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Extraordinary compliance procedure regarding deregulation measures to accelerate the deployment of renewable energy

Final report (Draft 15.05.2025)[1]

[1] According to point II.4.3 of the compliance mechanism this report is provisionally published without recommendations. This does not affect the subsequent steps towards its adoption by the Alpine Conference, which are as follows: the report, including the recommendations, will be translated into the four Alpine languages and forwarded to the Permanent Committee, which will forward it, unchanged and with any possible assessments, to the XIX Alpine Conference (see point II.1.3, II. 3.2.6, II. 3.2.7, II. 4.1 and II. 4.3 of the compliance mechanism).

Relevant abbreviations

CC	Compliance Committee
EIA	Environmental impact assessment according to Directive 2011/92/EU
EP	Energy Protocol of the Alpine Convention
ERRE	European emergency regulation on renewable energy (COUNCIL REGULATION (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy)
FFH-Directive	Fauna-Flora-Habitat Directive (Council DIRECTIVE 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora)
RED III	Renewable Energy Directive (EU) 2023/2413
SCP	Soil Conservation Protocol of the Alpine Convention
SEA	Strategic environmental assessment according to Directive 2001/42/EC
VCLT	Vienna Convention on the Law of Treaties

I. Introduction

1. Basics on the extraordinary compliance procedure

The extraordinary compliance procedure regarding alleged non-compliance with the Convention and its Protocols is regulated in point II.3.1.2 of the compliance mechanism for the Alpine Convention and its implementing Protocols (see Decision AKVII/4 amended by Decision AKXVII/A2/2). An extraordinary compliance procedure is initiated either by a written request from the Contracting Parties or the Observers. The subject of the review can be legal norms or administrative measures/decisions of the Contracting Parties referring to a specific situation. As far as the procedural rules are concerned, the same provisions apply to the extraordinary compliance procedure as to the ordinary one. Accordingly, the discussions throughout the procedure are confidential. Furthermore, in addition to the information received from the Parties, the Compliance Committee (from now on CC) is permitted to use other sources of information for the drafting of the final report (see point II.3.2.10). The final report on the compliance procedure is adopted by the CC, forwarded to the Permanent Committee for possible comments and then adopted by the Alpine Conference (see point II.4.1).
The extraordinary compliance procedures carried out to date have all been initiated on the basis of specific cases.[2] In this sense, the compliance procedure on which this final report is based is a novelty, as it is the first compliance procedure in the history of the CC dealing with an abstract norm.

2. The single steps of the present extraordinary compliance procedure

The extraordinary compliance procedure on an alleged non-compliance with the Alpine Convention and its Protocols by deregulation measures of the European Union to accelerate the deployment of renewable energy, with specific regard to the EU Regulation 2022/2577 (from now on ERRE), was triggered by a request of CIPRA International. At its 34th meeting the CC entered in the procedure and asks the Contracting Parties to provide answers to four of the questions raised by CIPRA International regarding the compatibility of certain provisions in the ERRE with provisions of the Energy Protocol (from now on EP) and the Soil Conservation Protocol (from now on SCP). The Contracting Parties were requested to provide answers by 31st May 2024.

[2] See ImplAlp/2015/22/5a/2 regarding CIPRA International's request to review an alleged non-compliance with Art. 11(1) of the "Nature protection and landscape conservation" protocol due to twenty amendments to the ordinance on the landscape conservation area "Egartenlandschaft um Miesbach" in the district of Miesbach/Bavaria; ImplAlp/2014/20/6a/3 regarding CAA request to review an alleged non-compliance with Art. 6(3) of the "Tourisms" protocol due to approval for the construction of a cable car on Piz Val Gronda (AT).

In the 35th meeting of the CC CIPRA International requested to extend the extraordinary compliance procedure to the Renewable Energy Directive (EU) 2023/2413 (RED III). The decision about the request was postponed by the CC to its following meeting.
At the 36th meeting of the CC, the issue was discussed for the first time from a substantive point of view. This discussion was based on a working document (see ImplAlp/2024/36/6) prepared by the Permanent Secretariat in collaboration with the Presidency summarizing the statements received from the Contracting Parties, i.e. EU, Slovenia, and Austria. Although not all Contracting Parties have issued statements the CC expressed its willingness to conclude the ongoing extraordinary compliance procedure as soon as possible, since the ERRE ceases to be in force on 30 June 2025. At the same time a first exchange on the question whether the ongoing extraordinary compliance procedure should be extended to the RED III Directive 2023/2413 took place.
Furthermore, the CC prepared a discussion about open legal questions on the topic with the expert on European and International law, Prof. Andreas Müller (LL.M.), which took place at the 37th meeting of the CC on 03 December 2024. As agreed by the CC, the questions to Prof. Müller addressed both the EU Regulation 2022/2577 and the RED III Directive 2023/2413 due to their systematic connection. The questions for this meeting (see working document ImplAlp/2024/37/5) were prepared by the Permanent Secretariat and were accepted by the Professor and the Contracting Parties without any comments.
These questions, served as guidelines for the discussion with the legal expert at the 37th meeting of the CC. The exchange was highly productive and contributed significantly to completing the material collection necessary for the elaboration of the present final draft report by the Permanent Secretariat in collaboration with the Presidency.
At this meeting, the CC decided to enter also in an extraordinary compliance procedure regarding the RED III Directive and asked the Permanent Secretariat to incorporate the results of the discussion with Prof. Müller into the present draft final report.
At the 38th meeting the CC discussed the present draft final report and decided to adopt it thereafter and to provisionally publish the report without recommendations, prior to its formal adoption by the Alpine Conference, as foreseen in point II.4.3 of the compliance mechanism.

3. Structure of the report

This final draft report is structured into three parts. The first part concerns the extraordinary procedure regarding the alleged non-compliance of the ERRE with the EP and SCP, the second part analyses the alleged non-compliance of the RED III with the EP and SCP. In both parts, the legal norms are briefly introduced, followed by the positions expressed by the Contracting Parties and/or the opinion of the legal expert. The third part proposes the conclusions and recommendations.

II. The alleged non-compliance with the EP and the SCP by the ERRE

1. The subject of the extraordinary compliance procedure

The broad subject matter for which CIPRA International requested the initiation of an extraordinary compliance procedure (see request of CIPRA International from April 14th, 2023) was accepted by the CC with regard to the following questions (see point 6 c) of the minutes of the 34th CC):

1. Does the possible exclusion of the EIA obligation in the ERRE violate Art. 2 (2) EP and Art. 7 SCP?
2. Does the overriding public interest enshrined in Art. 3 of the ERRE contradict Art. 6 (1) EP, according to which only environmentally friendly and landscape-friendly renewable energy sources are to be given preference?
3. Does the exemption from the appropriate assessment of certain types of projects or the permission of projects causing significant irreversible environmental damage in connection with the ERRE violate Art. 9 SCP if wetlands or peatlands are affected?

In addition to these questions, which all Contracting Parties were required to answer, the EU was asked to provide "legal explanations on the question of the superiority of mixed agreements over national law and EU secondary law" (see point 6 b) of the minutes of the 34th CC). Based on this question of general relevance, the (written and oral) statements of the Contracting Parties and the legal expert, Prof. Andreas Müller, are set out below.

2. The relationship between the Alpine Convention, including its Protocols, and EU secondary law as well as national law

The EU is Contracting Party of the Alpine Convention as well as to the EP and the SCP.[3] According to Art. 216 Treaty of the Functioning of the European Union (TFEU) the Alpine Convention, the EP and SCP are international agreements of the EU and therefore integral part of the European legal order. The international agreements are binding for the EU and the EU-Member States (see Art. 216(2) TFEU) and are situated between the EU primary and the EU secondary law (see Art. 218 (11) part 2 TFEU).[4] This means that the Alpine Convention and its Protocols must comply with the Treaty on the EU (TEU) and TFEU, while the EU secondary law – such as the ERRE – has to comply with the Alpine Convention and its Protocols.

Since, in addition to the EU, some EU Member States are also Contracting Parties of the Alpine Convention and its Protocols, they are classified as international "mixed agreements". These types of agreements are used when not all subjects covered by

[3] Additionally, the EU is also Contracting Party of the Mountain farming Protocol, the Tourism Protocol, the Transport Protocol.

[4] See Schroeder, Grundkurs Europarecht, 2024, 399-406.

the Alpine Convention and its Protocols fall within the competence of the EU but include subjects which still belong to the competence of the Member States.[5]

Those Contracting Parties to the Alpine Convention that are also EU Member States are bound by the provisions of the Alpine Convention and its Protocols in two ways. On the one hand in the light of international law as a Contracting Party to an international treaty (see Art. 26 VCLT, *pacta sunt servanda*) and on the other hand as an EU-Member State, since, as shown, the international treaties of the EU are an integral part of EU Law. In this sense, the EU Member States are required to observe the Alpine Convention and its protocols ratified by the EU on the basis of the principle of loyalty in accordance with Art. 4 (3) TEU. At the same time, this means that the principle of primacy of application applies to the Alpine Convention and its protocols ratified by the EU. Accordingly, provisions of Union agreements, such as those of the Alpine Convention and the ratified protocols, supersede national law in the event of conflict, provided that the relevant provisions are directly applicable.[6]

As outlined above, the EU legislator has to consider the Alpine Convention and its Protocols when enacting secondary EU Law. However, any potential conflict, which may arise, can be resolved in two ways. Generally, and the way preferred by the European Court of Justice (ECJ) is the way of convergence. It is assumed that Union secondary law is in harmony with the Union agreements or must be interpreted accordingly; so-called interpretation in conformity with the Union agreements.[7] The second way is the way of a contradiction that cannot be resolved. In this case, an action for annulment can be brought before the ECJ, which will declare the secondary legal act null and void for this part if it is upheld.
Based on the first way, the Contracting Parties are required to interpret the secondary legislation in accordance with the EU agreement when implementing the provisions. This applies to all provisions of the protocols that the EU has ratified. The situation is different if only the EU Member States have ratified the protocol, but even in this case it must be argued that the EU Member States are required to interpret the scope of action granted by the provisions of EU law in conformity with the provisions of international law.

Based on Art. 216 TFEU the EU confirmed the primacy of the Alpine Convention and its Protocols over secondary EU law, hence over the ERRE.

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[5] See Schroeder, Grundkurs Europarecht, 2024, 399-406; for the EP see Müller, Unmittelbare und mittelbare Anwendung und Wirkung des Energieprotokolls der Alpenkonvention, in Das Protokoll „Energie“ der Alpenkonvention, Essel/Schmid (Hg), Österreich Verlag, 2016, 7-26 (22 ss); Weber, Energieprotokoll und Europarecht – Was bleibt von der Alpenkonvention übrig?, *ibidem*, 27-38; see also Müller the Brief Opinion of Prof. Andreas Müller, provided by CIPRA international in its inintal request.
[6] See Müller, Legal effects if the Alpine Convention and its Protocols as Union agreements. Brief Opinion commissioned by the Legal Service Bureau for the Alpine Convention at CIPRA, p. 5; Schroeder Grundkurs Europarecht³, p. 78.
[7] See Müller, Legal effects, p. 5.

In addition to the EU, Austria has voluntarily commented on the relationship between EU Law, the Alpine Convention, its protocols and national law. In addition to the legal explanations above, Austria emphasizes that according to the national legal order, the Alpine Convention and its Protocols are international treaties within the meaning of Art. 50 (1) No. 1 of the Federal Constitution. As Protocols have been adopted without a reservation of fulfilment, there is a presumption that the provisions of the implementing protocols are directly applicable by the courts and administrative authorities, provided that they are sufficiently specific.

3. The compatibility of the exemption from the EIA obligation in the ERRE with Art. 2(2) EP and Art. 7 SCP

A) Legal provisions

a. Art. 6 ERRE – exemption from the EIA obligation

Regarding the exemption from the EIA obligation the essential legislative provision is Art. 6 ERRE.
According to this provision

- renewable energy projects
- energy storage projects
- electricity grid projects, which are necessary to integrate renewable energy into the electricity system

may be exempt from the

- EIA under Art. 2(1) of Directive 2011/92/EU (EIA-Directive)

and

- species protection assessments under Art. 12(1) of Directive 92/43/EEC (FFH-Directive) and under Art. 5 of Directive 2009/147/EC (Birds-Directive).

This exemption however is subject to the two following conditions: 1) The project is located in an area designated for renewable energy or for corresponding grid infrastructure necessary for the integration of renewable energy into the electricity system. 2) These areas have to be designated by the EU Member States and have to be subjected to a Strategic Environmental Assessment in accordance with Directive 2001/42/EC (SEA Directive).
Besides Art. 6 ERRE two other legal provisions provide exemptions from the EIA.
Art. 4 ERRE concerns the acceleration of the procedure for the installation of solar power plants by exempting the repowering of solar power plants from the EIA if no new land is used.[8]
Art. 5 ERRE concerns the repowering of renewable energy installations. It provides for an acceleration of the authorization procedure by, among other things, limiting the EIA requirements under Art. 4 of the EIA-Directive in two cases:

[8] See Art. 4(1), ERRE „in existing or future artificial structures“; see recital 10 and 11, ERRE.

- In case of repowering or updating a renewable energy power plant or related grid infrastructure, the prior determination and/or EIA shall be limited to the potential significant impacts resulting from the change or extension compared to the original project.
- In the case of repowering of solar installations, if (a) no additional space is used and (b) the applicable environmental mitigation measures established for the original installation are adhered to, an EIA is not required for the project.

b. Environmental Impact Analysis according to Art. 2(2) EP in combination with Art. 12(1) EP and Art. 7 SCP

Art. 2(2) and Art. 12(1) EP provide that power plants are subjected to an Environmental Impact Analysis. In particular the analysis has to be conducted regarding

- new and large power plants
- existing power plants in the case their capacity is significantly increased.

According to Art. 12(1) EP, 'power plants' that fall under the scope of the Environmental Impact Analysis include hydroelectric power plants, fossil fuels power plants, nuclear energy power plants, transport and energy distribution plants (see Art. 12(1) in combination with Art. 7, 8, 9 and 10 EP). Solar plants are instead not listed as power plants for which an Environmental Impact Analysis is necessary.
The analysis evaluates the effect of the power plants "on the Alpine environment" and on the "territorial and socioeconomic" structure (Art. 2(2) EP). In addition, the analysis must be done before the construction of the plants. Furthermore, the analysis has to be "in accordance with national legislation and international conventions".
Regarding Art. 7 SCP para. 3 is particularly relevant. This paragraph stipulates the obligation to consider the scarcity of the space in the Alpine region when assessing large scale infrastructure projects in the energy sector with regard to their spatial and environmental compatibility. This assessment has also to be conducted in accordance with national legislation.

B) Positions of the Contracting Parties

The EU outlines that Art. 2(2) EP only applies „In the event of, new, large power plants and a significant increase in the capacity of existing ones". Art. 12(1) EP foresees two other limits: 1) It limits the assessment of the environmental impact to hydroelectrical power plants and transport and energy distribution. Hence it does not apply to any other renewable energy projects. 2) The national legislation which "shapes the scope of the obligation set out therein" has to be considered. Based on this interpretation the EU states that Art. 6 ERRE does not violate Art. 2(2) and 12(1) EP and Art. 7 SCP with the following reasoning:

- Art. 2(2) and Art. 12(1) EP refer only to specific renewable energy plants, whereas Art. 6 ERRE regards all types according to Directive (EU) 2018/2001 on

the promotion of the use of energy from renewable sources. Also Art. 7(3) SPC has a limited scope of application at it refers only to “large-scale” projects.

- Art. 2(2) and Art. 12(1) EP outline that the EIA is carried out “in accordance with national legislation and international conventions”. As the ERRE applies to all EU Member States it is considered as national legislation and therefore already conceptually cannot be in contrast with the EP.
- The implementation of Art. 6 ERRE belongs to the EU Member States and is not compulsory. Therefore, it is the EU Member States responsibility to ensure that any exemptions they provide, are compatible with the provisions of the Alpine Convention and its Protocols.
- Apart from the fact that the EU Member States have to guarantee the compatibility, Art. 6 ERRE guarantees the consideration of the environmental impact in the planning stage as the exemption from the cited environmental assessments is only legitimate if the projects are located in areas designated by a plan which is subject to SEA.

Slovenia in general considers that the Regulation is sufficiently open. It means that the Regulation gives the EU Member States a wide margin of discretion and allows the EU Member States that are Contracting Parties to the Alpine Convention to implement the Regulation in their territory in accordance with the provisions or requirements of the Alpine Convention. Therefore, Slovenia considers that Art. 6 ERRE “does not violate the Alpine Convention and its Protocols, as it is the responsibility of the EU Member States, which are also Contracting Parties to the Alpine Convention, to take into account the Alpine Convention and its Protocols when designating areas as renewable energy areas and carrying out Strategic Environmental Assessments for such areas”. In addition, Slovenia stresses that the subject is also object of national legislation and is not of exclusive EU competence according to the principle of subsidiarity.

Austria emphasizes that the instrument of Environmental Impact Assessment appears in the protocols of the Alpine Convention in very different ways, with various scopes and extents. It must be interpreted in accordance with the rules of Art. 31-33 VCLT and must in any case be distinguished from the EIA under EU law. In this context, Austria also pointed out that the drafting of the EP was not based on corresponding legal institutions of EU Law and that the Contracting Parties' objective with the EP was to give priority to saving energy and increasing efficiency over the expansion and construction of new infrastructure.
With regard to Art. 2 (2) EP, Austria stated that the obligation foreseen is adequately defined, so that the relevant article is qualified as directly applicable. The situation is different with Art. 7 SCP, which relates to the assessment of the environmental compatibility of large scale energy-projects within the framework of the national procedures and attempts to establish criteria for the assessment with the broadly formulated objective of economical and sustainable use of soil. The EU’s secondary

legislation on the designation of acceleration areas and derogation from the EIA (see Art. 6 ERRE and Art. 15c and Art. 15e RED III) must be interpreted in accordance with the Alpine Convention. Furthermore, these provisions are not "contrary to the Alpine Convention" from the outset, as they do not provide for the mandatory designation of acceleration areas in Alpine locations.

France: With regard to whether Art. 6 ERRE allows EU Member States to take environmental interests into account, France states that the relevant article gives EU Member States the responsibility to ensure that appropriate and proportionate mitigation measures are taken or, if these are not available, the operator must be required by the competent authority to provide financial compensation for the purpose of the conservation status of the species concerned.

C) Opinion of the legal expert[9]

The legal expert underlines that Art. 6 ERRE is an "optional" provision. Through the opening clause, the relevant article leaves it up to the EU Member States to decide whether and how to apply it. Accordingly, it can be applied under certain conditions that guarantee compatibility with the provisions of the EP and SCP. At the same time, non-application of Art. 6 ERRE is also in line with EU law. It follows that Art. 6 ERRE gives the EU Member States sufficient leeway to act in accordance with the Alpine Convention. EU Member States are obligated to apply Art. 6 ERRE only to the extent that it does not conflict with the Alpine Convention and its protocols. This duty arises not only from international law for the Contracting Parties but also from EU Law for EU Member States, based on the principle of loyalty in Art. 4 TEU, since the Alpine Convention and the Protocols ratified by the EU that form part of EU Law (see II., 2. "*The relationship*").

How this scope of action must be shaped to act in accordance with the Alpine Convention must be determined in view of the obligations of Art. 2 (2) in conjunction with Art. 12 EP, i.e. it must primarily be determined what scope/standard the "Environmental Impact Assessment" comprises in accordance with the cited provisions. In this context, regarding the interpretation of the Alpine Convention and its protocols it should be noted that the rules of international law in Art. 31-33 VCLT are decisive.

Therefore, the term "Environmental Impact Assessment" is to be considered as an autonomous concept of Alpine Convention law, which has to be interpreted according to the standards of the Alpine Convention and its protocols and is not congruent with the concepts of EU Law. In this sense, it is irrelevant in the light of the EP whether an EIA under EU Law is replaced by an SEA under EU Law). The crucial factor is not the term used, but the extent to which the assessment density standards provided for by

[9] This chapter corresponds to the explanations given by the legal expert, Prof. Dr. Andreas Müller (LL.M.).

the provisions of the EP and those provided for by the provisions of EU law are compatible with each other. In this context, standards an environmental impact assessment must meet can be derived from Art. 12 EP itself. It can therefore be assumed that the assessment must take into account all environmentally relevant aspects, that the implementation must comply with current quality standards and that public participation is likely to be required. It remains to be seen whether the environmental assessment can be carried out with the existing data alone, or whether additional surveys are required. In this sense, the interpretation of the relevant articles of the Alpine Convention and its protocols based on Art. 31 VCLT should generate additional elements of understanding of Art. 12 EP. The result of this interpretation must then be compared with the application of Art. 6 ERRE by the EU Member States in order to determine whether there is a violation of the relevant provisions of the EP. In this context, it must also be taken into account that Art. 12 EP contains an opening clause by referring to the "applicable national legislation and international agreements". This means that - even if the Contracting Parties did not take EU Law into account when drafting the EP (as explained by *Austria*, see II., 3. B) – the Contracting Parties agree by consensus that Union requirements and/or requirements of the ESPOO-Convention on Environmental Impact Assessment in a transboundary context (the provisions have all influenced each other) also condition Art. 12 EP with regard to the definition of the standards of the Environmental Impact Assessment in the EP. However, caution is required if the Union provisions provide for higher standards/obligations than the Alpine Convention provisions.

4. The compatibility of granting an overriding public interest to renewable energy installations in the ERRE with Art. 6(1) EP

A) Legal provisions

a. Art. 3 ERRE – overriding public interest

For the purpose of

- granting permissions according to Art. 6(4) FFH-Directive and making use of the derogations according to Art. 16(1c) FFH-Directive
- new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater according to Art. 4(7) Water Framework Directive
- making use of the derogations of the protection obligations according to Art. 9(1) Birds-Directive

Art. 3(1) ERRE provides that

"the planning, construction and operation of plants and installations for the production of energy from renewable sources, and their connection to the grid, the related grid itself and storage assets shall be presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in the individual case". Therefore, renewable energy plants and installations are legally presumed to be

of public interest, relieving the competent national authority from having to prove this. However, this legal presumption is rebuttable.[10] In addition, EU Member States have the option to restrict the application of the overriding interest "to certain parts of their territory as well as to certain types of technologies or to projects with certain technical characteristics in accordance with the priorities set in their integrated national energy and climate plans".
Art. 3(2) ERRE states that EU-Member Sates shall ensure that the projects recognized as being of overriding public interest are given priority in the planning and permit-granting process within balancing legal interests in the individual case. However concerning species protection, this only applies 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.

b. Art. 6(1) EP – preferential treatment of renewable energy resources

This legal provision obliges the Contracting Parties to promote and give preferential treatment to renewable energy resources within the limits of their financial resources, provided that they "are environmentally friendly and do not harm the countryside".

B) Positions of the Contracting Parties

The EU outlines that Art. 3(1) ERRE does not contradict with Art. 6(1) EP because:

- Art. 6(1) EP is a best effort clause and not an obligation for the Contracting Parties as it shows that the article refers only to "financial resources". Moreover, the provision requests a "preferential treatment" and does therefore not foresee a strict prohibition for certain activities.
- Art. 3(1) ERRE "establishes a rebuttable presumption which shifts the burden of the proof to the benefit of renewable energy projects so that the authority granting the derogation does not need to demonstrate that the project complies with the conditions that it is in the public interest (Articles 6(4) and 16(1)(c) FFH-Directive, Article 4(7) Water Framework Directive) or serves public health (Article 9(1)(a)1st- indent Birds Directive) or that the interests pursued by the project override the conflicting environmental interests at stake (Articles 6(4) and 16(1)(c) FFH-Directive, Article 4(7) Water Framework Directive). The presumption has to be confirmed or not case by case by the competent national authority. Hence there is the possibility to prove that in the single case the overriding public interest regarding the renewable energy is not confirmed or that it does not serve public health and safety".
  In addition is outlined that the rebuttable presumption in Art. 3(1) ERRE "only concerns two out of many derogation conditions established in the Directives

[10] See recital 8, ERRE.

referred to therein. Thus, the requirements that there be no alternative solution (Articles 6(4) and 16(1) FFH-Directive, Article 9(1) Birds Directive, Article 4(7) Water Framework Directive), that the derogation is not detrimental to the favourable conservation status of the affected species (Article 16(1) FFH-Directive), that there be mitigation of adverse effects (Article 4(7) Water Framework Directive) or compensation (Article 6(4) FFH-Directive) remain fully applicable. For these derogation conditions, the burden of proof remains on the competent authorities seeking to rely on the derogation. To demonstrate compliance with the abovementioned derogation conditions, a case-by-case assessment is required."

- Art. 3(1) ERRE allows EU Member States to restrict the scope of application of the presumption "to certain parts of their territories or certain technologies or projects, for example having regard of specific situations and sensitive areas – also with regards to the landscape – like the areas covered by the Alpine Convention".

Slovenia outlines that Art. 3 ERRE is not in contrast with the Protocol as it

- "does not prejudice the requirement that, in cases where an activity affecting nature is negatively assessed, such a plan/scheme or project may only proceed if an overriding (other) public interest procedure has been carried out and the requirements or conditions for carrying out this procedure (absence of alternatives and compensation measures) have been met. This Article – unlike the previously applicable (general) regulation of the FFH-Directive – only: 1) defines the public interest in the planning and construction of renewable energy installations more broadly and 2) establishes a rebuttable presumption of overriding public interest – thus only changing the 'burden of proof' – in the event of doubt as to whether the interest in the planning or construction of an energy plant from renewable sources should prevail."
- "the override can only be established in the absence of alternatives and with the required implementation of compensation measures."
- "allows EU Member States to exclude the application of this Article entirely in certain areas (possibly also in the whole Alpine region) or to exclude the application on this Article for certain technologies – for example, for stand-alone solar power plants on (some or all) undeveloped areas (in the Alpine region)".

Austria states that according to Art. 3 ERRE and Art. 16f RED III, renewable energy projects have a privilege in the balancing of interests in the approval procedure, but not automatic or absolute priority. These provisions must be interpreted in light of Article 6 EP, ensuring that national implementing legislation and approval procedures also consider the relevant aspects of the Convention and the Protocol when balancing interests. If this is done to a sufficient extent - and the relevant secondary law

provisions do not appear to exclude such consideration - compatibility with the requirements of international law can be established. Furthermore, Article 3 ERRE and Article 16f RED III partially permit the exclusion of overriding public interest, allowing EU Member States to introduce exceptions for specific technologies in the Alpine region. The secondary legal basis thus gives the EU Member States sufficient leeway for implementation in compliance with the Convention.
With regard to the interpretation of Art. 6 EP, Austria argues that it is not clear whether projects must be constructed under environmentally and landscape-compatible conditions in individual cases, or whether a general assessment is also permissible. It is conceivable to make a general distinction between the emissions and the environmental impact of renewable energy installations, e.g. a photovoltaic installation on the roof should have no impact on the environment, whereas this cannot be said of a wind turbine.

C) Opinion of the legal expert[11]

Art. 3 ERRE is not an “optional” provision, but a requirement for the EU Member States to recognize an overriding public interest in renewable energy projects on a case-by-case basis. At the same time, Art. 3 ERRE does not establish an absolute or automatic priority for renewable energy installations and facilities, but merely gives them a 'bonus' in the context of the balancing of interests. This means that in the procedure for the construction of energy installations, the administrative authority must identify all the relevant interests involved and weigh them up in relation to each other. Renewable energies are granted an 'advantage' in this proportionality test by Art. 3 ERRE. The relevant provision therefore in no way determines the balancing of interests *ex ante*. Furthermore, Art. 3 ERRE must be read in the light of Art. 6 EP due to the necessary interpretation in conformity with this Union Agreement. Art. 6 EP also promotes renewable energies and is therefore not in contradiction with Art. 3 ERRE. However, Art. 6 EP also clearly emphasizes that this promotion must be compatible with the environment and the landscape. These values must therefore be read into Art. 3 ERRE. The decisive factor here is whether the provision in Art. 3 ERRE can be interpreted in terms of the environmentally and landscape-compatible promotion of renewable energies, or whether it is in direct contradiction with this. When comparing the standards, no direct contradiction in interpretation can be identified. It should also be noted here that it must generally be assumed that the Union legislator did not wish to act in contradiction with the provisions of the EP, as it is itself bound by it. In this sense, the Member State must ensure that the assessment in individual case decisions is not only based on the overriding interest of renewable energies in accordance with Art. 3 ERRE, but that the environmental and landscape compatibility of the projects is also taken into account in accordance with Art. 6 (1) EP.

[11] This chapter corresponds to the explanations given by the legal expert, Prof. Dr. Andreas Müller (LL.M.).

Regarding the interpretation of Art. 6 EP, too much weight should not be given to "financial support", which is only an insertion, i.e. the relevant article primarily states "The Contracting Parties undertake (...) to promote and use renewable energy sources under conditions compatible with the environment and the landscape". This is to be read not least as a reference to other protocols of the Alpine Convention. For administrative authorities, all this means that the various aspects must be taken into account in individual case assessments and that priority cannot be automatically given to renewable energies. Thus, there is no contradiction between Art. 3 ERRE and Art. 6 EP, as the former does not automatically consider renewable energy projects as approved without the possibility of taking other interests into account.

5. The compatibility of the exemption from environmental assessments of certain types of projects and the acceleration of procedures in the ERRE with Art. 9 SCP

A) Legal provisions

a. Art. 5 and Art. 6 ERRE

For the content of the provision see II., 3.

b. Art. 9 SCP

Art. 9 SCP states an obligation to preserve high and lowland moors, to limit drainage schemes in wetlands and moors to the upkeep of existing networks unless there are sound reasons for exceptions and to restrict the use of moor soils.

B) Positions of the Contracting Parties

The EU denies the incompatibility of the ERRE with Art. 9 SCP by outlining that:

- Art. 3 ERRE foresees that the EU Member States may restrict the scope of application and in doing so they can take into account the obligations laid down by the Protocols.
- Art. 5 ERRE has a limited scope of application and does not provide exemptions "from the permitting procedure or the legal status of peatlands".
- The ERRE does not provide exemptions form the assessment pursuant to Art. 6(3) FFH-Directive
- According to Art. 6 ERRE it belongs to the responsibility of the EU Member States to guarantee that the exemptions comply with the Protocol. In addition, Art. 6 ERRE requires a permit and links the exemptions to two conditions (see above).

Slovenia outlines that there is no incompatibility (see above).

Austria states that Art. 6 ERRE is an authorization to the EU Member States, which they may or may not exercise at their own discretion. If the creation of such exceptions in

the Alpine region results in a violation of an Alpine Convention protocol, EU Member States are bound by international law to exercise the authorization in a manner that avoids any breach of the Convention's implementing protocols. If necessary, this includes refraining from using the authorization in the Alpine region altogether. Such an approach does not contradict EU Law. Furthermore, by making use of the corresponding scope for action and options provided for in Art. 6 ERRE in conformity with the Union Agreement, violations of the Alpine Convention and its protocols can be avoided and compatibility with international law can be ensured.

In addition to Article 6 ERRE, Austria also addresses the compatibility of Article 15c (1) a RED III and Article 16a (4) RED III with Article 9 SCP. Both provisions must be interpreted in line with the protocol. Accordingly, Article 15c (1) RED III should not be understood as requiring the designation of wetlands and moors, as defined in Article 9 SCP, as acceleration areas, given the typically significant environmental impacts associated with such areas. Art. 16a (4) RED III ensures the consideration of environmental interests through screening, which can be followed by a classic EIA if significant unforeseen adverse effects are most likely to be expected and no mitigation measures are possible. The screening is a readjustment compared to the Strategic Environmental Assessment (SEA) already carried out at the time of site designation and amounts to a site-specific preliminary EIA assessment in terms of assessment density. If interpreted in conformity with the Union agreement, these screening provisions, especially the explicit reference to the "ecological sensitivity" of the corresponding geographic area, offer a further significant basis for the compatibility of EU acceleration legislation with the requirements of the SCP, especially regarding wetlands and moors.

III. The alleged non-compliance of the Renewable Energy Directive (EU) 2023/2413 (RED III) with the EP and the SCP[12]

1. The subject of the extraordinary compliance procedure

As mentioned above, at the 35th meeting of the CC, CIPRA International requested that the ongoing extraordinary compliance procedure of the ERRE be extended to RED III to the extent relevant to the respective questions (see II., 1).
In fact, the extraordinary procedure concerning RED III was initiated at the 37th meeting of the CC, after the explanations provided by the legal expert, Professor Müller, regarding the following questions (see Working Document ImplAlp/2024/37/5):

- Does, and if so, how does Art. 15c of the RED III allow the Contracting Parties to the Alpine Convention to take account of environmental protection within the meaning of Art. 2 (2) EP and soil protection as well as the limited availability of land in the Alpine region within the meaning of Art. 7 SCP when designating acceleration areas?
- Does, and if so, how does Art. 15e (2) of the RED III allow the Contracting Parties to the Alpine Convention to take account of environmental protection within the meaning of Art. 2 (2) EP and soil protection as well as the limited availability of land in the Alpine region within the meaning of Art. 7 SCP when designating dedicated infrastructure areas for the implementation of grid and storage projects?
- Does, and if so, how does the concept of overriding public interest included in Art. 16 f RED III differ of the overriding public interest foreseen by the ERRE? How can the Contracting Parties ensure the compatibility of Art. 16 f RED III Directive with Art. 6(1) EP?

n.b. Based on the course of the procedure to date, no statements were requested from the Contracting Parties regarding the alleged non-compliance with RED III. For this reason, the subchapter 'Statement of the Contracting Parties' is not included in Chapter III.

2. The compatibility of the derogation from the environmental assessment in acceleration areas under RED III with Art. 2 (2) EP and Art. 7 SCP

A) Legal provisions

a. The designation of acceleration areas pursuant to Art. 15c RED III and the corresponding approval procedures pursuant to Art. 16a RED III

Art. 15c RED III regulates the designation of acceleration areas for renewable energy, i.e. for the designation of those sites/areas that are considered by the Member State

[12] For all legal provisions mentioned in this Chapter III. only the relevant contents of the legal norms to this report are summarized. The complete legal provisions can be found on the EU website.

to be particularly suitable for the construction of plants for the generation of energy from renewable sources (see Art. 1(1) lit c RED III). The EU Member States are responsible for determining the size of these areas, although they must ensure that the areas taken together are of significant size and contribute to the achievement of the EU's climate neutrality objective.[13] The corresponding areas must be designated by plans that are subject to the SEA. Where significant effects on Natura 2000 sites are likely to occur, the environmental impact assessment pursuant to Art. 6 (3) of Directive 92/43/EEC is also necessary.[14] The authorities responsible for the plans must ensure that the use of the area for renewable energy "is not expected to have a significant environmental impact"(see Art. 15c (1) lit a) RED III and define mitigation measures to "to avoid the adverse environmental impact that may arise or, where that is not possible, to significantly reduce it"(see Art. 15c (1) lit b) RED III).

Art. 16a RED III sets out the procedure for the approval of renewable energy projects in the acceleration areas. These projects are exempt from the EIA under Directive 2011/92/EU provided that the mitigation measures established for the designated areas are respected.[15]
For projects in the acceleration areas, the competent authorities must carry out a screening "to identify if any of the renewable energy projects is highly likely to give rise to significant unforeseen adverse effects in view of the environmental sensitivity of the geographical areas where they are located" (see Art. 16a (4) RED III). This screening procedure is generally completed within 45 days. After the screening, there are two options for the project approval procedure:

- The application "shall be authorised from an environmental perspective without requiring any express decision from the competent authority" (see Art. 16a (5) first part, RED III).
- The competent authority decides that the project is highly likely to give rise to significant negative environmental effects in view of the environmental sensitivity of the geographical area. Therefore, the project is subject to an EIA according to Directive 2011/92/EU and eventually to an assessment pursuant to Directive 92/43/EEC.[16] However, EU Member States have the option of

[13] See Art. 15c (3) „Member States shall decide the size of renewables acceleration areas, (…). Member States shall aim to ensure that the combined size of those areas is significant and that they contribute to the achievement of the objectives set out in this Directive".
[14] See Art 15c (4) „ (…) plans designating renewables acceleration areas shall be subject to an environmental assessment pursuant to Directive 2001/42/EC of the European Parliament and of the Council (*16), and, if they are likely to have a significant impact on Natura 2000 sites, to the appropriate assessment pursuant to Article 6(3) of Directive 92/43/EEC".
[15] See Art 16a (3) „renewable energy projects (….) in designated renewables acceleration areas (…) shall be exempt from the requirement to carry out a dedicated environmental impact assessment pursuant to Article 2(1) of Directive 2011/92/EU, provided that those projects comply with Article 15c(1), point (b), of this Directive".
[16] See Art. 16a (5) second part "The competent authority adopts an administrative decision, setting out due reasons on the basis of clear evidence, to the effect that a specific project is highly likely to give rise to significant unforeseen adverse effects in view of the environmental sensitivity of the geographical

exempting wind energy and photovoltaic projects from the EIA in justified cases, provided that appropriate mitigation measures are in place.[17]

b. Art. 2 (2) EP and Art. 7 SCP

See above for the provisions.

B) Opinion of the legal expert[18]

In general, it should be noted that RED III contains various opening clauses which, in combination, should guarantee compliance with the obligations under the Alpine Convention. Accordingly, implementation by the EU Member States can be carried out in such a way that Art. 6 EP and Art. 12 EP are complied with.

Unlike Art. 6 ERRE, Art. 15c RED III does not include a zero option, meaning that EU Member States are obligated to designate acceleration areas—i.e., areas particularly suitable for the development of renewable energy. These areas must be of significant size and meet the objectives of the directive.

In addition, the relevant article contains flexibility clauses that grant EU Member States a degree of discretion in assessment and decision-making. This margin of discretion must be evaluated in light of the obligations arising from the protocols of the Alpine Convention.

It is also important to bear in mind that, under the principle of loyalty, EU Member States are obliged to assist the EU in complying with its own international legal commitments. Consequently, both the EU and its Member States must agree on an interpretation of secondary law that aligns with the provisions of the Alpine Convention.

The scope of discretion granted by Article 15c RED III can generally be categorized under four key points:

1. EU Member States have discretion in interpreting the term "**significant**".
2. EU Member States are free to decide where to designate acceleration areas within their territory. Depending on the country's geography, this allows for the possibility of (partially) excluding the Alpine Convention perimeter from such designations or, at the very least, exempting particularly sensitive areas within the Alpine region. As an additional argument from an EU law perspective, supporting the consideration of the Alpine Convention and its protocols, has to be cited Recital 7 of the Council Decision on the adoption of the SCP: *"Any*

area where the project is located that cannot be mitigated by the measures identified in the plans designating acceleration areas or proposed by the project developer" (….) "renewable energy projects shall be subject to an environmental impact assessment pursuant to Directive 2011/92/EU and, if applicable, to an assessment pursuant to Directive 92/43/EEC".

[17] See Art 16a (5) second paragraph "In the event of justified circumstances, including where needed to accelerate the deployment of renewable energy to achieve the climate and renewable energy targets, Member States may exempt wind and solar photovoltaic projects from such assessments".

[18] This chapter corresponds to the explanations given by the legal expert, Prof. Dr. Andreas Müller (LL.M.).

approach to soil protection should take account of the considerable diversity of regional and local conditions that exist in the Alpine region. The Protocol on Soil Protection could help to implement appropriate measures at national and regional level".[19] This demonstrates that the EU has already anticipated the existence of particularly sensitive areas within the Alpine region that require special consideration.

3. Article 15c(a) RED III explicitly states that acceleration areas should be designated where they are "not expected to have a significant environmental impact." This means that the EU legislator itself aims to minimize environmental impacts as much as possible. In this context, the provisions of the EP and SCP can be considered and serve as a benchmark for interpreting these regulations within EU law. Consequently, it follows that the EU legislator does not impose any requirements that would be incompatible with these provisions.
4. Article 15c RED III subjects the plans designating acceleration areas to a strategic environmental assessment. Although this is "less" than an EU EIA, it must be taken into account that Article 16a (4) RED III provides for a screening process during the approval procedure for specific projects. This screening is a site- and project-specific assessment that may conclude that, due to the sensitivity of the geographic area, the project is likely to have significant unforeseen impacts. In such cases, and if no adequate mitigation measures are in place, a full EIA under EU law must be conducted.
   Regarding the design of the screening process, EU Member States likely retain some degree of discretion in its implementation.

3. The compatibility of the exemption from the environmental assessment in areas for grid and storage infrastructure under RED III with Art. 2 (2) EP and Art. 7 SCP

A) Legal provisions

a. The approval of grid and storage projects pursuant to Art. 15e (2) RED III

The approval of grid and storage projects in Art. 15e (2) RED III requires the designation of corresponding areas by plans which are subject to SEA pursuant to Directive 2001/42/EC. In designating these areas, EU Member States have to consider the environmental and technical characteristics of the areas and avoid the designation in environmentally sensible areas such as Natura 2000 sites and national protection areas (see especially Article 15e (1), lit. a and b) RED III).

[19] See COUNCIL DECISION of 27 June 2006 on the conclusion, on behalf of the European Community, of the Protocol on Soil Protection, the Protocol on Energy and the Protocol on Tourism to the Alpine Convention, in OJ EU L 201/31, 25.07.2006.

Regarding these designated areas EU Member States may, in justified cases, exempt projects from EIA and other environmental assessments. If a project is exempted from environmental assessments, it is still subject to a screening process aimed at identifying "significant unforeseen adverse effects" that were not identified with the SEA (see Art. 15e(3) RED III). For adverse impacts, mitigation or appropriate compensation measures must be taken (see Art. 15e(4) RED III).

b. Art. (2) EP and Art. 7 SCP

For the content of the provision see above.

B) Opinion of the legal expert[20]

Art. 15e is similar to Art. 6 ERRE, as it is a "may" provision. This means that EU Member States are not required to designate infrastructure areas for grid and storage projects, nor are they obliged to exempt grid and storage projects from the EIA and other environmental assessments in the approval procedure. This provision also contains flexibility clauses, and once again, it is understood that, under the principle of loyalty, EU Member States must observe the Alpine Convention and its protocols. This means that if a Member State concludes that an area it intended to designate for grid and storage infrastructure is incompatible with the Alpine Convention and its protocols, it would not be required, under the principle of loyalty, to exercise its power to designate that area. From the perspective of the EU Member States, there is certainly more tension regarding the implementation of Art. 15c RED III, because this provision requires the Member State to act.

The main objective of RED III is to accelerate the approval of projects for the generation of renewable energy. Therefore, certain concessions are made regarding the EIA in the approval procedure. At the same time, however, environmental interests should be considered within the framework of this acceleration. A compromise between speeding up the procedures and considering environmental interests has been found by the EU legislator, by subjecting the plans for designating acceleration areas to the SEA at the abstract planning level and conducting a screening at the specific project level. The screening can be described as a "light" EIA, meaning a simplified version of the EIA. However, what exactly is meant by this is currently being debated in legal scholarship and can only be better understood through future case law. Based on the parameters set out in Article 16a(4) RED III, it can, however, be deducted that special attention is required when the area is ecologically sensitive, and it must be considered whether adverse impacts may occur. If that is the case, the "light" EIA becomes a classic EU EIA. This mechanism thus provides a safeguard in terms of acceleration, ensuring that projects with significant environmental impacts are not approved. In any case, there is also a degree of discretion for the EU Member States regarding the

[20] This chapter corresponds to the explanations given by the legal expert, Prof. Dr. Andreas Müller (LL.M.).

screening, which they can interpret in accordance with the Alpine Convention. For example, it is conceivable that an EU-Member State stipulates that authorities must give special consideration to the provisions of the EP or SCP during the screening process.

Another attempt by RED III to strike a balance between procedural acceleration and environmental interests is the 45-day deadline specified in Art. 16a(4) RED III, within which the screening should be completed, as well as the possibility of exemption from the obligation to conduct an EIA based on the screening results for wind and photovoltaic projects. Whether a comprehensive assessment is possible within a 45-day period is questionable; public participation, which is a key feature of the classic EIA, seems impossible in this context, marking a significant difference from the traditional EIA process. At the same time, it should be noted that there are still various uncertainties regarding the deadlines, such as the question of when these deadlines begin to run (there are disagreements in legal scholarship). Furthermore, it is up to the EU Member States, as part of adjusting their procedural provisions, to determine how to equip the authorities responsible for the screening, ensuring they are capable of conducting substantial assessments within the given tight deadline.
In this context, it is also important to emphasize that, for the CC, when assessing the provision/the screening, it is crucial not to rely on the standards of the EU EIA, but rather on the Environmental impact assessment of the Alpine Convention/the EP. In other words, it must be clarified how the screening aligns with Article 12 EP. Furthermore, it must be considered that the EU legislator has enacted these provisions in harmony with the EP.

4. Intermediate conclusions of the legal expert

In summary, the interpretation of the EU provisions regarding acceleration areas, according to the legal expert, does not suggest that EU Member States must choose between complying with the Alpine Convention or EU law. Rather, it indicates that the standards are compatible and can be applied with due consideration of both. Therefore, it can be stated that RED III provides flexibility regarding environmental assessments in acceleration areas. This flexibility can be shaped by EU Member States in a manner that enables implementation in line with the Alpine Convention.

5. The compatibility of granting an overriding public interest to renewable energy plants with Article 6(1) EP

A) Legal provisions

a. The overriding public interest pursuant to Art. 16f RED III

Art. 16f RED III stipulates that "until climate neutrality is achieved, EU Member States shall ensure that (…) renewable energy plants (…) are presumed as being in the overriding public interest and serving public health and safety when balancing legal

interests in individual cases for the purposes of Article 6(4) and Article 16(1), point (c), of Directive 92/43/EEC, Article 4(7) of Directive 2000/60/EC and Article 9(1), point (a), of Directive 2009/147/EC. EU Member States may, in duly justified and specific circumstances, restrict the application of this Article to certain parts of their territory, to certain types of technology or to projects with certain technical characteristics (…)".

b. Art. 6 (1) EP

For the content of the provision see II., 4., A), b.

B) Opinion of the legal expert[21]

Art. 16f RED III is very similar to Art. 3 ERRE, and the analysis comes to the same conclusion. This means that the provision does not establish a mandatory, automatic priority but rather a bonus in the balancing of interests. At the same time, the provision should be read in accordance with Art. 6 EP and interpreted in light of the EP and SCP. Additionally, Art. 16f RED III, like Art. 3 ERRE, contains a flexibility clause, allowing this bonus, granted to renewable energy projects in the approval process, to be adjusted or reduced in certain areas or with respect to specific technologies. It is important not to make the mistake of automatically granting priority to renewable energies, as is often the case in practice.

In the specific case, the balancing of interests under RED III can be imagined as follows. An authority would need to identify all relevant public interests in a particular case, such as the interests in expanding renewable energy and the environmental interests that exist, depending on whether the project is located in an environmentally sensitive area or not. These interests would then need to be weighed. Art. 16f RED III requires the authority to grant a bonus to the renewable energy interest. Then, it must be assessed whether this interest is overcompensated, as in some cases the environmental interests may outweigh it, for example, due to the particular sensitivity of the area. Therefore, the bonus provided for in Art. 16f RED III does not conflict with the EP.

At the same time, it must be considered that the Alpine Convention and its protocols must be interpreted dynamically. The Alpine Convention and its protocols are sufficiently open to also address the fight against climate change.

However, in practice, it is noticeable that the balancing of interests is not always done correctly by the authorities. Even in the ruling issued by the highest courts, the balancing of interests is not always fully comprehensible. This means that an interpretation, which may not be in line with the Alpine Convention, must be taken up.

[21] This chapter corresponds to the explanations given by the legal expert, Prof. Dr. Andreas Müller (LL.M.).

IV. Conclusions and recommendations

1. Procedure-related conclusions

In the present extraordinary compliance procedures, it proved fruitful from a procedural point of view to consult a legal expert due to the high complexity of the facts resulting from the interaction of three different legal systems, international law, EU Law and national law. This enabled the Contracting Parties and the Observers to clarify important legal aspects with the expert and helped speeding up the two extraordinary review procedures.

2. Content-related conclusions

From the content point of view, it makes sense to outline the results derived from the reports received, the exchange with the legal expert and the discussion of the CC in line with the structure of the questions mentioned at the beginning (see II., 1.):

A) The relationship between Union secondary law, the Alpine Convention and its protocols

The EP and SCP are EU agreements that take precedence over EU secondary law. When adopting secondary legislation, such as the ERRE and the RED III, the EU must adhere to the obligations set out in Art. 2(2) in conjunction with Art. 12 EP, 6 EP, 7 SCP, and 9 SCP. The EU Member States, which are also parties to the Alpine Convention and its protocols, are bound by the relevant provisions both under EU and International law.
According to prevailing opinion, EU secondary law, i.e., in this case, Art. 3 and Art. ERRE as well as Art. 15c, 15e, 16a, and 16f of RED III, must be interpreted in accordance with EU agreements, i.e. the obligations outlined in Art. 2(2) in conjunction with Art. 12 EP, 6 EP, 7 SCP, and 9 SCP.

B) The compatibility of selected provisions of the ERRE with provisions of the EP and SCP

Regarding the compatibility of Art. 3 ERRE and Art. 6 ERRE with the obligations in Art. 2 (2) in conjunction with Art. 12 EP, Art. 6 EP, Art. 7 SCP and Art. 9 SCP, both the Contracting Parties and the legal expert are of the opinion that the provisions of Union secondary law do not contradict the provisions of the EP and SCP. In other words, Art. 3 ERRE and Art. 6 ERRE give the EU Member States sufficient discretional scope to comply with the obligations in Art. 2 (2) in conjunction with Art. 12 EP, Art. 6 EP, Art. 7 SCP and Art. 9 SCP.

Specific conclusions can be made regarding the legal norms examined:

The objective of Art. 3 ERRE generally aligns with that of Art. 6 EP, as the latter also promotes renewable energy but on condition that the promotion is compatible with the environment and the landscape. In light of the condition set out in Art. 6 EP, the application of Art. 3 ERRE must incorporate the compatibility of projects with

environmental and landscape in the decision-making process and justify the decision accordingly. Art. 3 ERRE thereby grants EU Member States a degree of discretion by allowing authorities to assess, on a case-by-case basis, whether environmental interests outweigh the interest in expanding renewable energy. Furthermore, EU Member States have the option to limit the application of Art. 3 ERRE to specific parts of their territory, which allows them to exclude its application within the territorial scope of the Alpine Convention.

Art. 6 ERRE grants EU Member States a considerable degree of discretion, as it may be applied but is not mandatory. It leaves the designation of areas suitable for renewable energy to the EU Member States, allowing them to exclude the Perimeter of the Alpine Convention or sensitive areas within the Alps from its scope of application. If Article 6 ERRE is applied by EU Member States within the perimeter of the Alpine Convention, the obligation to conduct an environmental assessment pursuant to Art. 2(2) in conjunction with Art. 12 EP must be observed. However, the scope of this obligation covers only certain renewable energy generation facilities, such as hydropower plants, whereas it does not apply to wind or solar energy. Additionally, Art. 12 EP refers also to energy transport and distribution infrastructure. Furthermore, the project at stake must concern the "construction of new and significant expansion of existing large energy infrastructures" (see Art. 2(2) EP).
Additionally, it should be noted that the environmental assessment pursuant to Art. 2(2) in conjunction with Art. 12 EP is an autonomous concept of Alpine Convention law. Hence, the concept of environmental assessment of the EP does not align with the provisions of EU law and must be interpreted in accordance with Art. 31-33 VCLT. This raises the question of the scope of the environmental impact assessment under the EP. For example, it is questionable whether the obligation to carry out an environmental impact assessment under the EP is met by planning instruments designating the acceleration areas that have been subjected to SEA under EU law.
From a holistic view of the provisions of the Alpine Convention and its Protocols, it seems in any case possible to deduce that all conceivable environmental impacts must be recorded and assessed as part of the environmental assessment and that the implementation must comply with current quality standards and probably public participation. Finally, due to the opening clause in 12 EP, indications for the standards of the environmental assessment can be found both in the applicable national legislation and in international agreements.
In addition to Art. 2(2) in conjunction with Art. 12 EP, Art. 7(3) SCP sets criteria when assessing the environmental compatibility of large-scale projects in the energy sector within the framework of national procedures. The Article focuses on soil protection, which, therefore, must also be considered by EU Member States when applying Article 6 ERRE. This means that the assessment of environmental compatibility within the national procedures must be carried out from the perspective of the goal of

sustainable soil management. However, no further assessment criteria can be derived from this provision.
Ultimately, in consideration of Art. 9 SCP the application of Art. 6 ERRE has to ensure the preservation of soils in wetlands and moors. Impacts on particularly environmentally sensitive areas, such as these, can be avoided by EU Member States by not designating such areas as zones for renewable energy.

C) The compatibility of selected provisions of the RED-III with provisions of the EP and SCP[22]

From the explanations above it follows that EU Member States have sufficient flexibility in implementing RED III. They must exercise this discretion in accordance with both their EU legal and international legal obligations, ensuring compliance with Union agreements and the Alpine Convention.
Regarding the compatibility of the environmental impact assessment obligation under Art. 2(2) in conjunction with Art. 12 EP and Art. 7(3) SCP with the exemption from the EU environmental impact assessment under Art. 16a (3) RED III, the following should be noted:
As outlined for Art. 6 ERRE, the EU-EIA must be distinguished from the environmental impact assessment under the Alpine Convention. The exemption from conducting the EU-EIA does not affect the obligation to carry out the environmental assessment required by the Alpine Convention. That means the latter remains in effect, although, as pointed out above, there is some uncertainty regarding the depth of the assessment standards. Furthermore, it has to be taken into account that the exemption under Art. 16a (3) RED III only applies in acceleration areas designated according to Art. 15c RED III. When designating these areas, EU Member States have a considerable degree of discretion. Hence it is within the competence of the EU Member States to decide where the acceleration areas will be designated. In this context, they can completely or partially reduce the application area of the RED III. Indeed, the directive itself encourages EU Member States to exclude environmentally sensitive areas to ensure that the designation of areas is unlikely to have significant environmental impacts.
Additionally, the instruments/plans that designate the acceleration areas are subject to an EU-SEA. However, it has to be noted, that considering compatibility and the different legal frameworks, it must be assessed whether the SEA aligns with the standards of the Alpine Convention's environmental impact assessment. This, in turn, leads to the necessity of defining the standards for the latter. Furthermore, it is important to mention that while RED III, according to Article 16a (3), does not provide for traditional EU-EIA procedures, the environmentally relevant negative impacts on

[22] The findings of the report regarding the alleged non-compliance of RED III with the provisions of the EP and SCP are primarily based on the statements of the legal expert in the 37th meeting of the CC. Due to the clear explanations provided by the legal expert, the CC has not deemed it yet necessary to request corresponding statements from the Contracting Parties. Nevertheless, in its statements on the compatibility of ERRE with the provisions of the EP and SCP, Austria has also referred to RED III.

ecologically sensitive geographical areas will be assessed within a so-called "screening" process. In this context, it is emphasized that there are still uncertainties and open questions regarding the scope of the screening. Also, regarding the screening, however, it has to be outlined, that its level of assessment must be aligned to that of the environmental impact assessment under Alpine Convention law. This again highlights the necessity to establish standards/guidelines.

Concerning the compatibility of the exemption from the EU EIA for network and storage infrastructures under Art. 15e (2) RED III, with the environmental impact assessment obligation in Art.2(2) in conjunction with Art.12 EP and Art.7(3) SCP it has to be taken into account the discretion of the EU Member States provided by the EU norm (similar to Art.6 ERRE). There is no obligation for EU Member States to implement it. Additionally, the exemption from environmental assessments applies only to projects located within previously designated areas. Regarding the designation of these areas, similar considerations as outlined for Art. 15c RED III apply.

Regarding the compatibility with Art. 9 SCP of the RED III of the promotion and the prioritisation of renewable energy by RED III, the EU Member States can ensure the protection of soils in wetlands and moors by not designating acceleration areas in these environmental sensitive areas. In this connection, the provision in Art.15c(1) (a) para. ii) RED III, is of particular relevance, which states that EU Member States must exclude *"Natura 2000 sites and areas designated under national protection schemes for nature and biodiversity conservation*" from designation. Since wetland and moors are often part of Natura 2000 areas, as revealed in the ongoing in-depth review procedure of the CC concerning Art. 9 SCP, RED III does not pose an obstacle for EU Member States to ensure their protection.

Regarding the compatibility of the concept of "overriding public interest" under Art. 16f RED III with Art. 6 EP, similar considerations apply as with Art. 3 ERRE. Hence, Art. 16f RED III does not establish an automatic priority for renewable energy. In the balancing decision, the authorities must take landscape and environmental interests into account, which may, in individual cases, take precedence over the interest in renewable energy. Furthermore, EU Member States can exempt the territorial scope of the Alpine Convention, or parts of it, from the application of the RED III.

3. Recommendations[23]

[23] In accordance with II.4.3 of the compliance mechanism, the report is published provisionally without the recommendations.