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Fieldfisher Brussels Energy Team Newsletter

New Potential Advantages for Renewable Energy Projects under the EU Green Deal Implementation

May 2023

Context

In the context of the EU Green Deal and the Net Zero Industry Act, the European Union aims at developing an environment favourable to a fast(er) roll out of renewable energy projects. In this context, a Council Regulation aiming at accelerating the deployment of renewables has been recently adopted.[1] Under this emergency regulation, developers of renewable energy projects benefit from general and technology specific advantages.

Through this emergency framework, the European Union attempts to reduce the (administrative) complexity that developers of renewable energy projects face. In March 2023, the European Commission presented several initiatives, among which the Net Zero Industry Act[2], revealing the intention of the European Institutions to further reduce the administrative burden for developers of renewable energy projects.

This newsletter gives an overview of the extent to which the emergency regulation and the emerging trends in upcoming legislation change the game for wind projects and solar energy projects in particular. Since the initiatives discussed in this newsletter are not limited to (ground mounted) solar energy projects, the newsletter specifies when advantages are specific to solar technology or more generally applicable for renewable energy projects.

Current advantages under the emergency regulation

Which projects can benefit from the advantages?

Renewable energy projects for which the permitting procedure starts during the period of 18 months starting on 30 December 2022.

Projects for which the permitting procedure did not yet result in a final decision prior to 30 December 2022 can also benefit from the advantages if the relevant Member State so decides in order to shorten the currently applicable timeline.

Which advantages?

The emergency regulation would provide for both, general advantages for renewable energy projects and technology-specific advantages (solar and heat pumps). The scope of some solar-specific advantages are further limited to particular types of solar energy projects, as explained in the following.

[1] Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy.

[2] Proposal for a regulation of the European Parliament and of the Council of 16 March 2023 on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act).

Solar-specific advantages

Permit-granting process of maximum 3 months

This hard deadline is only applicable to the installation of solar energy equipment[3] (and co-located energy storage assets) in existing or future artificial structures. This measure, however, is not applicable to projects on:

- structures for which solar energy production is the primary aim;
- artificial water surfaces;
- areas or structures which have been excluded by the relevant Member State due to reasons of (i) cultural or historical heritage protection, (ii) national defence or (iii) safety.

This advantage will not benefit projects aiming at the installation of PV on natural water surfaces or on the ground if such projects have as a primary aim solar energy production.

Exemption with regard to environmental assessment obligations

The obligation for the relevant Member State to determine whether the project shall be made subject to an environmental impact assessment[4] is not applicable to installations that meet the conditions mentioned above. It follows that such installations are also exempted from the requirement to carry out a dedicated environmental impact assessment.

Positive administrative "silence"

If the relevant authorities or entities do not reply within one month following the application for the permit, the sought permit will be considered as granted if the following conditions are met:

- the capacity of the solar energy equipment is maximum 50 kW;
- the capacity of the solar energy equipment does not exceed the existing capacity of the connection to the distribution grid.

Member States can decide to lower the threshold of 50 kW, but not below 10,8 kW. Member States can only do so if the threshold of 50 kW leads to a significant administrative burden or constraints.

Repowering of solar installations: exemption with regard to environmental impact assessment

A repowering project for solar installations is exempted from the requirement to determine whether the project requires an environmental impact assessment[5] provided the repowering project:

- complies with applicable environmental mitigation measures established for the original installation; and
- does not entail the use of additional space.

[3] Rooftop solar energy equipment as well as building-integrated solar installation are included in the scope of this provision. However, often no (environmental) permit is required for rooftop solar energy equipment and building-integrated solar installations in Belgium.

[4] This provision refers to the obligation set forth in Article 4 of 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.

[5] In the sense of Article 4 of Directive 2011/92/EU.

General advantages for renewable energy projects: repowering of power plants

Maximum 6 months for permit-granting process

Provided the repowering project results in an increase in capacity, the permit-granting process for the project[6] cannot last longer than 6 months. If environmental impact assessments need to be carried out, it should be performed within the same timeframe of 6 months.

The permit-granting process starts on the date of the acknowledgment of the reception of complete application by the authority. It ends on the date of notification of the final decision on the outcome of the process by the relevant authority.

Permitting of grid connections to transmission or distribution grid within 3 months

This deadline applies if the following conditions are met:

- repowering does not result in an increase in capacity beyond 15%;
- no justified safety concerns;
- no technical incompatibility of the system components.

The period of 3 months is calculated in reference to the date of the application for the permit to the relevant authority.

Limited scope of environmental impact assessment obligations

Environmental impact assessments[7] (and the prior determination by the relevant Member State as to whether the project shall be made subject to an environmental impact assessment) are confined to the potential *significant* impacts stemming from the change or extension in comparison to the original project. This advantage also applies for the upgrade of related grid infrastructure.

General advantages for renewable energy projects: balancing of legal interests

Priority in the balance of legal interests

When balancing legal interests in individual cases, plants and installations for the production of energy from renewable sources recognised as being of overriding public interest[8] should be given priority in the different phases of the project:

- the planning of the project;
- the permit-granting process;
- construction and operations.

[6] The same timeframe of 6 months applies to the permit-granting process for the assets necessary for the connection to the grid.

[7] This provision refers to the obligation set forth in Article 4 of 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.

[8] In this provision, the concept of 'overriding public interest' may be understood in reference to the concept of 'overriding public interest' in the applicable directives (and national legislations adopted on their basis) mentioned below with regard to (i) the conservation of natural habitats and of wild fauna and flora, (ii) water policy and (iii) the conservation of wild birds. Member States are free to have a broader understanding of the concept 'overriding public interest' in this provision.

The same priority applies to the development of related grid infrastructure.

The priority should only be granted if appropriate species conservation measures[9] are undertaken (and that sufficient financial resources and areas are available to this end).

Rebuttable presumption when balancing legal interests in the context of EU environmental legislation

When balancing legal interests in individual cases for the purposes of the relevant EU environmental legislation[10], the following shall be presumed as being in the overriding public interest[11] and serving public health and safety:

- the planning, construction and operation of plants and installations for the production of energy from renewable sources;
- the connection of the aforementioned plants and installations to the grid;
- storage assets.

The rebuttable presumption allows projects to benefit from a simplified assessment for specific derogations foreseen in the EU environmental legislation.

However, Member States can restrict the application of this presumption to:

- parts of the territory;
- certain types of technologies;
- projects with certain technical characteristics.

Such restrictions should be made in accordance with the priorities identified in the integrated national energy and climate plans of the Member State.

Emerging trends from upcoming legislation

In March 2023, the European Commission presented the Net Zero Industry Act, a draft regulation together with the draft Critical Raw Materials Act. Although these proposals are potentially subject to changes and still need to be adopted, clear trends can be identified in view of the emergency regulation discussed above.

[9] Measures that contribute to the maintenance or restoration of the populations of the species at a favorable conservation status.

[10] The relevant EU environmental legislation in the sense of this emergency regulation is the legislation relating to the conservation of natural habitats and of wild fauna and flora (Articles 6(4) and 16(1)(c) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora), water policy (Article 4(7) of 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) and the conservation of wild birds (Article 9(1)(a) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds).

[11] The concept 'overriding public interest' is not defined in the emergency regulation. In this provision, it can only be understood in reference to the concept of 'overriding public interest' in the applicable directives (and national legislations adopted on their basis) mentioned above with regard to (i) the conservation of natural habitats and of wild fauna and flora, (ii) water policy and (iii) the conservation of wild birds. The scope of application of this presumption is therefore limited to the situations referred to in these directives.

The Net Zero Industry Act would provide for a temporary framework (2 years in the draft version) to further facilitate the roll out of net-zero technologies. Net-zero technologies entail, i.a. renewable energy technologies[12], electricity and heat storage technologies, heat pumps, grid technologies… The Net Zero Industry Act intends to further reduce the administrative burden for developers of renewable energy projects. The draft provides for similar advantages with regard to the emergency regulation (for example the limitation on the duration for permit-granting processes and advantages with regard to environmental assessments), but would benefit more types of projects given the broad definition of net-zero technologies.

The draft also provides for other measures that were not included in the emergency regulation. The Net Zero Industry Act aims at establishing "One Stop Shops" across the EU. This means that in each Member States, one single national competent authority should be the point of contact for project promoters. These One Stop Shops would facilitate and coordinate the permit-granting process and help further reducing the administrative burden. The draft also provides for more generous advantages to the benefit of so-called "net-zero strategic projects". Projects with the following technologies may qualify as strategic including:

- Solar PV;
- Solar thermal;
- Onshore wind;
- Offshore renewables;
- Battery and storage;

Such strategic projects would enjoy a priority status to ensure the most rapid treatment through the (administrative) process of the projects and more generous limitations on the duration of the permit-granting process.

Game changing framework and trends?

The emergency regulation aiming at accelerating the deployment of renewables converts some of the soft recommendations enacted earlier by the European Commission[13] into binding obligations.

With regard to solar specific advantages, the emergency regulation does not change substantially the game for traditional rooftop solar projects, since permits and environmental impact assessments are almost never required in the EU to install PV on rooftops. The emergency regulation may however boost the development of specific (ground mounted) solar projects though on a limited manner. Indeed, the limitation on the duration for the permit-granting

[12] Renewable energy is to be understood as energy from renewable non-fossil sources, namely wind, solar (solar thermal and solar photovoltaic) and geothermal energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas.

[13] Commission Recommendation of 18.5.2022 on speeding up permit-granting procedures for renewable energy projects and facilitating Power Purchase Agreements.

process does not apply for solar projects on artificial water surfaces nor for structures for which solar energy production is the primary aim.

With regard to the advantages at the benefit of other renewable energy projects, they can significantly boost wind projects, in particular when it comes to repowering existing wind turbines. However, it is unclear what sanctions could apply if the competent authority fails to respect the limitation on the duration of the permitting processes. Furthermore, the emergency regulation does not tackle delays that may result from appeals procedures. Finally, the emergency regulation gives latitude to Member States to adapt the scope of certain advantages.

In sum, the game changing potential of the emergency regulation seems at first sight to be rather limited, but upon the adoption and the further implementation of the Net Zero Industry Act, renewable energy projects may benefit from a more significant boost compared to the current emergency framework. Thus to be continued.

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