stek

May 19, 2023

EU emergency regulation on accelerating the deployment of renewable energy: implications for new projects in the Netherlands

Veii Jacobs

Joost van den Bogaerd

In May 2022, the European Commission (the **Commission**) proposed the REPowerEU Plan, its response to the hardships and global energy market disruption caused by Russia's military aggression against Ukraine. The REPowerEU Plan seeks to end the EU's dependence on Russian fossil fuels while simultaneously making further advances in reaching the EU's climate goals – which include a commitment to raise the share of renewable energy in the EU's overall energy consumption to 45% by 2030. Achieving these objectives will require a massive upscaling and acceleration of renewable energy production throughout the EU.

To that end, the Council has adopted an emergency regulation laying down a framework to accelerate the deployment of renewable energy (Council Regulation (EU) 2022/2577, the **Regulation**). The Regulation entered into force on 30 December 2022 and introduces temporary provisions aimed at fast-tracking permit-granting processes for renewable energy projects, in particular for solar installations, heat pumps and projects involving the repowering of renewable energy plants. The Regulation is directly applicable in all Member States for a limited period of 18 months, covering the time needed for the adoption and transposition of the new Renewable Energy Directive (**RED IIII**). Once adopted, the RED III will, among other things, require Member States to implement provisions aimed at streamlining and accelerating the permit-granting processes for renewable energy projects.

This article discusses the key takeaways of the Regulation and its implications for renewable energy projects in the Netherlands.

Background

The Regulation establishes temporary emergency rules to accelerate the rollout of renewable energy sources, which is regarded as one of the main measures that could help the EU to address the ongoing energy crisis, improve security of supply and reduce energy prices. In

this context, the Regulation complements various other EU emergency measures adopted in 2022, such as the regulations on gas demand reduction, gas storage and on addressing high energy prices (for further information on the latter regulation in relation to the Dutch energy price cap, please refer to the article "Combatting high energy prices in the Netherlands").

On 2 December 2022, the Minister of Climate and Energy Policy (the **Minister**) provided the Senate with an appraisal of the (proposal for the) Regulation (the **Appraisal**). By letters of 13 March and 8 May 2023, the Minister responded to (follow-up) questions from Senate regarding the Regulation (the **Response**). The Minister's Appraisal and Response are included in the analysis provided below.

Scope of application

The Regulation applies to all permit-granting processes that commence within its 18-month period of application. Additionally, Member States have the option to apply the Regulation to ongoing permit-granting processes which have not resulted in a final decision before 30 December 2022, provided that this shortens the permit-granting process and that pre-existing third party legal rights are preserved.

For the purpose of the Regulation, a 'permit-granting process' is defined as comprising: (i) all relevant administrative permits issued to build, repower and operate plants for the production of renewable energy, including heat pumps, co-located energy storage facilities and assets necessary for their connection to the grid, including grid connection permits and, if required, environmental impact assessments (**EIAs**); and (ii) all administrative stages starting from the acknowledgement of the receipt of the complete permit application by the relevant competent authority and ending with the notification of the final decision on the outcome of the procedure by the relevant competent authority.

Under Dutch law, the above-mentioned definition encompasses environmental permits (*milieuvergunningen*) on the basis of the Environmental Law (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht*), nature permits and exemptions (*natuurvergunningen en ontheffingen*) on the basis of the Nature Conservation Act (*Wet natuurbescherming* or **NCA**) and water permits *(watervergunningen)* on the basis of the Water Act (*Waterwet*). The Regulation does not clarify whether planning decisions, such as a zoning plan (*bestemmingsplan*), also fall within the scope of this definition.

Presumption of overriding public interest

The Regulation introduces a rebuttable presumption that the planning, construction and operation of renewable energy plants and installations (including their connection to the grid, the related grid itself and storage assets) is of overriding public interest (**OPI**) and serves public health and safety. Therefore, when balancing different legal interest in individual cases for the purposes of article 6(4) and article 16(1)(c) of Council Directive 92/43/EEC (the **Habitats Directive**), article 9(1)(a) of Directive 2009/147/EC (the **Birds Directive**) and article 4(7) of Directive 2000/60/EC (the **Water Framework Directive**) (together: the **Environmental Directives**), renewable energy projects will be presumed to have relative priority over environmental concerns and, accordingly, benefit from a simplified assessment procedure under the Environmental Directives. This priority may be given only if, and to the extent that, appropriate species conservation measures contributing to the maintenance or restoration of

the populations of the species at a favorable conservation status are undertaken and sufficient financial resources, as well as areas, are made available for that purpose.

Pursuant to the OPI presumption, environmental concerns for renewable energy projects will generally prevail over:

- a negative assessment of the implications for special areas of conservation, provided that there is no alternative solution pursuant to article 6(4) of the Habitats Directive;

- rules on the protection of animal and plant species, provided that there is no satisfactory alternative and that the derogation is not detrimental to the maintenance of the population of the species concerned at a favorable conservation status in their natural range pursuant to article 16(1) of the Habitats Directive;

- rules on the protection of birds, provided that there is no satisfactory alternative pursuant to article 9(1)(a) of the Birds Directive; and

- a deterioration in the condition of a body of surface water under EU water policy, provided that: (1) all practicable steps are taken to mitigate the adverse impact on the status of the body of water; (2) reasons for those modifications are set out in a specific river basin management plan and the objectives are reviewed every six years; and (3) the objectives served by modifications of the water body cannot be achieved by better environmental options for reasons of technical feasibility or disproportionate cost, pursuant to article 4(7) of the Water Framework Directive.

The OPI presumption does not apply if there is clear evidence that a renewable energy project has major adverse effects on the environment which cannot be mitigated or compensated for. In addition, Member States may restrict the application of the OPI presumption to certain parts of their territories or to certain technologies or projects in accordance with the priorities set in their integrated national energy and climate plans.

In his Appraisal, the Minister points out that while the government is in favor of a lighter and faster assessment procedure, the OPI presumption does not achieve that goal. This is because other environmental criteria under the Environmental Directives will still need to be met (and assessed) on a case-by-case basis. More specifically, with respect to article 6(4) of the Habitats Directive, the Minister rightly notes in his Response that the OPI presumption does not negate the other two requirements of article 6(4) of the Habits Directive, namely: (1) that there are no alternative solutions; and (2) that all compensatory measures are taken to ensure the protection of the overall coherence of the Natura 2000 network.

While the Council of State (*Raad van State*), the highest administrative court in the Netherlands, has already confirmed in a ruling of 18 February 2015 that renewable energy projects may classify as projects of overriding public interest under article 6(4) of the Habitats Directive, the necessary balancing of interests in this regard is no longer required due to the OPI presumption. The acceleration benefit of the OPI presumption is therefore primarily related to the fact that national authorities will assume that renewable energy project are of overriding public interest for the purposes of granting permits, and that it is up to the person objecting to a permit to substantiate that in that specific case, no overriding public interest is served by the project.

With respect to Dutch environmental law, article 2.8 of the NCA stipulates that, even if an appropriate assessment cannot rule out significant adverse consequences on nature conservations areas, a nature permit can be granted for plans or projects that are necessary for imperative reasons of major public interest and for which there are no alternative solutions. This so-called 'ADC-test' is a complex process and the motivation and substantiation requirements are generally difficult to meet. While the Minister has confirmed in his Response that renewable energy projects may benefit from the OPI presumption in ADC-procedures, the OPI presumption will not remove the obligation to carry out a full assessment of the environmental effects of a project and, in case significant effects cannot be mitigated, to find and secure nature compensation measures. This remains a time-consuming process. Therefore, within the context of the ADC-test, the added value of the OPI presumption seems limited to the rebuttable presumption that renewable energy projects are necessary for imperative reasons of major public interest.

That said, the OPI presumption may nevertheless serve a useful purpose with respect to the prohibition on the intentional killing or deliberate disturbance of birds and other species. Under the NCA, an exemption is required if birds or other species are intentionally killed. This includes conditional intent – *i.e.* knowingly accepting the substantial likelihood that the conduct will result in the killing or disturbance of birds and other species. Accordingly, any foreseeable casualty or disturbance is in principle a violation of the NCA and therefore subject to an exemption requirement, even if mitigating measures are adopted. If the exemption requirement can be waived on the basis of the OPI presumption by taking mitigating measures, this could potentially accelerate the realization of renewable energy projects.

Accelerated permit-granting process for solar energy equipment

The Regulation provides an accelerated permitting procedure for solar energy equipment (meaning equipment that converts energy from the sun into thermal or electrical energy, including solar thermal and solar photovoltaic equipment) by stipulating that the permit-granting process for the installation of solar energy equipment and co-located energy storage assets (including building-integrated solar installations and rooftop solar energy equipment) in existing or future artificial structures (excluding artificial water surfaces) must not exceed three months, provided that the primary aim of such artificial structures is not solar energy production. Furthermore, solar energy installations are exempted from the requirement, if applicable, of being subjected to the determination of whether the project requires an environmental impact assessment (**EIA**) or from the requirement to carry out a dedicated EIA. The Regulation does not clarify what is meant with 'existing or future artificial structures'. While the wording initially suggests that the Regulation also applies to solar parks, the additional requirement that the 'primary aim of such structures is not solar energy production' indicates that solar parks on land are exempted from the Regulation's scope of application.

For the permit-granting process concerning the installation of solar energy equipment (including for renewables self-consumers) with a capacity of 50 kW or less, the Regulation stipulates that the absence of a reply by the relevant competent authority within one month following the application shall result in the permit being considered as tacitly granted (under Dutch administrative law, referred to as the principle of *lex silencio positivo*), provided that the capacity of the solar energy equipment does not exceed the existing capacity of the connection to the distribution grid. In cases where the capacity threshold of 50 kW leads to a

significant administrative burden or constraints to the operation of the electricity grid, Member States may apply a lower threshold, provided that the threshold remains above 10,8 kW.

Accelerated deployment of heat pumps

With respect to the deployment of heat pumps, the Regulation stipulates that the permit-granting process for the installation of heat pumps with a capacity of less than 50 MW shall not exceed one month and for the installation of ground source heat pumps shall not exceed three months. Furthermore, unless there are justified safety concerns, further works are needed for grid connections or if there is technical incompatibility of the system components, connections to the transmission or distribution grid shall be permitted following notification to the competent authority for: (i) heat pumps of up to 12 kW capacity; and (ii) heat pumps installed by a renewables self-consumer of up to 50 kW capacity, provided that the capacity of the renewable electricity generation installation amounts to a least 60% of the capacity of the heat pump.

The Dutch government considers heat pumps and other sustainable heating systems as an important part of making the built environment more sustainable by reducing the dependence of natural gas for heating. With respect to heat pumps for large systems or systems that require soil drilling, the Appraisal points out that it is important that other interests are also properly safeguarded, such as the protection of nature and groundwater. It is important to note, however, that such interests can only be taken into account if and to the extent that they are not covered by the OPI presumption.

Repowering of renewable energy plants

According to the Commission, repowering renewable energy plants has a significant potential to rapidly increase renewable energy generation, thus enabling the reduction of gas consumption. The repowering of renewable energy plants is viewed as an option for increasing renewable energy production with the least impact on grid infrastructure and the environment, including with respect to renewable energy production technologies, such as wind power, for which permit-granting processes are typically longer.

To fast-track the repowering of existing renewable energy plants, the Regulation stipulates that the permit-granting process for the repowering of such plants (including the permits pertaining to the upgrade of the assets necessary for their connection to the grid in cases where the repowering results in an increase in capacity) and, if applicable, the execution of EIAs, shall not exceed six months. If the repowering does not result in an increase of capacity of more than 15%, and without affecting the need to assess any potential environmental impacts, grid connections to the distribution or transmission grid must be permitted within three months, unless there are justified safety concerns or there is technical incompatibility with the system components.

The Regulation furthermore stipulates that if the repowering of a renewable energy plant, or the upgrade of a related grid infrastructure, is subject to a determination of whether the project requires an EIA, such prior determination and/or EIA shall be limited to the potential significant impacts stemming from the change or extension as compared to the original project. Moreover, 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 subject to a determination of whether an EIA is required pursuant to article 4 of Directive 2011/92/EU (the **EIA Directive**).

The Dutch government supports the EU's approach to speed up and simplify permitting procedures for the repowering of existing renewable energy plants. In his Appraisal, the Minister nevertheless points out that this approach may have consequences for the spatial aspects of wind turbines (especially their height) and that attention should therefore be paid the impact on the environment. In light of the above-mentioned six-month decision period, the Minister notes that safeguarding proper participation within the said period should be a point of attention.

Possibility to extend the scope of application

The Regulation grants Member States the option to 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 the EIA Directive and the species protection assessments under article 12(1) of the Habitats Directive and article 5 of the Birds Directive. This exemption can only be applied if the project is located within a dedicated renewable area or a dedicated grid area for a related grid infrastructure which is necessary to integrate renewable energy into the electricity system (if any such grid area has been designated by the Member States). Furthermore, the area must have been subjected to a strategic environmental assessment (**SEA**) – a so-called 'plan EIA' – in accordance with Directive 2001/42/EC (the **SEA Directive**).

In his Response, the Minister emphasizes that the 'implementation' of the possibility to exempt renewable energy projects from the obligations under the EIA Directive, Habitats Directive and Birds Directive necessitates an amendment to national laws and regulations. For species protection, an exemption provision must be created in the NCA before the exemption provided in article 6 of the Regulation can be applied. Due to the time involved with the creation of the required national legislation, and given the Regulation's temporary nature, the Dutch government has decided for the time being to not extend the Regulation's scope of application. Instead, the Dutch government intends to incorporate this provision of the Regulation into the proposals for the implementing legislation for the RED III. However, in practical terms, this can only be accomplished if the Regulation is extended.

Enforcement

The provisions of the Regulation are directly applicable in the Netherlands and do not require national implementation. This not only means that new renewable energy projects may invoke the provisions of the Regulation directly before the national authorities and courts, but also that national authorities are obligated to ensure the full effectiveness of the Regulation when processing permit applications falling within its scope. Consequently, national authorities are required to adhere to the timelines set out in the Regulation. The failure to meet these timelines constitutes a breach of EU law, in which case the permit applicant can hold the competent authority liable for damages resulting from the violation of the Regulation. However, recourse to such a procedure is time-consuming and requires, among other things, the permit applicant to demonstrate a direct causal link between the violation and the damage suffered.

Aside from the possibility of state liability resulting from non-compliance with the timelines stipulated in the Regulation, the Regulation, in and of itself, lacks provisions to ensure that these timelines are actually adhered to. Only in the context of permitting procedures for solar equipment with a capacity of 50 kW or less does the Regulation attach consequences the failure to meet specified timelines, by stipulating that the permit is deemed to be tacitly granted in such cases.

Conclusion and outlook

Accelerating the rollout of renewables is considered one of the key measures that could help the EU accelerate the pace of deployment of renewables in the short term. While the Regulation may provide a welcome boost for the realization of solar energy equipment and heat pumps and the repowering of renewable energy plants, the effectiveness of the Regulation, and particularly the OPI presumption, in accelerating the rollout of renewable energy projects is currently unclear and may vary depending on the nature of the project.

At the national level, the Dutch government has explored options to expedite permitting procedures for energy infrastructure and renewable energy projects. By letter of 24 March 2023, the Minister informed the Senate about several proposals in this regard. Concerning permitting procedures for energy infrastructure, the Minister (referring to a letter from the government dated 2 December 2022) notes that acceleration can be achieved through various means, including accelerating appeal procedures, limiting access to appeal and reducing the number of authorities. Regarding permitting procedures for renewable energy projects, the Minister notes that the current legal framework provides acceleration possibilities that can be used more frequently and more effectively, and that the most significant time savings can be achieved by through non-legal measures, such as streamlining and optimizing permitting procedures as well as providing support, in the form of knowledge and capacity, to the authorities responsible for granting permits. The Minister has committed himself to presenting concrete proposals before the summer recess.

Should you have any questions pertaining to the impact of the Regulation on your projects/activities in the Netherlands, please contact Veii Jacobs or Joost van den Bogaerd by telephone (+31 20 530 52 00) or email (veii.jacobs@stek.com or joost.vandenbogaerd@stek.com).