 2011/92/EU for projects falling within the scope of Article 6 where the specific cumulative conditions provided under this article are fulfilled. In particular, the projects may only be located in a renewable or grid area that has been subject to a strategic environmental assessment in accordance with Directive 2001/42. Art. 4(1) of that Directive provides that an environmental assessment must be carried out during the preparation of a plan and before it is adopted. Art. 5(1) of that Directive sets out that the likely environmental effects of the plan on the environment and reasonable alternatives are identified, described, and evaluated. Art. 6(2) of the Directive requires that the public and authorities with specific environmental responsibilities are to be given an early and effective opportunity to express their opinion on such a plan. Taking into consideration these conditions, such an approach is proportionate and in line with the margin of discretion of the Council in the framework of the adoption of temporary measures under Article 122 TFEU as underlined under point 26 above.

87. By way of consequence, the Council does not deem it necessary to amend the contested Regulation in view of Directive 2011/92/EU.

8. Conclusion

88. For the reasons set out in the present reply, after having examined your request, the Council considers that your request is inadmissible. In the alternative, the Council considers that it is not necessary to review the contested Regulation in view of the applicable environmental law.