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NATURA 2000 DEROGATION PROCEDURE UNDER THE HABITATS DIRECTIVE: OPTIONS FOR IMPROVEMENT

Master's thesis

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List of Abbreviations

AA – appropriate assessment of Natura 2000 network site under the Habitats Directive Article 6(3)

AECOM study – feasibility study of Rail Baltica project carried out in 2011

Birds Directive – Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds

CJEU – Court of Justice of the European Union

EC – European Commission

EEB – Estonian Environmental Board

EIA – environmental impact assessment

EIA Act – Environmental Management System Act of Estonia

EIA Directive – Consolidated text: 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 (codification) (Text with EEA relevance)

ENGO – environmental non-government organisation

EU – European Union

GPECA – General Part of the Environmental Code Act of Estonia

Habitats Directive – Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

HMK – Harju County Court

KuM – Minister of Culture

m – [directive (minister)/regulation (government)]

N2000 – the Natura 2000 network

Natura assessment – a step by step Natura assessment under the Habitats Directive Article 6(3)

NGO – non-government organisation

o –judgement

pSCI – sites of Community importance on the national lists transmitted to the European Commission

RB – Rail Baltica project

RKHK – Supreme Court Administrative Law Chamber

RKPJK – Supreme Court Constitutional Review Chamber

SAC – Special Areas of Conservation

SCI – Site of Community Importance

SEA – strategic environmental assessment

SEA Directive – Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment

SMCE – social multi-criteria evaluation

SPA – Special Protected Area

TEN-T – Trans-European Transport Network

TEU – Consolidated version of the Treaty on European Union

TFEU – Consolidated version of the Treaty of the Functioning of the European Union

TlnRnK – Tallinn Circuit Court

TrtHK – Tartu Administrative Court

VV – Government of the Republic of Estonia

INTRODUCTION

Pursuant to Article 11 of the Treaty of the Functioning of the European Union (TFEU)[1], environmental protection requirements must be implemented into the European Union's (EU) policies and activities to promote sustainable development. Article 191 of TFEU specifies that in preparing its policy on the environment, i.e. preserving, protecting and improving the quality of the environment, EU shall take account of available scientific and technical data, as well as peculiarities of regions, potential benefits and costs, economic and social development of regions and the development of EU as a whole. In addition, the principle of proportionality as stipulated in the Treaty of European Union (TEU)[2] sets forth that Member States should achieve the objectives with the content and form of actions that do not exceed what is necessary.

The pillars of EU legislation on nature conservation and biodiversity are Council Directive 2009/147/EC[3] on the conservation of wild birds (Birds Directive) and Council Directive 92/43/EEC[4] on the conservation of natural habitats and of wild fauna and flora (Habitats Directive). To protect biodiversity under these two directives, the Natura 2000 network (N2000) across all EU countries has been established under the Habitats Directive Article 3, whereby core breeding and resting sites for rare and threatened species and rare natural habitat types are protected. According to the Habitats Directive Article 2(3), the measures to protect biodiversity shall take account of economic, social and cultural requirements and of regional and local characteristics. The Habitats Directive Article 6 lays down a so-called derogation procedure whereby a plan or a project that has significant adverse impact on N2000 site could be allowed in case imperative reasons of overriding public interest exist.

In practice, environmental legislation as an integral part of the EU policy has been under immense pressure lately because environmental requirements are alledged to restrict economic growth and are therefore considered as burden rather than a benefit for society[5]. It has also been

[1] Consolidated version of the Treaty on the Functioning of the European Union – OJ C 326, 26/10/2012, pp. 1-390. http://data.europa.eu/eli/treaty/tfeu_2012/oj (12.04.2021).
[2] Consolidated version of the Treaty on European Union, Art 5(4) – OJ C 326, 26.10.2012, pp. 13–390. http://data.europa.eu/eli/treaty/teu_2012/oj (12.04.2021).
[3] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds – OJ L 20, 26.1.2010, pp. 7–25. http://data.europa.eu/eli/dir/2009/147/oj (12.04.2021).
[4] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora - OJ L 206, 22.7.1992, pp. 7–50. http://data.europa.eu/eli/dir/1992/43/oj (12.04.2021).
[5] Koźluk, T., Zipperer, V. Environmental policies and productivity growth – a critical review of empirical findings. OECD Journal, Economic Studies, Volume 2014, 2015, pp. 155-159. https://www.oecd.org/economy/growth/Environmental-policies-and-productivity-growth-a-critical-review-of-empirical-findings-OECD-Journal-Economic-Studies-2014.pdf (22.04.2020).; Schoukens, H., Bastmeijer, K. Species protection in the European Union. How strict is strict? Born C.-H., Cliquet A., Schoukens, H., Misonne,

argued that the overwhelming influence of Environmental Non-Governmental Organisations (ENGO) in N2000 sites designation procedure resulted in the formation of N2000 dominantly on the basis of environmental considerations, without taking into account economic, social and cultural requirements, as well as regional and local characteristics. Therefore, the EU priorities and national priorities may have been in conflict, as certain interest groups were able to influence decision-making processes more than others[6].

The second main concern related to N2000 is that the aforementioned resolution mechanism laid down in Article 6 of the Habitats Directive is not always followed in appropriate manner by the Member States and derogation precedure is limited to the assessment of a certain project on a Member State level and does not involve assessing the feasibility of a particular project at the EU level. For instance, if a project that is part of the EU priority transport-corridor is not feasible and cannot be implemented due to environmental considerations in one Member State, consequently the whole transport-corridor might not be implemented in originally intended manner and alignment in neighbouring Member State(s) and at the EU level. As a result, the risk of placing a plan or a project on hold or altering it in one Member State might have severe impact on a more generic scale, especially when larger plan such as transport-corridor is already under development and construction in other Member States. The realisation of such risk is more likely if environmental requirements are not assessed on strategic level beforehand and can ultimately amount to considerable social, environmental and economical damage considering that the developments in other Member States might have been carried out in vain.

Although many authors have analyzed the legislation of formation and management of N2000, as well as planning and environmental impact assessment issues regarding N2000, the author of this paper was not able to find a comprehensive approach in which all relevant N2000 legislation aspects of the management of N2000 have been covered on a more generic scale.

D. & Van Hoorick, G. (eds.) The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope? Routledge, Abingdon, Oxford 2014, pp. 121-146. https://www.researchgate.net/publication/261728640_Species_Protection_in_the_European_Union_How_Strict_is_Strict (12.04.2021).; Schoukens, H., Cliquet, A. Biodiversity offsetting and restoration under the European Union Habitats Directive: balancing between no net loss and deathbed conservation? Ecology and Society, 21(4):10, 2016. http://dx.doi.org/10.5751/ES-08456-210410 (12.04.2021).

[6] Paavola, J. Protected Areas Governance and Justice: Theory and the European Union's Habitats Directive, Environmental Sciences, 1(1), 2004, p. 71. https://doi.org/10.1076/evms.1.1.59.23763 (12.04.2021).; Šobot, A., Lukšič, A. Natura 2000 Experiences in South-East Europe: Comparisons from Slovenia, Croatia and Bosnia and Herzegovina. Journal of Comparative Politics, 13(1), Jan 2020: Ljubljana, pp. 48-50. http://www.jofcp.org/assets/jcp/JCP-January-2020.pdf (12.04.2021).; Alphandéry, P., Fortier, A. Can a Territorial Policy be Based on Science Alone? The System for Creating the Natura 2000 Network in France. Sociologia Ruralis, 41(3), July 2001, pp. 324-325. Blackwell Publishers. https://www.researchgate.net/publication/229531699_Can_a_Territorial_Policy_be_Based_on_Science_Alone_The_System_for_Creating_the_Natura_2000_Network_in_France (12.04.2021).

Furthermore, the legislation regarding environmental protection in EU is dynamic and horizontal by nature, European Commission's (EC) approach towards management of N2000 has been under noticable change over the past years and the relevant case law of the Court of Justice of the European Union (CJEU) is still evolving. In addition, the recent case law of Estonian courts and heated debates in relation to the Habitats Directive ascertain urgent need for clarification of derogation procedure as it will be demonstrated in the analysis of particular cases that have reached Estonian courts: *Rail Baltica*[7]; *Linnamäe dam*[8] and *Hellenurme dam*[9]. Due to lack of thorough studies on the case law of Estonian courts regarding implementation of the Habitats Directive Article 6, it became evident that this study in relation to establishment and management of N2000 was necessary.

The research problem of this thesis lies in the shotcomings of establishment and management of N2000 at the EU level, but also in Estonia. The main aim of the thesis is to determine such shortcomings and propose improvements for the current N2000 management system and legal framework.

According to the research problem, the following research questions were formulated:

1. Were public interests other than environmental taken into account in establishing N2000 in the EU Member States?

2. Were relevant stakeholders and interest groups involved in the process of establishment of N2000 in the EU Member States?

3. Is the derogation clause under the Article 6 of the Habitats Directive effective?

4. Is the case law of Estoni judiciary regarding Article 6 of the Habitats Directive in accordance with the EU legislation, the EC guidelines and the case law of the CJEU?

5. Are there possibilities of improving N2000 management and its legislation?

This thesis elaborates on the environmental agenda in the EU and in Estonia and outlines the

[7] RKHKo 3-18-529/137.; Webpage of Rail Baltica Project (by project promoter). https://www.railbaltica.org/about-rail-baltica/ (21.04.2021).; European Commission, Trans-European Transport Network (TEN-T). https://ec.europa.eu/transport/themes/infrastructure/ten-t_en (18.04.2021).; Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU Text with EEA relevance – OJ L 348, 20.12.2013, Annex I, para 1.3., Annex II. http://data.europa.eu/eli/reg/2013/1315/oj (12.04.2021).
[8] HMKo 3-19-1697/78.
[9] RKHKo 3-17-1739/80.

process of formation of N2000 across the EU. Environment is a public resource and should be, in principle, managed transparently and in a manner that environmental agenda is balanced with other public interests. Therefore, the formation of N2000 is analyzed from the viewpoint of distributive justice. The focus in set on the question of how and whether alongside the interest to protect environment economic, social and cultural requirements, as well as regional and local characteristics were taken into account during formation of N2000 in EU. Public involvement in this process in various EU Member States is thoroughly studied to find out how stakeholders' interests were balanced against the interest of environmental protection and how conflicts that emerged were resolved. This thesis carries out a comparison of formation of N2000 in the EU countries in order to assess the coherance in establishment of N2000 and therefore the coherance of the criteria on the basis on which N2000 was formed.

Since the Habitats Directive Article 6 is the basis of proper management of N2000 sites, this paper lays down a procedure and criteria to be followed in planning the developments that might have an adverse impact on N2000 site. Major emphasis is given to requirements of appropriate assessment (AA) of N2000 sites, to the concept of „imperative reasons of overriding public interest", as well as to mitigation and compensatory measures as these constitute the cornerstones and key elements of proper application of the Habitats Directive Article 6. Furthermore, the requirements for a proper derogation authorisation procedure, as well as practical issues related are thoroughly examined and analyzed in order to evaluate the overall effectiveness of derogation procedure. In addition, recent developments in the EU legislation, the EC guidelines and the CJEU case law are analyzed and compared with the case law of Estonia. Thereby, the soundness of the impelementation of the Habitats Directive and its general principles in Estonia is also assessed.

This paper studies how environmental protection requirements have been integrated into the implementation of other EU-wide policies and activities, mainly focusing on the EU's Trans-European Transport Network (TEN-T)[10] development policy. Since there are colliding interests in some of the relevant EU-wide policies, this paper seeks to find an answer to questions of how such general conflicts are resolved on more strategic level and in which stages of developing strategies and policies the balancing of public interests takes place. In addition, the general principles of modern planning, environmental legislation and international conventions are studied in order to find examples of good practices suitable for improving management of

[10] European Commission, Trans-European Transport Network (TEN-T). https://ec.europa.eu/transport/themes/infrastructure/ten-t_en (18.04.2021).; Regulation (EU) No 1315/2013 (2013).

N2000 and the legislation regarding the Habitats Directive.

This master's thesis is a legal theoretical study that uses analytical, comparative and qualitative methods.

Analytical research method is used and EU and Estonian legislation, the CJEU case law, academic literature, policy and development documents, the EC guidelines, international conventions, interdiciplinary academic studies and other relevant development and policy documents are examined to elaborate on the public involvement of establishing N2000 and on the emerged conflicts between stakeholders and therefore between different public interests across the EU as well as to underline the possibilities of improvements of the legislation in the management of N2000. In addition analytical research method based on same study-materials is carried out to assess the overall efficiency of Article 6 of the Habitats Directive and the derogation procedure in EU and in Estonia.

Comparative research method is used and EU and Estonian legislation, the CJEU and Estonian case law, academic literature, policy and development documents, the EC guidelines, international conventions, interdiciplinary academic studies and other relevant development and policy documents are examined to assess the impact of public involvement of establishing N2000 in EU countries such as France, Finland, Nederlands, Belgium, Croatia, Slovenia, Bosnia and Herzegovina, Greece, Hungary, Poland, Romania and Estonia. In addition comparative research based on same study-materials is carried out to assess the overall efficiency of Article 6 of the Habitats Directive and the derogation procedure in EU and in Estonia. Furthermore comparative research method is used to assess whether the case law of Estonia complies with the EU legislation, EC guidelines and the case law of the CJEU. In addition this research method is used to to underline the possibilities of improvements of the legislation in the management of N2000 management.

Qualitative research method is used and EU and Estonian legislation, the CJEU case law, academic literature, policy and development documents, the EC guidelines, international conventions, interdiciplinary academic studies and other relevant development and policy documents are examined to elaborate on the public involvement of establishing N2000 and on the emerged conflicts between stakeholders and therefore between different public interests across the EU as well as to underline the possibilities of improvements of management of N2000.

The first chapter of the research elaborates on the environmental agenda both in the EU and in

Estonia, and concentrates on the establishment of N2000 in EU countries. The major emphasis is on the principles of establishment of N2000, on N2000 establishment procedures in different Member States and on the inclusion of stakeholders in this process. The second chapter of this paper discusses the essence of derogation procedure stipulated in Article 6 of the Habitats Directive. It elaborates on the implemenetation of derogation procedure in Estonia and assesses its soundness. Third chapter of this paper discusses distributive and procedural justice in managing N2000 sites and elaborates on the issues regarding the integration of EU environmental agenda into other EU policy branches. The third chapter also discusses the possibilities to improve the existing N2000 management system and legislation and makes recommendations thereof.

Keywords: *environmental law, protected areas, environmental governance, environmental impact assessment, environmental policy.*

1 Flaws of Natura 2000 Network

1.1 Agenda of the Protection of Environment in EU and Estonia

Rachel Carson's Silent Spring (1962)[11] brought the concern for limitation of resources into wider discussion. After the disclosure of this book, environmental movements emerged first in the USA and then in other industrialized countries[12]. Steady and increasing public concern of environmental issues and 1972 Stockholm Declaration[13], which focused on the preservation and enhancement of the human environment, were major catalysts for a more explicit role of the EU in the environmental protection agenda. In 1973, an Environment and Consumer Protection Service was set up in the EU and the first Environmental Action Programme was adopted[14] which focused on linking the environment with economic development and welfare of European citizens. The heightened interest in the environment was reflected in many social-economic associations and journals. Building upon these initial initiatives, environmental policy of the EU started to become more consistent during the 1980s[15].

Today the environmental legislation plays an integral part of the EU policy. The pillars of Europe's legislation on nature conservation and biodiversity are the Birds Directive, adopted in 1979, and the Habitats Directive, adopted in 1992. According to Article 11 of the TFEU, environmental protection requirements must be integrated into the definition and implementation of the EU policies and activities to promote sustainable development. Article 191 of the TFEU specifies that in preparing its policy on the environment, i.e. preserving, protecting and improving the quality of the environment, the EU shall take account of available scientific and technical data, peculiarities of regions, potential benefits and costs,

[11] Carson, R. Silent Spring. Crest Book, 1962. https://library.uniteddiversity.coop/More_Books_and_Reports/Silent_Spring-Rachel_Carson-1962.pdf (12.04.2021).
[12] Paavola, J., Røpke, I. Elgar Companion to Social Economics, Second Edition. Chapter 1: Environment and sustainability, p. 17. Publisher: Edward Elgar. Editors: John B. Davis, Wilfred Dolfsma. May 2015. https://doi.org/10.4337/9781783478545 (12.04.2021).
[13] United Nations (1972) Report of the United Nations Conference on the Human Environment. http://www.un-documents.net/aconf48-14r1.pdf (12.04.2021).
[14] Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States, meeting within the Council on 22 November 1973, on the programme of action of the European Communities on the environment – OJ C 112, 20.12.1973, pp. 1–53, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41973X1220 (12.04.2021).
[15] Orlando, E. The Transatlantic Relationship and the future Global Governance, Working Paper 21, The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges, pp. 3, 4. Publisher: Transworld. April 2013. http://www.iai.it/sites/default/files/TW_WP_21.pdf (12.04.2021).; Jordan, A. The Politics of Multilevel Environmental Governance: Subsidiarity and Environmental Policy in the European Union, Environment and Planning A 2000, 32, p. 1315. https://doi.org/10.1068/a3211 (12.04.2021).

economic and social development of regions and the development of the EU as a whole.

The principles of environmental protection in Estonian environmental legislation are formulated in the General Part of the Environmental Code Act (GPECA)[16] whereby the aim of promotion of environmental protection and sustainable development is set. According to GPECA, high-level standards of environmental protection measures and integration of environmental protection considerations are required and the principles of prevention, precaution and the so-called polluter pays are explained[17]. The aforementioned principles have not remained declarations, but are integral part of environmental law, having been ascertained also in the case law[18].

According to section 5 of the Estonian Constitution[19], the natural wealth and resources of Estonia are national riches which must be used sustainably. The state is therefore obliged to establish legislation that ensures sustainable use of natural environment in accordance with public interest. In conjunction with the obligation to preserve the living and natural environment and to compensate for damage caused to the environment, stemming from the section 53 of the Constitution, the grounds for setting restrictions on the rights of persons in favour of environmental protection, including restrictions on the right to engage in enterprise or on right to property, are established [20].

The section 53 of the Constitution stipulates that everyone has a duty to preserve the living and natural environment and to compensate for damage caused to the environment and the procedure for compensation shall be provided by a law. Both the obligation to save the environment and the obligation to compensate for environmental damage demonstrate that the environment is a common-good beyond ownership, which is protected in the public interest in order to prevent its deterioration and therefore to protect the quality of life. The obligation to compensate for environmental damage is regulated in the Environmental Liability Act[21].

It is important to keep in mind that obligation to compensate does not only apply to cases where environmental damage has already been caused, but also to the bearing of the costs of meeting the requirements of the preserving obligation, i.e. the costs related to environmental use and

[16] General Part of the Environmental Code Act, sec 1 subsec 2. – RT I, 10.07.2020, 47.
[17] *Ibid.*, sec 8-12.
[18] Triipan, M. Põhiseaduse § 5 kommentaar, komm 8. – Ü. Madise jt (toim). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 5., täiend. vlj. Tartu: sihtasutus Iuridicum 2020.
[19] The Constitution of the Republic of Estonia – RT I, 15.05.2015, 2.
[20] RKPJKo 3-4-1-27-13, para 63–64.
[21] Environmental Liability Act, sec 2 subsec 1. – RT I, 30.10.2020, 8.

environmental disturbances must be borne by the user. In practice, such costs encompass, *inter alia*, the costs of using best available technology and assessing the potential environmental impact, as well as the costs of remediation of the harm done to the environment. The same principles are stipulated in the Environmental Liability Act[22]. It becomes evident that costs of using the environment must be reflected in the price of products and services to display the burden that these particular products or services place on the environment[23]. The obligations to protect the environment and to compensate for damage done operate as incentives to the users of the environment to refrain from activities that burden the environment and to search for alternatives. This logic only works if the costs to mitigate and compensate for the adverse impact on the environment are high because then the zero-option, i.e. abandoning plans or projects that have adverse impact on the environment, is more likely to be considered and decided for.

Pursuant to the case law of the European Court of Human Rights and Estonian courts, the environmental interests can also be effectively protected through procedural rights: free access to information, public involvement and participation in decision-making and access to justice in environmental matters[24].

1.2 Establishing Natura 2000 Network in EU: Overwhelming Task of Balancing Interests

Environmental legislation, being an integral part of the EU policy, plays a crucial role in everyday lives of EU citizens because it is integrated in all EU policies and activities. Framework of N2000, which stretches throughout the EU, has most impact on large-scale plans and projects, as well as on other EU policies. In order to understand how biodiversity protection via N2000 was established and whether and how the social, economic and cultural considerations were taken into account already in the course of establishment of the N2000 network, further elaboration on this process is needed.

N2000 was established under the Habitats Directive Article 3 whereby breeding and resting sites for rare and threatened species, as well as some rare natural habitat types are protected in

[22] Environmental Liability Act, division 5.
[23] Kask, O., Triipan, M. Põhiseaduse § 53 kommentaar. Komm 4, 6, 9, 14. – Ü. Madise jt (toim). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 5., täiend. vlj. Tartu: sihtasutus Iuridicum 2020.
[24] *Ibid.,* Komm 26 and there cited cases.

their own right within the framework of N2000. The main purpose of N2000 is to ensure the long-term survival of Europe's most valuable and threatened species and habitats. Designation of Special Areas of Conservation (SAC) was carried out according to the Habitats Directive Article 4 and Annexes I and II thereof. Three phases of designation procedure for SACs were established: (1) assembling the list of the Member States; (2) assembling the list of Sites of Community Importance (SCIs) by the EC and in agreement with the Member States; (3) designation of SACs by the Member States and establishment of conservation priorities within 6 years after adoption of SCI. The designation itself was based on the criteria of Annex III (i.e. ecological criteria). As soon as a site reached SCI, it was subject to the Habitats Directive Articles 6(2)-6(4).[25] In addition, Special Protection Areas (SPAs) are also included in N2000 under the Birds Directive Artice 4 and Annex I thereof.

In a case C-44/95[26], *Regina v Secretary of State for the Environment*, the CJEU held that when designating the SPA and defining its boundaries under the Birds Directive, the Member State may not take into account economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive. In a case C-418/04, *Commission v Ireland*, the CJEU held that Member States do have a certain margin of discretion with regard to the choice of SPAs and classification of those areas is subject exclusively to the ornithological criteria determined by the Birds Directive[27]. Therefore, economic requirements mentioned in Article 2 of the Birds Directive should have not been taken into account when selecting the SPA and defining its boundaries.

In a case C-371/98, *First Corporate Shipping*, the CJEU held that although the Habitats Directive Article 2(3) sets forth that measures that take into account economic, social and cultural requirements and also consider regional and local characteristics, a Member State may not take these considerations into account when designating a site[28]. The Court explained that only in this way it is possible to realise the objective of maintaining or restoring the natural habitat types at a favourable conservation status. The justification for this viewpoint is that favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory. Since one particular Member State does not have comprehensive knowledge of the situation of habitats in other Member States, it must select only the most

[25] See the question No 5 and answer to it on European Commission's web-page of „Frequently asked questions on Natura 2000".https://ec.europa.eu/environment/nature/natura2000/faq_en.htm# (12.04.2021).
[26] CJEU 11.07.1996 C-44/95, *Regina v Secretary of State for the Environment*, judgement., ECLI:EU:C:1996:297.
[27] CJEU 13.12.2007 C-418/04, *Commission v Ireland*, para 39 and there cited cases, 141., ECLI:EU:C:2007:780.
[28] CJEU 07.11.2000 C-371/98, *First Corporate Shipping*, para 25., ECLI:EU:C:2000:600.

appropriate sites on the basis of ecological criteria[29].

As a paradox, the Habitats Directive Article 2(3) sets forth that the measures stipulated in this directive shall take into account economic, social and cultural requirements and regional and local characteristics, but the approach of the EC and the CJEU seem to have been quite an opposite to that. In other words, it postulated that the formation of the N2000 should have been carried out based on the scientific criteria and existing scientific information only, i.e. on the basis of environmental considerations. This approach resulted in confrontations between the EC and the Member States and caused practical difficulties of designating the SPAs and the SACs at the Member State level.

As to designation of the sites, it is important to clarify that the purpose of the Habitats Directive is to promote the favourable conservation status on the level of the biogeographical region (the territory of the EU is divided into 11 such regions, Estonia belongs to the boreal region[30]), not the conservation of specific natural areas. This means that N2000 sites that might be common in one Member State could be still strictly protected by the argument of the status of the spieces or habitats of the biogeographical region as whole[31]. This argument could be understood and aknowledged at the EU level but at the Member State level, much confusion could be created if the communication lacks concrete and harmonised message.

In case of Estonia, N2000 sites have been established for the protection of 60 habitat types listed in the Habitats Directive, for the protection of 53 Annex II animal and plant species and for the protection of 129 bird species and migratory bird species listed in Annex I of the Birds Directive. The adequacy of N2000 sites submitted by Estonia was assessed in two stages: first for terrestrial, including coastal, habitat types and species (2005) and later for marine habitat types and species (2009). In 2017, the Estonian N2000 consisted of 66 bird areas and 541 nature areas. As the bird and nature areas largely overlap, the total area of the Estonian N2000 is 14 861 km^2. Just under half of N2000 sites are located in the sea and 17 percent of Estonia's land territory is covered by N2000 sites (please refer to a map of N2000 in Estonia in Annex 1 – NATURA 2000 NETWORK SITES IN ESTONIA). At the beginning of the selection of sites, there was a

[29] C-371/98, *First Corporate Shipping*, para 23.
[30] European Environment Agency, Biogeographical regions in Europe, Last modified 04 Oct 2012. https://www.eea.europa.eu/data-and-maps/figures/biogeographical-regions-in-europe-1/map_2-1_biogeographical-regions.eps (12.04.2021).; European Commission, Environment Directorate General, Brochure Natura 2000 in Boreal region, Author: Sundseth, K., Ecosystems LTD, 2005. https://ec.europa.eu/environment/nature/info/pubs/docs/brochures/nat2000_boreal.pdf (12.04.2021).
[31] Veinla, H. Looduskaitse metsades – konfliktsete eesmärkide ühendamise võimalikkusest. - Juridica 2019/V, p. 321.

heated debate as to whether the N2000 sites should be small, well-defined along nature conservation areas, or whether they should be large, including both nature conservation areas and the surrounding buffer zone. At the time, the Natura pilot project was led by the advantages of large areas, therefore Estonia took the approach to form N2000 sites with buffer zones.[32] The same approach was also taken, for example, in France[33] and Germany[34].

The heated debate over the question of how to form N2000 was not a central issue only in Estonia. The collision of different interest groups and controversy was predictable as the EC, while delegating the formation of N2000 sites to the Member States, failed to provide sufficient guidance materials to ensure common and coherent approach for the formation of N2000 across the EU. This strategy, combined with tight deadlines resulted in conflicts all over the Europe as natural outcome of aforementioned shortcomings, as well as the lack of information regarding the impact of N2000 on future land use[35]. The conflicts over the Habitats Directive were primarily about procedural justice and indicate the lack of recognition, hearing and right of participation. As a result, many of the Member States had to revise the designation process to improve the involvement of affected stakeholder groups[36].

The lack of public consultation in designation of N2000 sites infuriated hunters and forest owners in France who questioned the science-based site designation, i.e. ecological criteria, and the quality of information. In addition, confrontation between people living in towns and people living in rural areas was evident: people living in the countryside found it to be unfair that regulation regarding protection of biodiversity originated from towns but the implication of this policy affected them the most, however, their interests were not taken into consideration. Ultimately, the deviation from the scientific criteria with the intent to resolve conflicts between stakeholders resulted in a much-reduced list of designated sites in France. That, in turn, resulted in the EC filing claims against France for not fulfilling the obligations under the Habitats Directive.[37]

The CJEU held that by (1) providing generally that fishing, aquaculture, hunting and other hunting-related activities practised by the laws and regulations in force do not constitute

[32] Ministry of the Environment of Estonia. Natura 2000. https://www.envir.ee/et/natura-2000 (12.04.2021).
[33] Alphandéry, P., Fortier, A. *Op cit,* pp. 319-320.
[34] The German Federal Agency for nature Conservation. Natura 2000 Site Designation. https://www.bfn.de/en/activities/natura-2000/natura-2000-site-designation.html (20.04.2021).
[35] Paavola, J. *Op cit,* p. 71.
[36] *Ibid.*, pp. 73, 74, 317, 324.
[37] Alphandéry, P., Fortier, A. *Op cit,* pp. 317, 322, 324, 325, 327.

activities causing disturbance, by (2) systematically exempting works and developments from the procedure of assessment of their implications for the site, and by (3) systematically exempting works and development programmes and projects which are subject to a declaratory system from that procedure, France failed to fulfil its obligations under the Habitats Directive Article 6(2) and Article 6(3)[38].

Even though France was one of the most illustrative examples of how a Member State struggled to find balance between the interests of local people and at the same time trying to comply with the requirements of the EC, the EU legislation and the CJEU case-law, several other EU Member States struggled with the same task as well. Stakeholder groups such as hunters, owners of agricultural land and forests were excluded from N2000 site designation process also in Finland. However, almost half of the sites proposed for the inclusion in N2000 were eventually dropped from the final proposal after landowners in Karvia went on hunger strike in protest against the proposed N2000 sites[39]. In addition, the case-law from Nederlands and Belgium indicate that even though the Member States must have assured the compliance with the criteria laid down by the Habitats Directive, they still had a margin of discretion when making their site proposals[40].

In many EU Member States the involvement of stakeholders and interest groups in N2000 site designation was, on the contrary, modest and insufficient. The EU provisions for nature conservation overwhelmed the state actors in Central and Eastern European accession countries such as Hungary, Poland and Romania, whose resources were already scarce for managing the transition process. This, in combination with limited institutional capacities, administrative culture discouraging public participation, tight deadlines as well as institutional changes in those countries resulted in the failure of involving environmental non-government organisations (ENGOs) and other stakeholders in the N2000 sites designation process[41]. It has been argued that in Slovenia, Croatia and Bosnia and Herzegovina, the sector of forestry cooperated quite well, but the sector of agriculture had very little cooperation and all other sectors were

[38] CJEU 06.04.2000 C-256/98, *Commission v France*, ECLI:EU:C:2000:192.; CJEU 04.03.2000 C-241/08, *Commission v France*, ECLI:EU:C:2010:114.
[39] Hiedanpää, J. European-wide conservation versus local well-being: the reception of the Natura 2000 Reserve Network in Karvia, SW-Finland. Landscape and Urban Planning, 61(2-4), Nov 2002, pp. 113, 116-117, 119. https://doi.org/10.1016/S0169-2046(02)00106-8 (12.04.2021).
[40] Schoukens, H., Cliquet, A. Judical Training on EU Environmental Law. Trier, 27-28 May 2019, p. 67 and there cited national case-law. https://www.ejtn.eu/PageFiles/17863/Habitat%20Directive_Presentation.pdf (12.04.2021).
[41] Börzel, T., Buzogány, A. Environmental organisations and the Europeanisation of public policy in Central and Eastern Europe: the case of biodiversity governance. Environmental Politics, 19(5), 2010, p. 728. http://dx.doi.org/10.1080/09644016.2010.508302 (12.04.2021).

marginally involved in the N2000 designation process[42].

As to the involvement of stakeholders, it has been argued that ENGOs had more influence in the designation of N2000 sites than other interest groups[43]. In many EU countries ENGOs were able to influence the N2000 site designation process because they could offer resources and expertise that the national governments and other state istitutions needed but did not have[44]. For example, in Poland and Hungary the involvement of ENGOs in designating N2000 sites was considerable as they assisted N2000 implementation and contributed significantly to the site selection[45].

The EC and the Member States failed in providing adequate guidance materials and instructions. Dissimentation of information about the purposes and logic behind biodiversity protection and of the consequences of implication of N2000 to land use was lacking. A study[46] on the experiences of the United Kingdom implementing the EU biodiversity policy emphasised that participatory approaches can help to reach consensus between competitive objectives and dissimenation of information to stakeholders is essential. This study drew a conclusion that a number of problems regarding implementation of the Habitats Directive could be avoided in the long term if conservation objectives were considered at a more strategic level. The study stressed the need for a much greater integration of biodiversity protection policy to other sectoral policies[47].

In Germany, the conflicts were evident amongst forest administrators, farmers and active citizens' groups in the process of designating N2000 sites where opposition to nature conservation did not originate from economic considerations nor from concerns for the future land use but rather from strong social identity and a lack of knowledge about conservation purposes[48]. In Greece, dissemination of information during the designation of N2000 was quite limited and the the lack of trust by local communities towards government initiatives were

[42] Šobot, A., Lukšič, A. (2020), pp. 51-52.
[43] Paavola, J. *Op cit*, p 71.
[44] Weber, N., Christophersen, T. The influence of non-governmental organisations on the creation of Natura 2000 during the European Policy process. Forest Policy and Economics, 4(1), Feb 2002, pp. 4-10. https://doi.org/10.1016/S1389-9341(01)00070-3 (12.04.2021).
[45] Cent, J., *et al*. Roles and impacts of non-governmental organizations in Natura 2000 implementation in Hungary and Poland. Environmental Conservation, 40(02), Jan 2013, pp. 119, 126. 10.1017/S0376892912000380 (12.04.2021).
[46] Ledoux, L., *et al*. Implementing EU biodiversity policy: UK experiences. Land Use Policy, 17(4), Oct 2000, p. 266. https://doi.org/10.1016/S0264-8377(00)00031-4 (12.04.2021).
[47] *Ibid.*, p. 267.
[48] Stoll-Kleemann, S. Barriers to Nature Conservation in Germany: A Model Explaining Opposition to Protected Areas. Journal of Environmental Psychology, 21(4), Dec 2001, pp. 371, 382. http://dx.doi.org/10.1006/jevp.2001.0228 (12.04.2021).

identified as key barriers to the establishment of a national network of protected areas[49].

One of the reason why implementation of the N2000 was packed with controversy and conflicts was the fact that the N2000 framework departs from a centralised top-down steering model towards a more participatory mode of policy-making that systematically involves non-state stakeholders. This approach was not common and widely used in practice in many of the EU Member States, including Estonia. This new approach therefore did not take fully into account the existing policies and administrative traditions.

The other important reason why the N2000 sites designation was not smooth enough was that neither the EC nor the Member States were able to communicate conservation purposes and the future impact of the N2000 sites on land use. Instead of proper guidelines and harominised message, uncertainty and ambiguity of information gave rise to protests and dissatisfaction. The EC as the leading institution should have assembled proper guidelines and provisions regarding distributive consequences and the recognition and hearing of involved stakeholder groups before the designation of N2000 sites took off. In this way, it could have been possible to designate N2000 sites in a similar manner and the involvement of stakeholders and therefore the balancing public interests would have been ensured. The lack of harmonised approach and ambiguity of the impacts of conservation objectives led to fierce conflicts between the stakeholders and interest groups. Some of the Member States found themselves in an awkward situation of seeking balance between the strict N2000 site selection criteria and stakeholders whose interests were at stake. Since the EC delegated the responsibility of formation of N2000 to the Member States but failed to provide proper guidelines and criteria of how the N2000 sites should be selected and how the publicity should be included[50], the Member States had different approaches in the site selection procedures and struggled to resolve disputes and conflicts that emerged.

As extensive practice shows, the Member States had relatively wide freedom in deciding how to carry out procedures of designating N2000 sites. In addition, the establishment of the N2000 created great number of conflicts and as several authors have argued, establishment,

[49] Apostolopoulou, E., *et al*. Participation in the management of Greek Natura 2000 sites: Evidence from a cross-level analysis. Journal of Environmental Management, 113, Dec 2012, p. 316. https://doi.org/10.1016/j.jenvman.2012.09.006 (12.04.2021).
[50] Veinla, H. Problems in Transposing the European Union's Nature Conservation Directives into Estonian Law and Plans for Solving Them. Juridica Intrenational 2011/XVIII, p. 139. https://juridicainternational.eu/public/pdf/ji_2011_1_132.pdf (14.04.2021).

interpretation and implementation of the Habitats Directive was slow[51], ineffective and reflects relatively greater power of ENGOs in European decision-making mechanism than in the national one [52]. This means that the EU priorities and national priorities may have been in conflict and certain interest groups were able to influence decision-making processes more than the others[53].

Although the Habitats Directive Article 2(3) sets forth that the measures shall take account of economic, social and cultural requirements and regional and local characteristics, the EC instructions and the CJEU case-law backed with overwhelming influence of ENGOs resulted in the formation of the N2000 mainly based on scientific criteria and existing scientific information, i.e. on the basis on environmental considerations. It could be argued that although the N2000 was indeed formulated mainly on the basis of scientific criteria, it was also influenced by the „loudest" interest groups and the ENGOs.

As a result, some countries such as France, Finland, Nederlands and Belgium with more extensive practice of public involvement used their discretional right of designating N2000 sites in a way that other public interests of stakeholders such as landowners (forest and agricultural land), hunters and fishermen were taken into account after all. This indicates that in some EU countries N2000 site selection was not carried out purely on scientific grounds because the pressure of interest groups resulted in altering N2000 site proposals considerably. However, in many EU countries, e.g. Croatia, Slovenia, Bosnia and Herzegovina, Greece, Hungary, Poland and Romania, public involvement was rather modest and it could be argued that in those countries the rules and instructions of the EC and the CJEU case-law were followed more strictly. Unfortunately the academic literature about establishment N2000 in Estonia is very limited and in this paper conclusions of how interest groups may have influenced N2000 site designation in Estonia are not drawn.

To conclude, N2000 was established in an incoherent manner. In some of the Member States, other public interests such as economic, social and cultural requirements and regional and local characteristics were taken into account after all, as demonstrated hereinabove. The N2000 also reflects the interests of the loudest stakeholders in some of the Member States and of ENGOs in most of the EU countries. In general, with some exceptions, N2000 was to a large extent

[51] European Commission 16.12.2016 SWD(2016) 472 final „Fitness Check of the EU Nature Legislation (Birds and Habitats Directives), p. 88. https://ec.europa.eu/environment/nature/legislation/fitness_check/docs/nature_fitness_check.pdf (24.04.2021).
[52] Paavola, J. *Op cit,* p. 71 and there cited authors.
[53] Alphandéry, P., Fortier, A. *Op cit,* pp. 324-325.

established following strictly the ecological criteria set forth in the Habitats Directive, the rules and instructions of the EC and the CJEU case-law and therefore does not carry the spirit of balancing the economic, social, cultural and ecological concerns, despite the Habitats Directive's objective was to establish a network of protected areas which do not exclude human factor.

2 Derogation Under the Habitats Directive Article 6: Recent Case Law of the CJEU and of Estonian Courts

As Articles 6(3) and 6(4) of the Habitats Directive formulate the backbone of derogation procedure, this chapter focuses mainly on the following aspects of aforementioned procedure:

1) the appropriate assessment of N2000 site (subchapter 2.1);

2) definition of "imperative reasons of overriding interest" (subchapter 2.2);

3) distinction between mitigation and compensatory measures (subchapter 2.3).

2.1 Appropriate Assessment of the Impacts on Natura 2000 Site

Article 6 of the Habitats Directive plays a crucial role in the management of the sites that constitute N2000. It is also known as derogation clause under the Habitats Directive. In Estonian legislation, the principles of the Habitats Directive Article 6 are stipulated in the Environmental Management System Act (EIA Act)[54] where specifications for environmental assessment of activities affecting N2000 sites are given[55]. In order to provide proper guidelines for the Member States on the interpretation of key concepts used in Article 6, the EC issued a notice on managing N2000 sites under the provisions of Article 6 of the Habitats Directive in 2018[56]. As the EC explains, the provisions of Article 6 reflect the general approach set out in Article 2 with the aim of promoting biodiversity and granting the favourable conservation status of the habitats and species within the EU, but at the same time taking into account economic, social, cultural and regional requirements as means of achieving sustainable development[57].

After designation of SACs and SPAs, these sites are subject to the Habitats Directive Articles 6(2)-6(4). It is important to note that Articles 6(2), 6(3) and 6(4) only apply to the sites which are placed in the list of sites selected as sites of SCIs and not to the sites eligible for identification as sites of Community importance on the national lists transmitted to the the EC

[54] Environmental Impact Assessment and Environmental Management System Act - RT I, 10.07.2020, 46.
[55] *Ibid.*, sec 29, 45.
[56] European Commission 21.11.2018 notice C(2018) 7621 "Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC". https://ec.europa.eu/transparency/regdoc/rep/3/2018/EN/C-2018-7621-F1-EN-MAIN-PART-1.PDF (12.04.2021).
[57] *Ibid.*, p. 8.

(pSCI)[58].

Article 6(2) of the Habitats Directive sets the general standard for the obligations of the Member States': a Member State must take all necessary steps to avoid deterioration of natural habitats and the habitats of species listed as N2000 sites, as well as avoid disturbance of the species for which the areas have been designated for. Therefore, in principle, any plan or project that might have an adverse effect to a N2000 site, should be avoided. In case this is not possible, permitting regime is given by the provisions of Articles 6(3) and 6(4) by setting criteria according to which the plans and projects with likely significant adverse effects on N2000 sites may or may not be allowed (please refer to a more detailed scheme in Annex 2 – STEP-WISE PROCEDURE FOR CONSIDERING PLANS AND PROJECTS).

The Habitats Directive Article 6(3) requires firstly that if a plan or a project, which is not related to the management of N2000 site but likely have significant effect to it, must pass appropriate assessment (AA) of its implications for the site in view of the conservation objectives of this particular site. Secondly, and in the light of conclusions of AA, a plan or a project will be subject to Article 6(4) of the Habitats Directive, whereby competent national authorities shall agree to the plan or a project only after being convinced that the integrity of the site concerned is ensured.

The Habitats Directive does not define the terms "plan" or "project", but jurisprudence has demonstrated that these terms require a broad interpretation, since the only triggering factor for applying Article 6(3) of the Habitats Directive is whether or not significant effect on a site is likely to happen[59].

The proper implementation of Article 6 of the Habitats Directive is also supported by the relevant extensive EU case-law[60]. It is highlighted that around 20 percent of all environmental cases and more than 80 rulings by the CJEU[61] are related to the Habitats Directive and most of the cases involve infringements of proper implementation of the EU legislation (Article 258 of

[58] CJEU 13.01.2005 C-117/03, *Dragaggi and Others*, para 31., ECLI:EU:C:2005:16.; CJEU 13.09.2006 C-244/05, *Bund Naturschutz in Bayern and Others*, para 34, 35 and there cited case-law., ECLI:EU:C:2006:579.; European Commission 25.01.2019 notice 2019/C 33/01, Managing Natura 2000 sites, The provisions of Article 6 of the Habitats Directive 92/43/EEC, para 3.5.1 and 3.5.2. – OJ C 33, 25.1.2019, pp. 1–62. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2019:033:FULL&from=PT (12.04.2021).
[59] See the question No 37 and answer to it on European Commission's web-page of „Frequently asked questions on Natura 2000". https://ec.europa.eu/environment/nature/natura2000/faq_en.htm# (12.04.2021).
[60] European Commission' booklet. Article 6 of the Habitats Directive: Rulings of the European Court of Justice, Jun 2014. pp. 1-80. https://ec.europa.eu/environment/nature/info/pubs/docs/others/ECJ_rulings%20Art_%206%20-%20Final%20Sept%202014-2.pdf (14.04.2021).
[61] Schoukens, H., Cliquet, A. (2019). p. 6.

the TFEU). As a guidance material, the EC has published an overview of the rulings of the CJEU considering environmental assessments of plans, programmes and projects[62], but also a wide variety of thematic guidlines such as on wind energy[63], energy transmission facilities[64], hydropower[65], forests[66], farming[67], aquaculture[68], inland waterway transport[69], non-energy mineral extraction[70], climate change[71], etc[72]. It is important to mention that the general methodology of a step by step Natura assessment under the Habitats Directive Article 6(3) is covered in all sector-specific guidelines with the emphasis on the fact that the scope of Natura assessment is narrower than an assessment under EIA Directive[73], as amended, or under SEA Directive[74], and is confined to implications for N2000 site in relation to the conservation

[62] European Commission. Environmental Assessments of Plans, Programmes and Projects rulings of the Court of Justice of the European Union, 2020, p. 48. https://ec.europa.eu/environment/eia/pdf/EIA_rulings_web.pdf (12.04.2021).
[63] European Commission 18.11.2020 notice C(2020) 7730 final. Guidance document on wind energy developments and EU nature legislation. https://ec.europa.eu/environment/nature/natura2000/management/docs/wind_farms_en.pdf (14.04.2021).
[64] European Commission notice C/2018/2620. Energy Transmission Infrastructure and EU nature legislation - OJ C 213, 18.6.2018, pp. 62–169. https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1542188309010&uri=CELEX:52018XC0618(02) (14.04.2021).
[65] European Commission notice C/2018/2619. Guidance document on the requirements for hydropower in relation to EU nature legislation - OJ C 213, 18.6.2018, pp. 1–61. https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1542188309010&uri=CELEX:52018XC0618(01) (14.04.2021).
[66] European Commission. Natura 2000 and Forests Part I-II, 2015. https://ec.europa.eu/environment/nature/natura2000/management/docs/Final%20Guide%20N2000%20%20Forests%20Part%20I-II-Annexes.pdf (14.04.2021).; European Commission. Natura 2000 and Forests Part III – Case studies, 2015. https://ec.europa.eu/environment/nature/natura2000/management/docs/Final%20Guide%20N2000%20Forests%20Part%20III.pdf (14.04.2021).
[67] European Commission. Farming for Natura 2000, 2018. https://ec.europa.eu/environment/nature/natura2000/management/docs/FARMING%20FOR%20NATURA%202000-final%20guidance.pdf (14.04.2021).; European Commission. Managing farmland in Natura 2000 – case studies, 2018 https://ec.europa.eu/environment/nature/natura2000/management/docs/Farmland_Annex-E_WEB_en.pdf (14.04.2021).
[68] European Commission. Guidance on Aquaculture and Natura 2000, 2018. https://ec.europa.eu/environment/nature/natura2000/management/pdf/guidance_on_aquaculture_and_natura_2000_en.pdf (14.04.2021).
[69] European Commission. Guidance on Inland waterway transport and Natura 2000, 2018. https://ec.europa.eu/environment/nature/natura2000/management/docs/iwt_en.pdf (14.04.2021).
[70] European Commission. Guidance Document: Non-energy mineral extraction and Natura 2000, 2011. https://ec.europa.eu/environment/nature/natura2000/management/docs/neei_n2000_guidance.pdf (14.04.2021).; European Commission. Non-energy mineral extraction in relation to Natura 2000 – case studies, 2019. https://ec.europa.eu/environment/nature/natura2000/management/docs/NEEI%20case%20studies%20-%20Final%20booklet.pdf (14.04.2021).
[71] European Commission. Guidelines on Climate Change and Natura 2000, 2013. https://ec.europa.eu/environment/nature/climatechange/pdf/Guidance%20document.pdf (14.04.2021).
[72] European Commission. Management of Natura 2000 sites. https://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm (14.04.2021).
[73] Consolidated text: 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 (codification) (Text with EEA relevance) – OJ L 26, 28.1.2012, pp. 1–21. http://data.europa.eu/eli/dir/2011/92/2014-05-15 (23.04.2021).
[74] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment – OJ L 197, 21.7.2001, pp. 30–37. http://data.europa.eu/eli/dir/2001/42/oj (12.04.2021).

objectives.

As previously explained, the CJEU case-law provides excellent guidance material because many so-called landmark cases further elaborate on the essence of the Habitats Directive Articles 6(2) and 6(3). For example, the CJEU has held in many cases that an assessment cannot constitute as appropriate where reliable and updated data is lacking[75]; also, all cumulative effects which result from the combination of a plan or a project with other plans or projects must be taken into account in view of the site's conservation objectives[76]. It is worth noticing that environmental impact assessment (EIA) and Natura assessment have different legal consequences as assessments carried out pursuant to the EIA Directive or the SEA Directive cannot replace the procedure provided for in Articles 6(3) and 6(4) of the Habitats Directive[77].

The EIA Directive sets the standards of the assessment of the environmental impact in general and applies to a wide range of defined public and private projects (which are defined in Annexes I and II thereof) [78]. Although the Article 2(1) combined with Annex III note 3 of the EIA Directive and the Habitats Directive Article 6(3) have somewhat similar meaning, it is often pointed out that the obligation to initiate impact assessments differs significantly due to the relevant case law[79].

Under Estonian domestic law, carrying out the EIA is regulated in the EIA Act and spatial planning (e.g. national spatial plan, national designated spatial plan, county-wide spatial plan, comprehensive plan, local government designated spatial plan, detailed spatial plan) in the National Planning Act[80]. Procedural rules for planning also apply to the EIA which is carried out according to the EIA Act. Specifications for EIA activities related to the N2000 sites are also governed by the EIA Act[81]. The general logic of EIA is divided into three stages[82] (please refer to a more detailed scheme in Annex 3 – STEP-WISE PROCEDURE FOR CARRYING OUT EIA).

[75] E.g. CJEU 11.09.2011 C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others v Ipourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others*, para 115., ECLI:EU:C:2012:560.; CJEU 24.11.2011 C-404/09, *Commission v Spain*, para 101-105., ECLI:EU:C:2011:768.
[76] CJEU 07.09.2004 C-127/02, *Waddenzee*, para 53., ECLI:EU:C:2004:482.
[77] C-418/04, *Commission v Ireland*, para 229-231.
[78] European Commission. Environmental Impact Assessment – EIA. Overview – legal context. https://ec.europa.eu/environment/eia/eia-legalcontext.htm (12.04.2021).
[79] Relve, K., Vahtrus, S. Keskkonnamõjude hindamine omadega metsas. Juridica 2019/V, p. 327.
[80] Planning Act – RT I, 19.03.2019, 104.
[81] EIA Act, sec 29, 33 (in case of SEA).
[82] EIA Act, sec 3^2.

In addition and as explained by the Supreme Court of Estonia[83], the EIA is generally a central question of how to carry out a specific development activity, but the purpose of the SEA is to influence the choice of alternatives for development activities in the decision-making process at an early stage, when it is still possible to analyze different alternatives and thus influence the strategic choices[84].

The CJEU has clarified that in order to initiate a Natura assessment, the effects of a plan or a project need not be certain, but that the risk of significant effects has been identified and and on basis of objective data one cannot rule out this risk[85]. The national guidance material[86] commissioned by the Estonian Environmental Board (EEB) for conducting Natura assessment in under Article 6(3) of the Habitats Directive provides clear instructions for conducting the Natura assessment. Natura assessment can be roughly divided into three stages: (1) ex-ante assessment; (2) AA, i.e. full assessment or appropriate assessment; (3) granting an exemption, including consideration of alternatives[87] following thus the EC notice (2018) for managing the N2000 sites under the provisions of Article 6 of the Habitats Directive.

According to the EC, the role of Articles 6(3)-6(4) of the Habitats Directive need to be considered in relation to that of the first (or, in the case of SPAs, with that of the first and second paragraphs of Articles 3 and 4 of the Birds Directive) and the second paragraph of Article 6. Therefore, even if it has been determined that an initiative or activity does not fall within the scope of Article 6(3), it will still be necessary to make it compatible with other aforementioned provisions. In general, Article 6(3) of the Habitats Directive defines a step-wise procedure for considering plans and projects where the first part is the pre-assessment, the second is the AA and a third part of the procedure is governed by Article 6(4).[88]

In determining the likelihood of significant impacts, whether the project or a plan is necessary to carry out, and the need for AA, mitigation measures (i.e. measures to avoid or to reduce negative effects) cannot be taken into account[89]. In addition, the case law of the CJEU confirms that compensatory measures should be considered only after having ascertained a negative

[83] RKHKo 08.08.2018 3-16-1472/92, para 24.
[84] See also CJEU 07.06.2018 C-671/16, *Inter-Environnement Bruxelles et al,* para 63., ECLI:EU:C:2018:403.; CJEU 07.06.2018 C-160/17, *Thybaut et al,* para 62., ECLI:EU:C:2018:401.
[85] C-127/02, *Waddenzee,* para 41-45.
[86] Kutsar, R., *et al*. Juhised Natura hindamise läbiviimiseks loodusdirektiivi artikli 6 lõike 3 rakendamisel Eestis, 2019. https://www.envir.ee/sites/default/files/KKO/KMH/natura_hindamise_juhend_taiendatud_2020.pdf (12.04.2021).
[87] *Ibid.*, p. 17.
[88] EC notice (2018), pp. 34-35.
[89] *Ibid.*, p. 41.; CJEU 12.04.2018 C-323/17, *People Over Wind*, para 40, 41., ECLI:EU:C:2018:244.

impact on the integrity of a N2000 site[90].

In a case 258/11, *Sweetman and Others*, the CJEU explained that the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Court explained that in order to maintain the integrity of a site as a natural habitat, the site needs to be preserved at a favourable conservation status. It follows that this ensures the lasting preservation of the constitutive characteristics of the site concerned and the competent national authorities cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites that host priority natural habitat types.[91]

In a case C-209/04, *Commission v Austria*, the CJEU held that if the application for authorisation for a project was formally lodged before the expiry of the time limit for transposition of the Habitats Directive, a requirement to conduct an AA does not apply. At the same time, court explained that formal criteria is the only one which accords with the principle of legal certainty and preserves a directive's effectiveness. The Court explained that as it would not be appropriate in this case (construction of the S 18 carriageway) to demand relevant procedures, which are complex at national level and which were formally initiated prior to the date of the expiry of the period for transposing the Habitats Directive, to be carried out again due to the fact that it would be too cumbersome to the Member State as well as too time-consuming[92].

It can be drawn from above that according to the EU and domestic legislation, the AA of N2000 should be carried out as a rule. As explained by the EC and ascertained by the CJEU, the AA of N2000 must be strictly distinguished from the general EIA requirements that are governed by the EIA and the SEA Directives. Thus, the AA of N2000 is much narrower than general EIA as it concentrates only on N2000 site affected and on its conservation objectives in relation of intended plan or a project. Only under very rare conditions where a plan or project was approved prior to the formation N2000 and the requirement of carrying out proper AA would be cumbersome and time-consuming, the CJEU has allowed an exception.

There are three recent rulings in Estonian case-law also regarding the applications of permits in

[90] See also CJEU 16.02.2012 C-182/10, *Solvay and Others*, para 73, 74., ECLI:EU:C:2012:82.; CJEU 11.04.2013 C-258/11, *Sweetman and Others v An Bord Pleanála*, para 34, 35., ECLI:EU:C:2013:220.
[91] Case C-258/11, *Sweetman and Others*, para 32 and there cited cases, para 39 and there cited cases, para 42 and there cited cases.
[92] CJEU 23.03.2006 C-209/04, *Commission v Austria*, para 56, 57, 62., ECLI:EU:C:2006:195.

order to carry out projects in N2000 sites.

In a case 3-15-3184, the Tallinn Circuit Court held on 28.03.2018 that the Estonian Environmental Board (EEB), by not agreeing to approve the building permit for residential house and up to two outhouses on N2000 site[93] in Vilsandi (a small island in the Baltic Sea), did not lawfully execute its discretionary right by not properly assessing the permit's impact on N2000 site. In that particular area, a comprehensive spatial plan of the municipaly and the regulation for management of N2000 site did not exclude building if these are suitable and comply with traditional housing structure in Vilsandi. In addition, the property on which the buildings were planned was in a residential area according to the comprehensive spatial plan. The core of this dispute was whether construction of residential house and two outhouses could be allowed in N2000 site which constitutes a bird and nature area where junipers habitat is protected and where the favorable condition of junipers (Habitats Directive Annex I habitat type 5130) must be ensured and where the preservation of the historical settlement structure is part of the cultural heritage. In the opinion of the Court, the EEB had discretionary right to assess to what extent the proposed housing construction would impose negative effect on achieving the favorable condition of Vilsandi protected natural habitats (incl. juniper). The Court explained that the EEB did not overrule the statement of land owner according to which without purposeful human maintenance activities, such as building residential house and carrying out maintenance activities, the protected habitat type (junipers) is endangered even more as bushes and trees that grow between the junipers would crowd junipers out due to insufficient daylight. To conclude, the Tallinn Circuit Court held that the EEB failed to properly use its right of discretion of balancing and weighting the constitutional right of using the property[94] by the land owner against the public interest of conservation. Therefore, the court obliged the EEB to exercise its discretionary right properly and to give a consent (or refuse to give consent) to the issuance of design specifications.[95]

In a case 3-3-1-56-12, the Supreme Court of Estonia held on 06.12.2012 that the building permit which was issued by a municipality for construction of a drainage system on a property located in the Laidunina conservation area, which also constitutes a N2000 site, must be anulled. In this case, the building permit was issued, but no AA was carried out. Therefore, the owner of the neighbouring immovable filed a claim to the court in order to annul the building permit. The

[93] SCI for the protection of nature and wild birds.
[94] Estonian Constitution, sec 32.
[95] TlnRnKo 3-15-3184, para 13, 23-25.

Court, by referring to the CJEU case-law, pointed out that as a preliminary assessment of the impacts on N2000 site was not properly carried out and therefore precautionary principle was not followed, the issuance of a building permit must be annulled.[96]

In a case 3-17-740, the Supreme Court of Estonia held on 28.11.2019 that by not agreeing to approve the design specifications for a building in a N2000 site in Saaremaa, the EEB did not exercise its dicreatory right properly. The Court obliged the EEB to exercise its discretionary right and to give or refuse to give a consent to the issuance of design specifications. In Court's opinion, the EEB should have assessed whether achieving of the objectives of protection of a N2000 site would be endangered in the event of construction a building in that area. By not assessing this aspect and by counting only on the fact that building has adverse impact on the N2000 site, the EEB did not follow the principle of proportionality as stipulated the TEU[97]. The Court held that the admissibility of construction depends on whether it undermines the protection objectives of the site separately or in combination with other activities, plans, projects and developments. The Court also specified that if necessary, a preliminary assessment of Natura and, if it proves necessary according to the preliminary assessment, also an AA should be carried out.[98]

In conclusion, the Supreme Court of Estonia ascertained the discretionary right of the EEB, previously pronounced by the Tallinn Circuit Court in the case 3-15-3184. It seems evident that the EEB, when assessing the permissability of activities that have or might have adverse impact on conservation sites, must at all times take into account the right of ownership, on one hand, and the conservation objectives, on the other. The case-law of Estonia demonstrates that in principle, adverse impacts on N2000 sites are permissable unless these impacts endanger achieving the overall objectives of that particular N2000 site. To summarise the aforementioned three cases, the case-law of Estonia demonstrates that a margin of discretion exists in deciding whether to allow implementation of small-scale projects in N2000 sites. Therefore, the principle of taking into account the economic, social and cultural requirements and regional and local characteristics, as set forth in Article 2(3) of Habitats Directive, has been applied in a manner that allows even a small-scale deterioration of the protected habitat types N2000 if overall conservation objectives are not endangered. The author of this paper fully agrees with this approach and is in the opinion that in such cases an AA should, as a rule, be carried out in order to specify impacts of human activity to N2000 site. When it becomes evident that activities do

[96] RKHKo 3-3-1-56-12, para 13-15, 18-19.
[97] TEU, Art 5(4).
[98] RKHKo 3-17-740, para 12, 14, 25, 26.

not endanger achieving objectives of N2000 site or the impacts could be mitigated, some human activity should, in principle, be allowed also in N2000 sites. This approach must nevertheless be absolute and generalized as the aforementioned cases were all related to small-scale residential buildings.

One of the most influential ruling in Estonia related to the Habitats Directive and its implementation is a case 3-18-529/137, *Rail Baltica*, where the Supreme Court of Estonia held that the establishment of a county plan (one of the three county plans in place, adopted in 2018) concerning the alignment of the Rail Baltica (RB)[99] in Estonia in section linking Pärnu (southern city of Estonia) and Estonian-Latvian boarder was flawd and and must therefore be anulled due to the fact that Natura assessment was not properly carried out[100]. To specify, the sections 4A, 4H and 3A of the county plan were annulled (please see Annex 4 – RAIL BALTICA ROUTE OPTIONS: SECTIONS 3A, 4A AND 4H (anulled)).

This case is special due to the fact that the RB is part of the EU TEN-T network and belongs to North Sea-Baltic transport corridor which connects Finland, Estonia, Latvia, Lithuania, Poland, Germany, Nederlands and Belgium[101]. In the aforemention case, the Court did not consider it to be necessary to ask a preliminary ruling from the CJEU and concluded on the basis of the existing CJEU case law[102] that the State failed to carry out an AA (only preliminary Natura assessment was conducted). Namely, the alignment of railway was close to a N2000 site and the preliminary assessment stated that even though the railway does not directly destroy the habitats of the protected birds in the bird area, it can be expected that the construction and operation of the railway may lead to disturbances that degrade the quality of habitats. Therefore, further analysis would have been necessary and in order to comply with the requirements of the Natura assessment, up-to-date, high-quality and reliable data on protected bird species in the Luitemaa bird area should have been collected using the best possible methods[103].

Interestingly enough, the study[104] by AECOM (international infrastructure consulting firm)

[99] Webpage of Rail Baltica Project. https://www.railbaltica.org/about-rail-baltica/ (21.04.2021).
[100] RKHKo 3-18-529/137, para 12.
[101] European Commission, Trans-European Transport Network (TEN-T). https://ec.europa.eu/transport/themes/infrastructure/ten-t_en (18.04.2021).
[102] C-127/02, *Waddenzee*, pp. 44-45, 52-54, 59, 61.; EC notice (2018), para 4.5.2.; CJEU 26.04.2017 C-142/16, *Commission v Germany*, para 29., ECLI:EU:C:2017:301.; C-323/17, *People Over Wind*, para 35-37.; CJEU 17.04.2018 C-441/17, *Commission v Poland*, para 114., ECLI:EU:C:2018:255.; C-43/10, *Nomarchiaki and Others*, para 115.; CJEU 07.11.2018 C-461/17, *Brian Holohan et al v An Bord Pleanála*, para 39-40., ECLI:EU:C:2018:883.
[103] RKHKo 19.05.2020, para 27.
[104] AECOM. Rail Baltica Final Report, 2011. https://www.railbaltica.org/wp-content/uploads/2017/05/AECOM_Final_Report_Volume_I.pdf (21.04.2021).

published already in 2011 highlighted that RB has significant impact on N2000 sites and a rather high probability exists that compensatory measures will have to be foreseen and implemented, e.g. restoration of similar habitat in another site and implementation of additional protection of management measures. The preferred route had 10 crossings of N2000 sites and 22 N2000 sites were situated nearby (less than 1 km). In addition, this study displays that there was very little data gathered about the protected species and habitats on the preferred route and in most of the areas, there was no data available at the time study was published. Although the preferred route of RB passes through mainly agricultural and forest land, it also passes through a number of N2000 sites and this will have an effect on the planning process. The study concluded that it is not anticipated that impact on N2000 sites will present a major problem to the implementation of RB. However, AECOM pointed out though that a full EIA, including Natura assessment will have to be carried out as part of the future project development.[105]

This case is notable because it demonstrates the shortcomings of integrating the EU biodiversity policy into other policies in as early stage as possible. To illustrate: in this case, three different county plans were initiated in 2012 due to the fact that National Planning Act did not at that time recognize a possibility to initiate a national designated spatial plan (which would have covered the whole RB in Estonia). In 2015, the legislation changed and now it is possible to plan and carry out the SEA and the EIA in the total lenght of the railway track in the territory of Estonia (approximately 213 km). In the current case, however, three different procedures (county plans) were carried out in Estonia. Although national designated spatial plan facilitates to execute a project that stays within the boarders of Estonia, the question of how to plan and implement projects that have wider cross-boarder impact, remains. Those kind of projects should be planned and carried out in the EU level in coherent way. However, in this case, Estonia, Latvia, Lithuania and Poland have conducted spatial planning on the Rail Baltica railway corridor separately and therefore all those countries have been and will remain in different time-schedules in context of planning, carrying out the SEA and the EIA, designing the project and sub-projects and constructing infrastructure.

Furthermore, in cases where a project or development, which in addition is a part of EU-wide development plan such as TEN-T, is put on hold in one of the Member State, this might have serious consequences to other related ongoing projects in neighbouring countries and therefore also to the EU-wide policy priorities. In worst case cenario, it is possible that the whole project alignment should be changed drastically in one Member State in a way that affects the alignment

[105] AECOM. Rail Baltica Final Report, pp. 178-179, 188-191, 214-216, 327.

of the project in neighbouring Memeber States. For example, the previously mentioned RB feasibility study analyzed and compared the preferred route (red route in Annex 5, which is under development) with other options (green, yellow and orange) that differ significantly from the preferred alignment (please see Annex 5 – RAIL BALTICA ALTERNATIVE ROUTE OPTIONS). The RB development has not been put in hold in Estonia though: the local authorities are proceeding with designing and construction activites on the preferred route of the railway track. Same applies to other Member States who are also continuing developing and carrying out projects on the TEN-T raiway corridor associated to the RB. Therefore, and in the event that an AA in relation to the county plan in the section linking Pärnu and Estonian-Latvian border is properly carried out, one could doubt that strategic alternatives will be considered on other routes which were presented in AECOM study in 2011. In addition, there seems to be little room for amending county plan due to the geobiographical limitations of alignment of raiway corridor which stretches between coastline of the Baltic Sea and N2000 sites (please see Annex 4 – RAIL BALTICA ROUTE OPTIONS: SECTIONS 3A, 4A AND 4H (anulled)).

As a general rule, the AA must be carried out within development of a plan or a project if there is even a slight possibility of potential significant adverse impact on N2000 site. In case C-127/02, *Waddenzee*, the CJEU held that also activities which have been carried out periodically for several years but for which a license is granted annually for a limited period, each license should be considered, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive[106]. This means that in deciding whether or not to carry out an AA, competent authorities have narrow margin of discretion due to precautionary principle.

In case 3-17-1739/80, *Hellenurme dam,* the dispute over the special use of water permit took place in Estonia. The owner of the powerplant and a watermill on the Hellenurme dam, which operates since 2002 as a museum and where no electricity is generated, requested a special use of water permit from the Estonian Environmental Board (EEB). The dam is on Elva River which is a N2000 site since 08.01.2006[107] for the protection of the habitat type listed in Annex I to the Habitats Directive: rivers and streams (3260) and for the protection of the habitats *Cobitis taenia* and *Unio crassus*. Therefore, the Elva River should be, once included in the list of sites of Community importance, managed under the provisions set out in Article 6 of the Habitats Directive. The EEB requested the project promoter to carry out full Natura assessment, i.e. AA, but the owner of the powerplant and a watermill filed a claim to court declaring that this

[106] C-127/02, *Waddenzee*, para 28.
[107] VVm 15.12.2005 No 311 „Hoiualade kaitse alla võtmine Valga maakonnas“ - RT I 2006, 2, 4.

requirement is not proportional. The Supreme Court of Estonia held in this case that the promoter of a project must be released from the obligation of carrying out a full EIA, including AA. The Court explained that the EEB cannot include the requirement of assessing the impact of water impoundment to N2000 site as the water has been already impounded, including the period prior to the formation of the N2000 site.

The Supreme Court of Estonia argued that as the power plant's turbine dates back to the 1950s and was put back into operation in 2005; the working mill equipment dates back to 1932–1933 and the dam together with the dam lake already existed in 19th century and the whole complex is under heritage protection together with the manor ensemble, this activity on the Elva River constitutes as continuing activity in which case Article 6 of the Habitats Directive does not apply. The Court did not consider it to be necessary to ask a preliminary ruling from the CJEU. The ruling was based of the existing CJEU case law[108] and concluded that carrying out and financing an EIA (and AA) should be the responsibility of the administrative body (the EEB). In addition, the Court explained that heritage protection interests can, in principle, overpower environmental protection objectives and a competent authority may allow exception according to the Article 6(4) of the Habitats Directive.[109]

By this ruling, the Supreme Court of Estonia seems to have departed from the strict interpretation of the Natura assessment, whereas Natura assessment should at all times be observed seperatley from EIA. In addition, this ruling contradicts with the principle of obligation to compensate, i.e. incurring the costs related to environmental use and environmental disturbances must be borne by the environmental user. Environmental Liability Act of Estonia clearly stipulates that costs related to the prevention or remedying of environmental damage will be borne by the person who caused damage and these costs include the costs of identifying, preventing and remedying environmental damage and a threat of damage, including the costs of assessing alternative measures[110]. It also seems peculiar that

[108] CJEU 09.09.2020 C-254/19, *Friends of the Irish Environment Ltd v An Bord Pleanála*, para 28-30., ECLI:EU:C:2020.; C-127/02, *Waddenzee*, para 25-29.; CJEU 29.07.2019 C-411/17, *Inter-Environnement Wallonie ASBL ja Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres*, para 127-128., ECLI:EU:C:2019:622.; CJEU 07.11.2018 C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu v College van gedeputeerde staten van Limburg and College van gedeputeerde staten van Gelderland*, para 78-80, 85., ECLI:EU:C:2018:882.; CJEU 14.01.2010 C-226/08, *Stadt Papenburg v Bundesrepublik Deutschland*, para 47-51., ECLI:EU:C:2010:10.; C-209/04, *Commission v Austria*, para 56 and there cited cases.; CJEU 07.01.2004 C-201/02, *Wells*, ECLI:EU:C:2004:12.; C-418/04, *Commission v Ireland*, para 154, 245.; C-404/09, *Commission v Spain*, para 125-126, 135.; CJEU 14.01.2016 C-399/14, *Grüne Liga Sachsen eV and Others v Freistaat Sachsen*, para 43, 51-55, 58-61, ECLI:EU:C:2016:10.; CJEU 21.07.2016 C-387/15 and C-388/15, *Hilde Orleans and Others v Vlaams Gewest*, para 33., ECLI:EU:C:2016:583.; CJEU 14.10.2010 C-535/07, *Commission v Austria*, para 59., ECLI:EU:C:2010:602.

[109] RKHKo 3-17-1739/80, para 14, 17, 25, 32-34.

[110] Environmental Liability Act, sec 25, sec 26 subsec 1.

when it is ultimately established that a project falls within the concept of „plan“ or „project“ within the meaning of Article 6(3) of the Habitats Directive, the question of who is obliged to incur costs of the AA and all necessary measures, could be raised at all. Furthermore, the ruling in case of *Hellenurme dam* seems to be quite an opposite of what the CJEU held in case C-258/11, *Sweetman and Others,* where the CJEU explained that Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive and in order to maintain the integrity of a N2000 site, the competent national authorities cannot authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites that host priority natural habitat types.

The main argument of the Supreme Court of Estonia seems to rely on the 2010 case C-226/08, *Stadt Papenburg*, where the CJEU held that ongoing maintenance works in respect of the navigable channels of estuaries can be regarded as constituting a single operation. The Court also referred to the 2006 case C-209/04, *Commission v Austria*, where the CJEU had previously held that a construction of a carriageway for which building permit was given prior to the expiry of the time-limit for transposition of the Habitats Directive is not subject to AA. By analogy, the Supreme Court of Estonia concluded that the EEB should take a dam on the Elva River as a single operation for which the building permit was given prior to the expiry of the time-limit for transposition of the Habitats Directive and if the purpose and nature of water use remains the same (no extra impact to N2000 site is imposed compared to the time N2000 site was established) an AA is not necessary to assess the implication of a dam to river water regime.[111]

In a case C-256/98, *Commission v France*, the CJEU held that in the context of the Habitats Directive, no project could be excluded of proper enivironmental assessment by the argument of its low cost (by implying its irrelevant impact) or its purpose, as this would exceed the discretion of a Member State. In addition, the CJEU pointed out that EIA must be carried out with consideration of the site's conservation objectives according to Article 6(3) of the Habitats Directive, which requires the assessment to determine the environmental impact of development plan in the light of the site's particular conservation objectives[112].

With regard to the analogy used by the Supreme Court of Estonia in case of *Hellenurme dam*, it is doubtful that the maintenance works of channels and a road project that went through almost 10 years of preliminaty assessments and planning procedures can be compared to a small

[111] RKHKo 3-17-1739/80, para 18, 19.; C-226/08, *Stadt Papenburg,* para 47-51 and the judgement.; C-209/04, *Commission v Austria*, para 56.
[112] C-256/98, *Commission v France*, para 39 and 40.

dam on a river which changes water regime of a N2000 site (the Elva River) completely and has no importance whatsoever with regard to electricity generation. To point out, a total of more than 1 000 dams have been counted on Estonian rivers and about 40 percent of them have a significant impact on the state of fish, fauna and flora[113]. As a large proportion of dams have signifaicant effect on N2000 sites as well, AA must be carried out properly as Article 6 of the Habitats Directive sets forth but if proper impelementation of Article 6 is neglected, the objectives set forth by the Habitats Directive cannot be achieved. Considering the existing situation in Estonia, there seems to be two options in relation to dams on rivers. First option would be that by mitigation measures (e.g. bypass for fishes and alternative would be demolition of a dam or part of it) could ease the impact on N2000 sites and the second option is to carry out appropriate derogation procedure whereby either the opinion of the EC is requested or the EC would be informed of compensatory measures taken. With regard to derogation procedure the whole context of a particular river must be taken into consideration as it would not make any sense to carry out derogation procedure in case of a downstream dam and at the same time mitigate the impacts of upstream dams.

To remind, the CJEU has explained in case C-209/04, *Commission v Austria*, that the expiry of the time-limit for transposition of the Habitats Directive as a formal criteria is not the only one which accords with the principle of legal certainty, as in this particular case the relevant procedures were already complex at national level and it would have been too cumbersome and time-consuming to meet the new criteria of the AA under the Habitats Directive[114]. Even more strange is that in case of *Hellenurme dam*, the case law cited dates back to time when an older version of the EIA Directive [115] was in force and where the definition of a 'plan' or 'project' and Natura assessment was significantly different as opposed to the new and amended EIA Directive[116]. In addition, the EIA Directive was amended to the very purpose of elaborating on the relations of the EIA Directive, the Habitats Directive and the Birds Directive and in order to specify and scrutinise the screening and AA procedures[117].

Even more astonishing is that the Supreme Court of Estonia emphasizes that the position taken

[113] Ministry of the Environment. Dams in Estonia. https://www.envir.ee/et/eesmargid-tegevused/kalandus/paisud-eestis (26.04.2021).
[114] C-209/04, *Commission v Austria*, para 56, 57, 62.
[115] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment - J L 175, 5.7.1985, pp. 40–48. http://data.europa.eu/eli/dir/1985/337/oj (15.04.2021).
[116] C-226/08, *Stadt Papenburg*, para 38.
[117] European Commission. Informal consolidated version of the EIA Directive. https://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf (23.04.2021).

in case of *Hellenurme dam* where a project was deemed to be an ongoing operation as regards to special circumstances may not be transferable to other permits and activities and in general, periodic permits should be considered as permits for new activities[118].Therefore, several questions rise: why the Court did not consider it to be necessary to ask a preliminary ruling from the CJEU if the case was a special one; how would it be possible to carry out an AA on other Estonian rivers where dams exist; would there be a viable option of fulfilling the objectives under the Habitats Directive in similar cases?

It seems evident that in case of *Hellenurme dam* the Supreme Court of Estonia considered the interests of private enterprise and cultural considerations to outweigh the objectives of the Habitats Directive. However, this approach seems to contradict not only the principle according to which a promoter of a plan or a projects must always incur the costs of using the public resource - the environment - but also the EU legislation, the case-law of the CJEU and the most recent guidance materials issued by the EC. To add, the ultimate purpose of weighing cultural considerations against public interest pursued by the Habitats Directive would have been possible also if a N2000 derogation procedure is followed in a proper manner. The author of this paper do not agree with aforementioned approach of the Supreme Court of Estonia in case 3-17-1739/80, *Hellenurme dam*, and considers this ruling paving the way for further improper implementation of Natura assessment and improper derogation procedures.

The statement of the Supreme Court of Estonia in case 3-17-1739/80 of *Hellenurme dam* that the analogy of this case might not be used seems to refer to a similar case, *Linnamäe dam*, where currently a heated debate is being held. In Northen Estonia, one particular historical dam restricts the fulfilling of objectives under the Habitats Directive. In this case a private enterprise applied a new special use of water permit for electricity production on the Jägala River. The Jägala River is N2000 site since 10.07.2005 for the protection of the habitat type listed in Annex I to the Habitats Directive: rivers and streams (3260) and common species listed in Annex II: *Cottus gobio*, *Lampetra fluviatilis* and *Salmo salar*[119]. Therefore, the Jägala River should, once included in the list of sites of Community importance, managed under the provisions set out in Article 6 of the Habitats Directive.

The enterpreneur claims in this case that the conditions in that particular area have not worsened compared to the time N2000 site was established. In this case, the Harju County Court as the

[118] RKHKo 3-17-1739/80, para 19.3.
[119] VVm 16.06.2005 No 144 „Hoiualade kaitse alla võtmine Harju maakonnas“ - RT I 2005, 38, 300.

first instace court ruled on 27.07.2020 in a case 3-19-1697/78, *Linnamäe dam*, that the Estonian Environmental Board (EEB) has to issue a proper administrative act regarding special use of water permit[120]. However, this case took an interesting turn as the dam (renovated in 2002) was taken under heritage protection as an immovable monument[121] by 18.12.2020 directive[122] of the Minister of Culture. As a result, the EEB cannot oblige the owner of the dam to demolish this immovamble monument, on one hand, but on the other, the Ministry of Culture has not initiated a derogation procedure under the Article 6(4) of the Habitats Directive in which the opinion of the EC should be obtained, but seems to be consent with the *status quo*. Interestingly, the dam itself was built in 2002 and is a concrete construction which seems to have least value in the viewpoint of heritage protection (compared to the hydroelectric generating station nearby built in the beginning of 20th century and which is not a obstacle to fishes), but at the same time, the dam is the only and by far the largest concern with regard to achieving the objectives of the Habitats Directive. It is most peculiar how the interests of a private enterprise in this case are protected at as high level as this. It only remains to hope that some national ENGO issue a proper claim to the EC, since the Habitats Directive is definitely not being followed properly in the *Linnamäe dam* case.

The Tartu Administrative Court, on the other hand, held on 20.01.2015 in a case 3-14-51675 that the EEB had every right to require the EIA, including AA of N2000 site, in the course of processing special use of water permit involving a dam of a hydroelectric power station on the Kunda River. The Kunda River is N2000 site since 01.10.2004[123] for the protection of the habitat type listed in Annex I to the Habitats Directive: rivers and streams (3260) and common species listed in Annex II (*Cottus gobio*), the protection of the habitats *Cobitis taenia*, *Salmo salar* and *Unio crassus*. Therefore, the Kunda River is, once included in the list of sites of Community importance, managed under the provisions set out in Article 6 of the Habitats Directive. The Court held that if the proposed activity may jeopardize the conservation objectives of the Natura site, an EIA, including an AA, must be initiated. In preliminary assessment, *inter alia*, the following considerations should be taken into account: reduction of the habitat area of the habitat type or species targeted by the site; increasing fragmentation; impact on site integrity; increased disturbance; reduction in the number or population density

[120] HMKo 3-19-1697/78.
[121] National Registry of Cultural Monument. Registry no 30418 „Linnamäe hüdroelektrijaama pais". https://register.muinas.ee/public.php?menuID=monument&action=view&id=30418&lang=en (24.04.2021).
[122] KuMm 18.12.2020 No 190 „Asulakohtade ja muistsete põllujäänuste kultuurimälestiseks tunnistamine ning ühise kaitsevööndi kehtestamine" - RT III, 22.12.2020, 1.
[123] VVm 15.09.2005 No 237 „Hoiualade kaitse alla võtmine Lääne-Viru maakonnas" - RT I 2005, 51, 404.

of species; changes in water regime or water quality; duration of effect; habitat resilience; cumulative effects, taking into account other existing or planned projects in the region. Furthermore, the Court held that the need for an EIA must be considered in each application for a permit for the special use of water, not only when altering the activity.[124] The author of this paper fully agrees with the approach taken in a case 3-14-51675 by the Tartu Administrative Court.

In the light of previously mentioned cases in the Estonian case-law, the courts seem to be of the opinion that when the purpose of the special use of water permit is to generate hydroelectricity, an EIA and if relevant, also an AA must be carried out by the promoter of the project, but when the dam is operating for heritage purposes (e.g. museum), an EIA should be carried out by the State (despite the operator of the dam being a private enterprise). However, the Habitats Directive Article 6 does not distinguish the projects by the purposes. Estonian domestic legislation, as well as general principles applied both in the EU and Estonian legislation and the EC guidance materials place the obligation of incurring the costs of meeting the requirements of the preserving obligation, including those that are related to environmental use and environmental disturbances, on the environmental user[125]. In addition, the CJEU case-law clearly indicates that proper environmental impacts must be assessed at all times according to Article 6(3) of the Habitats Directive in the light of the site's particular conservation objectives, regardless the the purpose of the project.

As to the continuing activity, the CJEU has ruled in case C-72/95, *Aannemersbedrijf P.K*, that the projects that include modifications to activities such as relocation, reinforcement or widening of the dyke, replacement of a dyke by constructing a new dyke in situ, whether or not the new dyke is stronger or wider than the old one, or a combination of such works, these works constitute a project whereby the EIA must be carried out in order to assess projects' impact on the environment and should therefore be made subject to an assessment with regard to its effects[126]. In the same case, the CJEU held than when the Member State establishes the criteria or thresholds that particular projects are exempted in advance from the requirement of an EIA, exceeds the limits of discretion of a Member State, unless projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

[124] TrtHKo 3-14-51675/16, para 12, 22.
[125] EC notice (2018), p. 70.; Constitution of the Republic of Estonia, sec 53.; Kask, O., Triipan, M. *Op cit*, para 14.; Environmental Liability Act, sec 25, sec 26 subsec 1.
[126] CJEU 24.10.1996 C-72/95, *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland*, para 42, 54, 55 and there cited cases and the judgement., ECLI:EU:C:1996:404.

In a case C-538/09, *Commission v Kingdom of Belgium*, the CJEU held that Article 6(3) does not authorise a Member State to enact national legislation, which allows the EIA obligation for a development plan to benefit from a general waiver because of the low costs entailed or the particular type of work planned. The Court added that systematically exempting works and development programmes and projects, which are subject to a declaratory scheme from the procedure for assessing their implications for a site, a Member State fails to fulfil its obligations under Article 6(3) of the Habitats Directive[127]. In a case C-226/08, *Stadt Papenburg*, the CJEU held[128] that Articles 6(3) and 6(4) of the Habitats Directive must be interpreted as meaning that ongoing maintenance works in respect of the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive, must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of SCIs. A subsidy granted by a public authority for measures taken in order to compensate for damage to a N2000 site can be considered also as state aid, should it be granted to an undertaking established in N2000 site, designated before or after the establishment of the undertaking[129].

In relation to foregoing activities (already open mines) and carrying out the AA, the CJEU held in cases C-388/05, *Commission v Italy*, and C-404/09, *Commission v Spain*, that by failing to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which that area was established, Member States failed to fulfil their obligations under Article 4(4) of the Birds Directive and Article 6(2) of the Habitats Directive[130]. In addition and in the light of the foregoing considerations, in a case C-254/19, *Friends of the Irish Environment*, the CJEU held that the 10-year period originally set for carrying out a project for the construction of a liquefied natural gas regasification terminal constitutes as an agreement of a project under Article 6(3) of the Habitats Directive and as the original consent for that project lapsed, this consent ceased to have legal effect[131]. In a case C-50/09, *European Commission v Ireland*, the CJEU held that demolition works come within the

[127] CJEU 26.05.2011 C-538/09,*Commission v Kingdom of Belgium*, para 43 and there cited cases., ECLI:EU:C:2011:349.
[128] C-226/08, *Stadt Papenburg*, para 35-51 and there cited cases.
[129] Van Hoorick, G. Compensatory Measures in European Nature Conservation Law. Utrecht Law Review, 10(2), May 2014, p. 169. http://doi.org/10.18352/ulr.276 (12.04.2021).
[130] CJEU 20.09.2007 C-388/05, *Commission v Italy*, para 29., ECLI:EU:C:2007:533.; C-404/09, *Commission v Spain*, para 97 and judgement.
[131] C-254/19, *Friends of the Irish Environment*, para 48.

scope of Directive 85/337[132] (older version of the EIA Directive) and, in that respect, may constitute a project, whereby a Member State must adopt all measures necessary to ensure that project does not have a significant effect on the environment within the meaning of Article 1(2) in Directive 85/337[133]. In addition, in numerous cases the CJEU has held that the Member States must implement the Directive 85/337 in a manner which fully corresponds to its requirements, i.e. by carrying out appropriate assessment in regard to the objective to assess potential effects on the environment and by doing so, development consent is given on the basis of comprehensive and extensive information in regard to assessing the effects on the environment[134].

To be clear, only in very rare circumstances it is possible to make an exemption of carrying out appropriate environmental assessment. The EIA Directive Article 2(4) excludes projects from the requirement to conduct EIA if a Member State can demonstrante that the alleged risk to security of the electricity supply is reasonably probable and that that project is sufficiently urgent[135]. These rare circumstances are non-existent in cases *Hellenurme dam* and *Linnamäe dam*, though.

In the light of aforementioned extensive case-law by the CJEU, the ruling of the Supreme Court of Estonia in case *Hellenurme dam* seems odd, to put it mildly, since any authorisation of an existing project in N2000 site should be, in principle, assessed thoroughly and according to the legislation in place. This means that the Habitats Directive Article 6(3) should have its full effect in any case and should be applied also to the project or a plan with ongoing activity. This is supported by the fact that opposite interpretation would result excluding certain type of plans or projects from the obligation to go through appropriate environmental assessment, including Natura assessment, which is aligned neither with the EU legislation and the EC guidances nor the case-law of the CJEU.

The European Commission has issued an evaluation study in 2013 to investigate how the AA

[132] Council Directive 85/337/EEC, pp. 40–48.
[133] CJEU C-50/09, *European Commission v Ireland*, para 97-101., ECLI:EU:C:2011:109.
[134] CJEA 19.09.2000 C-287/98, *Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster*, para 52., EU:C:2000:468.; CJEU 23.11.2006 C-486/04, *Commission v Italy*, para 36., EU:C:2006:732.; CJEU 03.07.2008 C-215/06, *Commission v Ireland*, para 49., EU:C:2008:380.; CJEU 07.08.2018 C-329/17, *Gerhard Prenninger and Others v Oberösterreichische Landesregierung and Netz Oberösterreich GmbH*, para 35., ECLI:EU:C:2018:640.
[135] C-411/17, *Inter-Environnement Wallonie ASBL et al*, para 102.

is used in the Member States[136] that determined very inconsistent use of the AA. The study revealed that there were more than 70 different AA approaches in practical use by either national or regional legislation across the EU[137]. In 2017 report of the European Court of Auditors it was highlighted that substantial deficies exist in the Member States such as France, Germany, Spain, Poland and Romania of adequately assessing projects that have impact on N2000 sites[138].

In the light of the EC guidance material and the CJEU case-law, it becomes evident that the meaning of a project or a plan must be intepreted broadly, but carrying out apropriate assessment under the Habitats Directive Article 6 must be intepreted narrowly, as the focus should be determining the impacts on specific site in relation with specific conservation objectives. This means that competent authorities can give assent to the plan or a project only after having made sure that it will not adversely affect the integrity of the site. The concept of narrow approach also seems to apply for foregoing projects because previously given consents cease to have their legal effect and these projects must be assessed fully in the light of the criteria established in the Habritats Directive Article 6. Furthermore, the obligation under the Habitats Directive Article 6(3) directs Memeber States to scrutinise environmental use in order to minimise adverse impacts on it and to promote sustainable development. This objective is most effectively achieved in case the costs of meeting the requirements of the preserving obligation, including of those that are related to environmental use and environmental disturbances, are put on the user of the environment.

To conclude, the Estonian case-law seems to leave more room for the discreationary right of competent authorities and steers them to take other public interests such as cultural heritage into account when managing the N2000 sites. In the case of *Hellenurme dam*, the Supreme Court of Estonia went too far when excluding "an ongoing activity" (historical dam on river that is a N2000 site) from the obligation of the AA: the proponent of a project could not be relased of such obligation according to the EU and domestic legislation in force and according to extensive CJEU case-law which has been very strict in that matter. In addition, in the case of *Hellenurme dam*, the Supreme Court of Estonia basically lifted the obligation to compensate, i.e. incurring the costs related to environmental use and environmental disturbances, from the

[136] Sundseth, K., Roth, P. Study on Evaluating and Improving the Article 6.3 Permit Procedure for Natura 2000 Sites. European Commission, 2013, p. 63. http://ec.europa.eu/environment/nature/natura2000/management/docs/AA_final_analysis.pdf (13.04.2021).
[137] *Ibid.*, p. 17.
[138] European Court of Auditors. Special Report No 1: More efforts needed to implement the Natura 2000 network to its full potential, 2017, p. 9. https://www.eca.europa.eu/Lists/ECADocuments/SR17_1/SR_NATURA_2000_EN.pdf (26.04.2021).

enterprise which owned the dam on the river in N2000 site, and put this obligation to the State. Referring to the aforementioned 2013 study by the EC, the case of *Hellenurme dam* seems to be another example of a project with adverse impact on N2000 site that escapes through a „loophole“ as it is not considered to be necessary to be included in the EIA[139] and thus paving the way for improper Natura assessment.

Moving forward with derogation procedure stipulated in Article 6 of the Habitats Directive, and only when an AA is properly commenced whereby adverse impact on N2000 site is determined and the absence of alternative solutions is evident, allowing plan or a project could be considered only if imperative reasons of overriding public interest exist and integrity of N2000 site is ensured. The Habitats Directive Article 6(3) implies that a planning procedure or a public authorisation process must be established in order to carry out projects or plans that have negative impact on N2000 network sites, by saying that, if appropriate, opinion of the general public should be obtained before giving a consent to such project.

In the next subparagraph, definitions of „imperative reasons“ and „overriding public interest“ are unfolded and clarified in the light of the EC opinions, the CJEU case-law and relevant academic literature, whereas the means of ensuring the integrity of N2000 sites are elaborated in detail in subchapter 2.3 of this paper.

2.2 Imperative Reasons of Overriding Public Interest

The first provison of Article 6(4) of the Habitats Directive enables a Member State to give a consent to a plan or a project for imperative reasons, including those of a social or economic nature of overriding public interest, despite the negative assessment of the implications for the site, due to the absence of alternatives. In this case, the Member State is obliged to take all compensatory measures necessary to ensure the overall coherence of N2000, as well as to inform the EC of the measures adopted.

The second provision of Article 6(4) of the Habitats Directive stipulates that in case the site concerned hosts a priority natural habitat type or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, after receiving an opinion from

[139] Sundseth, K., Roth, P. *Op cit*, pp. 55-56.

the EC, to other imperative reasons of overriding public interest. The EC has explained that although the opinion of the EC is not binding by nature, legal action may be taken in case proper procedures stipulated in Article 6(4) are not followed[140].

General rule in interpretating Article 6(4) is that the interpretation must be narrow in order to fulful biodiversity objectives set forth in Article 2 of the Habitats Directive. This means that derogation procedure should be a rare exception, not the norm. In this regard, the proper implementation of Article 6(3), i.e. carrying out proper AA of plans and projects that include risks of adverse effects on the integrity of N2000 sites (SACs, SPAs and SCIs) is an essential prerequisite for the correct implementation of derogation procedure[141].Therefore, the general principle is that the projects and plans, which have adverse impact on N2000 sites, are not allowed.

In order to clarify the criteria of imperative reasons of overriding public interest for alternative solutions and the EC opinion in this matter, the EC issued a guidance document in 2007 on Article 6(4) of the Habitats Directive[142]. Considering that the Habitats Directive itself does not explain the concepts of „imperative reasons" and „overriding public interest" and interpretation of those concepts varied from country to country, it was a logical step in this regard. The logic of the EC 2007 guidance document and the aforementioned principles are followed also in the Estonian domestic legislation[143].

It is interesting to note that the concept of „service of general economic interest" is also recognized in Article 106(2) of the TFEU which at EU level is understood as activities which deliver outcomes in the overall public good but would not be supplied without public intervention[144]. In general, the concept „imperative reasons of overriding public interest" should contain only those public interests, including those of social and economic nature, and plans or projects that are indispensable[145]. It seems that public interest can be overriding only if there

[140] European Commission. Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, 2007, p. 24. https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf (12.04.2021).
[141] C-127/02, *Waddenzee*, para 57, 61 and there cited case-law.; CJEU 20.10.2005 C-6/04, *Commission v United Kingdom*, para 54 and there cited case-law., ECLI:EU:C:2005:626.
[142] EC guidance document (2007).
[143] EIA Act sec 29, 45.; Nature Conservation Act, sec 70^1 – RT I, 06.05.2020, 17.
[144] European Commission 20.11.2011 COM(2011) 900, A Quality Framework for Services of General Interest in Europe, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Commitee and the Commitee of the Regions, p. 3. https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0900_/com_com(2011)0900_en.pdf (12.04.2021).
[145] EC notice (2018), pp. 58, 59.; Habitats Directive Art 6(4).

exists a long-term interest that brings benefits for the society for long period and it therefore outweights long-term conservation interests protected by the Habitats Directive[146].

With a few exceptions, both the EC and the CJEU have been very consistant in scutinizing the narrow implementation of Articles 6(3) and 6(4) of the Habitats Directive and in demanding a proper AA to be carried out before the commence of implementation of a plan or a project. The definition of „imperative reasons of overriding public interest" has been tested in practice and, as will be demonstrated in the following cases, the reasons should be substantial. According to the EC practice up until now, there have been 25 cases where the EC has allowed exceptions under the Habitats Directive Article 6(4), last five of them being as follows[147]:

Case	Imperative reasons of overriding public interest	Application	Decision
River Danube[148]	a) Objective of national and European transport policy: deepening the River Danube between Straubing and Vilshofen which is part of a priority project no 18 „Waterway axis Rhine/Meuse-Main-Danube"[149] and is of high economic interest for Europe. b) Better connectivity for inland ports: the project will improve navigation conditions in the project area when water levels in the River Danube are low as Straubing-Vilshofen being a navigation bottleneck. c) Safety and ease of navigation: reduction of frequency of accidents[150]. d) Predicted increase in freight transport. e) The project forms part of the national implementation of the European Union Strategy for the Danube Region[151], which, among other things, calls for the removal of existing	05.01.2018	19.11.2019

[146] EC notice (2018), p. 59.
[147] European Commission Opinions relevant to Article 6 (4) of the Habitats Directive. https://ec.europa.eu/environment/nature/natura2000/management/opinion_en.htm (24.04.2021).
[148] European Commission 19.11.2019 opinion C(2019) 8090, *River Danube*. https://ec.europa.eu/environment/nature/natura2000/management/docs/C-2019-8090-EN.pdf (12.04.2021).
[149] Under the regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU Text with EEA relevance - OJ L 348, 20.12.2013, pp. 1–128. http://data.europa.eu/eli/reg/2013/1315/oj (12.04.2021) - the Danube federal waterway forms part of the core network of the European TEN-T Network (part of a priority Project no 18). https://ec.europa.eu/inea/en/ten-t/ten-t-projects/projects-by-priority-project/priority-project-18 (12.04.2021).
[150] EC opinion, *River Danube*, p. 6, para 2.4. sub-para c.
[151] European Commission 08.12.2010 COM(2010)715, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Union Strategy for the Danube Region. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0715&from=EN (12.04.2021).

	navigability bottlenecks on rivers.		
Railway Bad Cannstatt [152]	The project improves regional and long-distance passenger transport services, creating and strengthening cross-regional links to other development areas.	03.04.2017.	30.01.2018
B 173[153]	The planned widening of the B 173 aims to improve the east-west link to other business centres, traffic is to be diverted away from the municipalities of Trieb and Hochstadt am Main and widening of the B 173 forms part of the 'German Unification' transport project.	09.05.2014	18.12.2015
River Main[154]	Economic importance of the River Main functioning as a cross-border traffic route for goods connecting Rotterdam (NL) and Konstanza (RO). The River Main is part of the TEN-T network and is the only inland waterway connecting several Memberstates with the south-east of Europe. This part of the River Main creates a bottleneck of 30 km where ships are still limited in their dimension in width and deep.	21.03.2012	5.04.2013
B 252/B 62[155]	The National Road B 252 is an important north-south connection between the regions Paderborn-Korbach and Marburg-Gießen. After completion of the project, traffic will decrease between 68% and 94% in the municipalities concerned.	12.09.2011	29.05.2012

Firstly, it should be noted that it takes quite a long time for the the EC to issue its opinion: the average duration of obtaining the opinion of the EC is approximately one year; in the *River Danube* case, the opinion was issued almost 2 years after the request. In comparison, the Estonian national legislation sets forth that a response to a memorandum or request for explanation shall be provided by a competent authority without undue delay, but not later than within 30 calendar days after the date of registration thereof and only under special circumstances, the term may be extended to up to two months depending on the complexity of the response[156]. This rule of law is, in general, followed in Estonia also in practice. Although

[152] European Commission 30.01.2018 opinion C(2018) 466, *Railway Bad Cannstatt*. https://ec.europa.eu/environment/nature/natura2000/management/docs/C_2018_466_F1_COMMISSION_OPINION_EN_V5_P1_961037.pdf (12.04.2021).
[153] European Commission 18.12.2015 opinion C(2015) 9085, *B 173*. https://ec.europa.eu/environment/nature/natura2000/management/docs/C(2015)9085%20EN.pdf (12.04.2021).
[154] European Commission 05.04.2013 opinion C(2013) 1871, *River Main*. https://ec.europa.eu/environment/nature/natura2000/management/docs/Commission%20Opinion%20Main%20EN%20SEC-2013-1871.pdf (12.04.2021).
[155] European Commission 29.05.2012 opinion C(2012) 3392, *B 252/B 62*. https://ec.europa.eu/environment/nature/natura2000/management/docs/Commission%20Opinion%20adopted%20EN%20C-2012-3392.pdf (12.04.2021).
[156] Response to Memoranda and Requests for Explanations and Submission of Collective Proposals Act, sec 6 - RT I, 25.10.2016, 16.

the complexity of derogation procedure and related materials could be of considerable quantity, the avarage time of issuing an opinion by the EC exceeds all limits of rationale. Considering the fact that all necessary planning activities, including environmental assessment and relevant studies are by the time the opinion of the EC is requested, carried out by the Member State, a whole plan or a project is put on hold for an average time period of a year. Furthermore, it is not excluded that due to failure to issue an opinion, environmental damage takes place (e.g. in case of dams).

Secondly, it is evident that only a marginal porportion of projects or plans reach the EC for determination whether these plans or projects comply with the criteria of imperative reasons of overriding public interest, the projects being major infrastructure projects mainly. Although it would be interesting to further analyse whether this might be the result of EU scrutinising implementation of the Habitats Directive in EU funded projects, the author of this paper did not delve into this matter. It may be concluded though, that in cases where derogation procedure is properly followed, i.e. the AA has been carried out and the opinion of the EC has been requested, the EC seems to have less strict approach. For instance, in the opinion *River Danube,* the imperative reason of overriding public interest originated from the EU transport policy (TEN-T). By analogy, in the *Rail Baltica* case, one cannot rule out the possibility of requesting the opinion of the EC if adverese impact to N2000 sites cannot be avoided. However, in the cases of *Hellenurme dam* and *Linnamäe dam*[157], it is doubtful that these cases would ever reach the EC via derogation procedure as explained in subparagraph 2.3 in this paper.

Improper national case law however, might be at least one of the root causes, why the general objectives of the Habitats and Birds Directives are not met and some of the species and habitat types continue to decline or remain endangered[158]. To remind, a total of more than 1 000 dams are on Estonian rivers with about 400 of them have a significant impact on the state of fish, fauna and flora. Therefore one improper use of Habitats Directive Article 6 by the court could have immense impact to all species and habitats related to rivers. Due to the fact that Estonian case law is not translated into English nor is always the preliminary ruling from the CJEU requested, the limitation of purposeful scrutiny at the level of EU becomes evident. Therefore it makes sense to set a standand that all national case-law with regard to the management of

[157] HMKo 3-19-1697/78; RKHKo 3-17-1739/80.
[158] European Commission, Fitness Check of the EU Nature Legislation (2016), p. 87.; European Commission 20.05.2015 COM(2015) 219 final, Report from the Commission to the Council and the European Parliament, The State of Nature in the EU, Report on the status of and trends for habitat types and species covered by the Birds and Habitats Directives for the 2007-2012 period as required under Article 17 of the Habitats Directive and Article 12 of the Birds Directive, p. 19. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:219:FIN (26.04.2021).

N2000 must be translated and made available to the EC and to the CJEU.

It can be concluded on the basis of disclosed opinions of the EC that either (1) plans and projects developed throughout the EU are in general complying with the Habitats Directive and do not have adverse effect on N2000 sites; (2) the derogation clause laid down in Article 6(4) of the Habitats Directive is correctly implemented in the Member States or (3) it is not widely used after all and only little margin of cases reach the EC. If the last be the case, a question remains whether the Member States and competent authorities are following the Habitats Directive and derogation procedures adequately since there might be reason to worry that in reality, more projects and plans carried out throughout EU should reach the EC. The latter seems to apply also to Estonia. In addition, the inconsistency and rare application of derogation procedures are confirmed not only in academic literature but also by the EC on basis of its own statistics[159].

The CJEU has held that in general, only considerations of human health or public safety may be raised with regard to derogation clause. For example, in a case C-43/10[160], *Nomarchiaki and Others,* the CJEU held that irrigation and the supply of drinking water may constitute imperative reasons of overriding public interest. In the same case court concluded though, that irrigation itself cannot, in principle, qualify as a consideration relating to human health or public safety and thus be the argument for implementation of a project. In a case C-182/10, *Solvay and Others*, the CJEU held that a for a plan or a project to meet the criteria of imperative reasons of overriding public interest, it must be important enough to be weighed up against conservation objectives protected in the Habitats Directive. The CJEU further explained that these conditions can be considered only in exceptional circumstances and mere purpose of accommodating a management centre cannot be taken as an imperative reason of overriding public interest.[161]

The CJEU held in a case C-399/14, *Grüne Liga*, that although economic cost (e.g. cost of demolition) of the steps necessary to be taken can be taken into account in the review of alternatives, but these are not of equal importance to the objectives of conserving natural habitats and wild fauna and flora. It follows that the economic cost as an argument may not be the sole determining factor in the choice of seeking alternative solutions under Article 6(4) of the Habitats Directive.

To sum up, the CJEU case-law and the EC clearly indicate that the concepts of „imperative

[159] Möckel, S. The European ecological network "Natura 2000" and its derogation procedure to ensure compatibility with competing public interests. Nature Conservation, 23, 2017, p. 89. https://doi.org/10.3897/natureconservation.23.13603 (24.04.2021).; Sundseth, K., Roth, P. *Op cit*, p. 63.
[160] C-43/10, *Nomarchiaki and Others*, para 120-128.
[161] C-182/10, *Solvay and Others*, para 75, 76, 78.

reason(s)“ and „overriding public interest“ should be interpreted narrowly. It is evident that only those public interests that have long-lasting purposes, especially those related to human health or public safety, but also those of social and economic nature can fit under derogation procedure and therefore constitute as plans or projects carried out in light of imperative reasons and overriding public interest. However, in the EC practice, mainly large infrastructure projects (with the public service, economic, social and safety considerations) are the projects for which the official opinion of the EC is requested. However, it is unknown to the author of this paper, how many unofficial consultations are carried out between the Member States and the EC, how many derogations are being carried out by the Member States' competent authorities and how eager are the Member States informing the EC of derogation cases. Often, it takes more than one reason of other public interest to constitute the imperative reasons of orverruling public interest that exceeds the weight of conservation objective set by the Habitats Directive. Therefore “imperative reasons” is in plural purposefully.

After determining the existance of imperative reasons of overriding public interest, the Member State must take all compensatory measures necessary to ensure the overall coherence of N2000 and inform the EC of the measures adopted, according to the latter provision of Article 6(4) of the Habitats Directive. Compensatory measures must always be distinguished from the mitigation measures, as further elaborated in the next subchapter, in order to ensure that least damaging options to N2000 sites are selected and the spirit of the Habitats Directive is followed.

2.3 Distinction of Mitigation and Compensatory Measures

The framework for compensation obligations of the Member States is given in Articles 6(4) and 16(1) of the the Habitats Directive, whereby Member States must take compensatory measures which maintain favourable conservation status for protected species to ensure the coherence of N2000 in cases where plans or projects that have adverse impact on N2000 sites are allowed.

The term „compensatory measures“ is not defined in the Habitats Directive but an EC notice (2018) explains that in order to understand what constitutes a compensatory measures, the coherent approach to what constitutes mitigation measures is needed. According to the EC, mitigation measures are measures that have a purpose of minimizing or eliminating adverse impacts of a plan or a project to N2000 site in order to maintain the integrity of a site and these

measures should only be considered in the context of Article 6(3) of the Habitats Directive[162].

In the EC opinions[163], the following measures were regarded as mitigation measures: a railway line planned as a tunnel[164] and planning a viaduct[165] to minimize the surface area used of the N2000 site; building a bridge to reduce the impact to alluvial forests, keeping duration of the building activities as short as possible and utilising the existing industrial and forestry tracks as service roads;[166] building of noise barriers;[167] removal of temporary construction roads after completion of works;[168] construction of flyovers in order to channel salty water away; [169] building fundaments of a bridge above the ground-water level in order to maintain water regime and building anti-collision barriers for bats;[170] prohibiting construction at night;[171] prohibiting dredging activities during spawning times;[172] restricting building works during spawning and larval season to limit the negative impact on protected fish species; [173] postponing the felling of trees during the breeding season;[174] collecting and relocating of protected species[175] and setting speed limits for ships to reduce the intensity of their waves[176].

Compensatory measures, on the other hand, should be observed independently, as they are intended to maintain ecological coherence of the N2000 and to offset negative impacts of a plan or a project. Therefore, compensatory measures must be assessed and considered only in the context of Article 6(4) and not prior to it[177].

Clear distinction between mitigation and compensatory measures is vital in order to have a

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[162] EC notice (2018), p. 60.
[163] European Commission Opinions relevant to Article 6 (4) of the Habitats Directive. https://ec.europa.eu/environment/nature/natura2000/management/opinion_en.htm (12.04.2021).
[164] Opinion in *Railway Bad Cannstatt*, p. 4.
[165] European Commission 09.09.2014 opinion E/1795/2014, *TGV East*, p. 3. https://ec.europa.eu/environment/nature/natura2000/management/docs/Commission%20Opinion%20adopted%20EN%20C-2012-3392.pdf (12.04.2021).
[166] European Commission 03.12.2010 opinion C(2010) 8438, *Motorway A 49*, p. 4. https://ec.europa.eu/environment/nature/natura2000/management/docs/hessen_en.pdf (12.04.2021).
[167] Opinions in *B 252/B 62*, p. 4.; *Motorway A 49*, p. 4.
[168] Opinion in *Motorway A 49*, p. 4.
[169] Opinion in *B 173*, p. 5.
[170] European Commission 11.06.2010 opinion C(2010) 3674, *Motorway A 20*, p. 5. https://ec.europa.eu/environment/nature/natura2000/management/docs/a20_en.pdf (12.04.2021).
[171] *Ibid.*, p. 5.
[172] European Commission 06.12.2011 opinion C(2011) 9090, *River Elbe*, pp. 5-6. https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/1_EN_ACT_part1_v4[1].pdf (12.04.2021).
[173] Opinion in *River Danube*, pp. 7-8.
[174] Opinion in *River Main*, p. 4.
[175] European Commission 25.01.2011 opinion C(2011) 351, *Győr*, p. 5. https://ec.europa.eu/environment/nature/natura2000/management/docs/2_EN_ACT_part1_v4.pdf (12.04.2021).
[176] Opinion in *River Elbe*, p. 5.
[177] EC notice (2018), p. 60.

sound assessment of adverse effects of the plan or project, on one hand, and of the alternative solutions, on the other. Otherwise, a worse plan or project with strong compensatory measures could be preferred to a better alternative plan or project with weak compensatory measures. Therefore, compensatory measures should allow the implementation of plans or projects that escape appropriate Natura assessment obligations under Article 6(3) of the Habitats Directive and should be seen as last resort. E.g., when constructing a highway, an ecoduct in order to connect the populations of affected species constitutes mitigation, but the creation of a new habitat for the affected species is compensation[178].

In cases C-304/05[179], *Commission v Italy*, C-258/11[180], *Sweetman and Others*, and C-521/12[181], *Briels*, the CJEU clearly stated that Article 6(4) can apply and compensatory measures can be discussed only after the implications of a plan or project have been studied in accordance with Article 6(3), whereby the impact and damage to a N2000 site is precisely determined. Thereon, the assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternative require a weighing up against the damage caused to the site by the plan or project under consideration[182].

Firstly, the EC sets forth that it must be documented that the alternative selected is the least damaging for habitats, for species and for the integrity of N2000 sites and, regardless of economic reasons, no other feasible alternative exists that would not have adverse impact on integrity of the N2000 site(s). Secondly, imperative reasons of overriding public interest must be demonstrated, and lastly, all compensatory measures must be taken to ensure coherence of the N2000 network.[183]

An exception to Article 6(3), Article 6(4) must be therefore interpreted strictly[184]. The economic cost of the steps that may be considered in the review of alternatives, including the demolition of the works already completed, but it cannot be determining factor in the choice of alternative solutions[185]. In other words, a project proponent cannot claim that the alternatives have not been examined because the cost is too high. E.g., in the case of the La Breńa water reservoir in

[178] Van Hoorick, G. *Op cit*, p. 162.
[179] CJEU 20.09.2007 C-304/05, *Commission v Italy*, para 83., ECLI:EU:C:2007:532.
[180] C-258/11, *Sweetman and Others*, para 35.
[181] CJEU 15.05.2014 C-521/12, *T.C. Briels and Others v Minister van Infrastructuur en Milieu*, para 35 and there cited cases., ECLI:EU:C:2014:330.
[182] See also C-399/14, *Grüne Liga*, para 57 and the case-law cited.
[183] EC notice (2018), p. 56.
[184] CJEU 26.10.2006 C-239/04, *Commission v Portugal*, para 35., ECLI:EU:C:2006:665.
[185] C-399/14, *Grüne Liga*, para 77.

Spain[186], the main compensatory measure was to expropriate 15 estates with a total area of more than 2,100 ha to create a habitat and food for the *Iberian lynx* with total estimated cost over 28 million euros. The same is concluded by the EC in a 2018 notice that stresses that the promoter of a plan or project must incur the cost of compensatory measures[187].

The costs of compensatory measures should not be taken into account while evaluating their effectiveness. They must be seen as additional actions to requirements of the Habitats and Birds Directives and should be part of the total costs of the plan or project. If the costs are considered too high, it should preclude the promoter from initiating the plan or project and stimulate the promoter to search for alternative plans or projects that are less harmful for N2000.[188]

In a 2007 guidance document, the EC brought out that zero option, i.e. dismissal of a plan or a project that has or likely has substantial adverese impact on N2000 site should be seriously considered when the negative effects are related to rare natural habitats types or natural habitats that need a long period of time to provide the same ecological functionality[189]. E.g., raised bogs need more than a thousand years to develop and projects or plans involving destruction of such habitats should therefore be, in principle, excluded. A 2018 notice by the EC does not specify the objective criteria for the zero option, since it should always be seriously considered[190].

In line with the principle of subsidiarity goes the obligation of the Memeber States and competent authorities to assess the relative impact of alternative solutions on the site concerned in light of the aspects regarding the conservation and the maintenance of the integrity of the site and of its ecological functions. Therefore, other assessment criteria, such as of economic nature, cannot be seen as overruling the ecological criteria.

Keeping in mind that one of the principles of the EU policy is „no net loss“ of biodiversity[191], it is important to realise that achieving this objective is possible only if an obligation to take quantitative compensatory measures in projects where N2000 site or a part of it is destroyed

[186] European Commission 07.05.2004 opinion E/1105/2004, *La Breña*, p. 6. https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/labrena_en.pdf (12.04.2021).
[187] EC notice (2018), p. 71.
[188] Van Hoorick, G. *Op cit*, p. 165.
[189] EC guidance document (2007), p. 14.
[190] EC notice (2018), p. 57.
[191] European Commission 03.05.2011 COM(2011) 244 final, Our life insurance, our natural capital: an EU biodiversity strategy to 2020, Communication from the Commission to the European Parliament, the Council, the Economic and Social Commitee and the Commitee of the Regions, para 4.2., Annex, para 7b. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0244 (12.04.2021).; McGillivray, D. Compensating Biodiversity Loss: The EU Commission's Approach to Compensation under Article 6 of the Habitats Directive. Journal of Environmental Law, 24(3), Nov 2012, p. 421. https://doi.org/10.1093/jel/eqs007 (12.04.2021).

(e.g., widening of a highway, seaport or airport; developing a housing project, etc) is fulfilled. By following the „no net loss“ of biodiversity principle, the surface of N2000 would not diminish and the coherence of N2000 would be protected. Moreover, according to the logic of Article 6(4) of the Habitats Directive, the Member States have a legal obligation to conserve sufficient potential N2000 sites outside the existing N2000 framework, i.e. sufficient habitats of bird species of Annex I of the Birds Directive or migratory bird species, and habitats from Annex I of the Habitats Directive and from species of Annex II of the Habitats Directive.

The CJEU has held in a case C-301/12, *Cascina Tre Pini*, that pursuant to Articles 4(1), 9 and 11 of the Habitats Directive, when it becomes evident that a site no longer contributes to the conservation objectives and to N2000 due to environmental degradation of the site, the competent authorities are required to propose to the EC the declassification of the site from the list of SCIs. It follows that where the results of surveillance undertaken by the Member State pursuant to Article 11 give rise to the conclusion that criteria can be irretrievably no longer met, the Member States has an obligation to propose the adaptation of the list of SCIs in a way that the list meets criteria brought out under Article 4(1) once again. [192] This ruling clearly implies that “no net loss” principle is absolute and Member States have strict obligation to ensure that the area of N2000 would not diminish.

The overall coherence of N2000 must be protected at all times according to the Habitats Directive Articles 6(4), 3(1), 3(3) and 10, whereby best endeavours of the Member States should be used in maintaining N2000 and, where appropriate, developing it. It follows that compensatory measures for a project should endeavor to provide similar habitats to the habitats and species adversely affected, where the whole geobiographical region should assessed if appropriate.[193]

Compensatory measures must be feasible, adequate and simultaneous with damaging activities in reestablishing the ecological conditions needed to ensure the overall coherence of N2000. Overcompensation is the norm while compensatory habitat needs time to develop in order to reach the same ecological quality as the damaged habitat. In addition, the estimated timescale and maintanance measures must be foreseen and all necessary studies, including the asessment of technical feasibility of the proposed solution, have to be carried out before the

[192] CJEU 03.04.2014 C-301/12, *Cascina Tre Pini Ss v Ministero dell’Ambiente e della Tutela del Territorio e del Mare and Others*, pp. 25-27., ECLI:EU:C:2014:214.
[193] EC notice (2018), pp. 61, 63.

implementation of a plan or a project commences.[194] In a more recent opinions, the EC even considers it necessary that the compensatory measures have to be completed before the damaging activities commence[195]. The EC has lately always required that a monitoring system must be put in place,[196] which may eventually lead to additional compensatory measures according to the EC[197].

The EC has regarded the creation or restoration of N2000 sites as compensatory measures. According to the EC, compensatory measures (in addition to what is already required under the Habitats Directive) may consist of improvement of habitat in the existing sites or restoring the habitat in another N2000 site, in proportion to the loss that occurs due to the plan or project; habitat re-creation on a new or enlarged site to be incorporated into N2000; or proposing a new site of sufficient quality under the Habitats or Birds Directive and establishing/implementing conservation measures for this new site.[198]

The latest practice of the EC shows that although compensation ratios are set on a case-by-case basis, determined in the light of the information from the AA under Article 6(3), they are generally well above 1:1. Ratios 1:10[199]; over 1:7 and 1:4[200]; 1:6[201]; 1:3[202] and 1:2[203] have been accepted by the EC in some of the cases. The range of measures is also rather wide: creation of a reserve; reintroduction of species, recovery and reinforcement; acquisition of land or rights; incentives for certain activities, etc[204].

Article 6(4) of the Habitats Directice stipulates that the compensatory measures should be submitted to the EC before they are implemented and before the realisation of the plan or project

[194] Van Hoorick, G. *Op cit*, p. 166.; 96/15/EC: Commission Opinion of 18 December 1995 on the intersection of the Peene Valley (Germany) by the planned A 20 motorway pursuant to Article 6 (4) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora - OJ L 6, 9.1.1996, para 4.3. http://data.europa.eu/eli/opin/1996/15/oj (12.04.2021).; Opinion in *La Breña*, p. 7.; EC notice (2018), pp. 63, 64, 66, 67, 69.
[195] Opinions in *B 173*, p. 6; *Motorway A 20*, p. 6.; European Commission opinion COM(2006), *Granadilla*, p. 8. https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/granadilla_en.pdf (12.04.2021).
[196] Opinions in *River Danube*, *Railway Cannstatt*, *B 173*, *Prosper Haniel*, *TGV East* and *La Breña.*
[197] EC notice (2018), p. 70.
[198] *Ibid.*, p. 64.
[199] European Commission 06.06.2005 opinion C (2005) 1641, *Baden Airport*, pp. 8-9. https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/baden_airport_en.pdf (12.04.2021).
[200] Opinion in *River Main*, p. 4.
[201] Option in *B 173*, p. 5.
[202] Opinions in *River Danube*, pp. 7, 8; *B 173*, p. 5; *B 252/B 62* p. 5; *River Elbe*, p. 6; *La Breña*, pp. 4, 6.; European Commission 24.04.2003 opinion, *Prosper Haniel*, p. 5. https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/prosper_haniel_en.pdf (12.04.2021).
[203] Opinions in *River Danube*, pp. 7, 8; *B 252/B 62*, p. 5; European Commission 05.05.2009 opinion C(2009) 3218, *Lübeck Airport,* p. 5. https://ec.europa.eu/environment/nature/natura2000/management/docs/c_2009_3218_en.pdf (12.04.2021).
[204] EC notice (2018), p. 64.

concerned, but after its authorisation. Even in cases where the prior opinion of the EC is not mandatory, the planned compensatory measures must at all times be communicated to the EC who analyses the balance between ecological values and imperative reasons and the appropriateness of compensatory measures.

Although compensatory measures must be communicated to the EC, it has been argued, on the basis of German case-law, that the EC and the CJEU has little opportunity to enter into the individual requirements for a derogating authorisation. In addition, it has been argued that the German case-law has been favouring developments, especially governmental infrastructural projects, and has therefore weakened the concepts of N2000 and AA by allowing derogating authorisations too easily. Therefore, developing governmental infrastructural projects that ignore conservation objectives of the Habitats Directive, the EC guidlines and the CJEU case-law has become a norm in Germany.[205] In the light of the national cases of *Rail Baltica*, *Hellenurme dam* and *Linnamäe dam*, the same risk could realise also in Estonia.

According to the second clause of Article 6(4) which stipulates that if a plan or project related to a site hosting priority habitats or species that has or likely has adverse affect on these sites, could only be justified in case of imperative reasons of overriding public interest of a concern for human health and public safety or overriding beneficial consequences for the environment, or if the EC grants an approval to this plan or project. The EC, in delivering its opinion, must check the balance between the ecological values affected and the invoked imperative reasons, as well as evaluate the compensatory measures. Even though the opinion of the EC is not binding, in case of non-conformity with the EU legislation, legal action might be taken[206].

By keeping the implementation of Article 6(4) narrow, compensatory measures should be considered only when other safeguards (mitigation of the impacts) are insufficient. This principle seems to be rather consistently followed by the CJEU case-law, with one exception. The CJEU ruling C-43/10, *Nomarchiaki and Others*, in 2011 seems to leave too much freedom for defining overriding public interest by allowing compensatory measures to be taken too easily and therefore the framework of Article 16(1) is undermined[207].

The EC also have been holding strict approach, but the opinion in *River Danube* seems to give leverage to the further easing of the principles of Articles 6(4) and 16(1) of the Habitats Directive. In the case *River Danube*, the EC approved a solution where, *inter alia,* priority

[205] Möckel, S. *Op cit*, p. 103.
[206] EC guidance document (2007), p. 24.
[207] Van Hoorick, G. *Op cit*, p. 161.

habitat type was planned to be destroyed and compensatory measures to alleviate the impact of a projects was going to take 30 years to achieve conservation status B. It seems that the EC was stuck between the objectives set by the Habitats Directive, on one hand, and the objectives set by other EU-wide policies that migh as well constitute as imperative reason of overriding public interest such as TEN-T projects, on the other.

In the light of the EC guidance and the CJEU latest rulings, especially in a case C-521/12, *Briels,* one must clearly distinguish mitigation measures from compensatory measures, meaning that it is impermissible to present compensatory measures as mitigation measures to alleviate the impact on the AA carried out under the provision of Article 6(3) of the Habitats Directive. Namely, even the creation of an area of equal or greater size of the same natural habitat type within the same site that is affected, has an effect on the integrity of that site and must be seen as a compensatory measure[208]. In order to maintain the integrity of N2000, the derogation procedure stipulated in Articles 6(3) and 6(4) must be narrow. Therefore, the Member States must use their best endeavours to protect biodiversity through the conservation of natural habitats and of wild fauna and flora and secure sustainable development thereof.

Returning to the case 3-18-529 of *Rail Baltica* (RB) in Estonia, the proper derogation procedure remains to be questioned. To elaborate, the AA that has to be carried out due to anulled county plan will most probably remain limited only to the alignment of the so-called „red alternative“ (according to AECOM 2011 study), as in that particular area, only a narrow corridor can be used between the coastline of the Baltic Sea and N2000 sites. Therefore, a risk exists that an alternative that does not have adverse impact on the integrity of N2000 sites cannot be found and therefore, derogation procedure under Article 6(4) of the Habitats Directive seems inevitable.

The case of RB is a model example of how risks realise and the part of a plan and project in one Member State endangers not only the integrity of N2000 sites, but also the feasibility of the entire TEN-T network corridor. It becomes evident, therefore, that planning procedudes, including spatial planning, SEA, EIA and AA, should be improved at the EU level and a comprehensive system must be established in order to enable projects with cross-border impact to be assessed as a whole. In this procedural system, involvement of the public and NGOs should be well thought through and the EC decision mechanism must be integrated, because the EC is the authority of last say in the matter under the derogation procedure. It becomes

[208] C-512/12, *Briels,* para 33, 39.

evident therefore that derogation procedure under the Article 6 of Habitats Directive is not suitable in cases of implementing large plans or projects that relate to more strategic cross-boarder or EU-wide policies or plans because derogation clause is designed to resolve the issues within a specific plan or a project and more general and comprehensive view is missing.

In addition, the derogation procedure under Article 6(4) of the Habitats Directive is detemined to be rarely used by the Member States, which leaves a question whether and to what extent Estonian domestic legislation and derogation procedures are in line with the extensive and developing case-law of the CJEU. As demonstrated above, it has been argued that German case-law departs from the general approach of the CJEU with regard to derogation procedure in cases of governmental infrastructural development and the same risk seems to be existent also in Estonia.

Furthermore, derogation procedure under Article 6(4) of the Habitats Directive is time-consuming and ineffective, because it puts projects on hold for at least one year period. In regard to the projects of a major importance related to TEN-T, the EC has little to no choice to disgard those projects under Article 6(4) despite significant effect on N2000 network and irrevocable damage inflicted. The question of how many TEN-T-related projects that might overrule the objectives of the Habitats Directive remain and whether conflict areas could be determined before developments advance further to the point of no return.

3 Improving the Management of Natura 2000 Sites

3.1 Balancing Public Interests via Participatory Measures

Commonly used resources like biodiversity create conflicts over their use and preservation[209], which is natural. This is explained by the fact that public resources do not have one specific owner and the management of this public good constitutes a public agreement of the society. Often, public agreements are made through planning procedures via distributive justice, i.e. distibution of the resources and sharing the costs by society in a fair manner. Managing N2000 sites is a complex task, which involves a large variety of conservation objectives: the protection of a certain plant or animal species or the preservation or expansion of scarce types of ecosystems. As the units of flows of common-pool resources such as biodiversity, landscapes, heritage are rivals in the sense of public consumption[210], the management of those resources must be an integral system where dicretionary decision-making should be possible. Biodiverity, landscapes, heritage also have certain physical attributes in common that set them apart from common-pool resources such as pastures, forests and fisheries: e.g. fisheries generate flows of fish and when a fish is captured by one individual, it is not available for others, but biodiversity, landscapes and heritage are often called public goods[211].

The main problem of measuring common-pool resources and the values of biodiversability is that those values are difficult to measure in a quantitative way and this obstacle cannot be overcome easily[212]. Conventional economic prescriptions include the setting of welfare-maximising policy goals and the use of market-mimicking policy instruments. However, the EU biodiversity policy and N2000 are not established for the improvement of human welfare only. Even though pecuniary value of the services of ecosystems could be assessed with the help of different criteria, the ultimate outcome of such calculation depends greatly on the specific geographical location, livelihood circumstances, price levels, social and economical conditions, etc[213]. Therefore, the results of this kind of assessment could not tell us pure truth.

[209] Paavola, J. *Op cit*, p. 59.
[210] Ostrom, E. (1990). Governing the commons: The evolution of institutions for collective action. Cambridge: Cambridge University Press, 1990, p. 30. https://www.actu-environnement.com/media/pdf/ostrom_1990.pdf (12.04.2021).
[211] Paavola, J. *Op cit*, p. 63.
[212] Maron, M., et al. Faustian bargains? Restoration realities in the context of biodiversity offset policies, Biological Conservation, 155, 2012, pp. 144–145. https://doi.org/10.1016/j.biocon.2012.06.003 (12.04.2021).
[213] De Groot, R., et al. Global estimates of the value of ecosystems and their services in monetary units. Ecosystem Services. 1(1), 2012, p. 58. https://doi.org/10.1016/j.ecoser.2012.07.005 (12.04.2021).

In addition, goals like preservation of habitat or specific species for its own sake, which also might not be adequately measured, might be included in environmental protection agenda. To mix it even more, same common-pool resources might have different values in different regions of the world. To conclude, monetary valuation of the environment is and will be based on shaky foundations and cannot provide the guidance for an action plan it is purported to give[214]. Also, the application of a social multi-criteria evaluation (SMCE), which tries to take into account also the qualitative values of protected areas, is limited. It has been argued that most appropriate solution could be reached in the context of SMCE only if the actors taking part in the decision process have the opportunity to either shape, argue and/or transform their preferences within SMCE[215].

According to Jouni Paavola and Inge Røpke, environmental problems are constructed by historical processes where social, economical and cultural considerations should not be set aside and therefore sustainable development should be achieved by balancing aforementioned interests via procedural measures such as inclusion, participation and ideals of democracy. It seems logical that the resources that belong to a community must be managed by means of institutional arrangements in a way that overexploitation is refrained and sustainability is ensured. [216] The importance of democratic principles and the proper involvement of stakeholders are considered as prerequisites for sustainable development for implementation of the objectives of nature protection[217].

By protecting the so-called public goods or common-pool reseources, the EU biodiversity policy as a whole has been facing serious opposition from business sector, as well. Also, many Member States struggle with the exclusive focus on conservation objectives when issuing permits for harmful project developments and, as cited hereinabove, in some countries,

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[214] Spash, C. L. Ecosystems, contingent valuation and ethics: the case of wetland recreation, Ecological Economics, 34, 2000, pp. 212–214. https://www.clivespash.org/wp-content/uploads/2015/04/2000_Spash_EE_Lexi.pdf (12.04.2021).

[215] Etxano, I., et al. Towards a Participatory Integrated Assessment Approach for Planning and Managing Natura 2000 Network Sites. The Basque Centre for Climate Change (BC3), October 2012, pp. 2-3, 27-28. https://addi.ehu.es/bitstream/handle/10810/12214/ETXANO%2c%20I_Towards%20a%20Participatory%20Integrated%20Assessment%20Approach.pdf?sequence=1&isAllowed=y (12.04.2021).

[216] Paavola, J., Røpke, I. *Op cit*, pp. 11, 19, 22.

[217]Stringer, L. C., Paavola, J. Participation in environmental conservation and protected area management in Romania: A review of three case studies. Environmental Conservation, 40(2), 2013, pp. 138, 140. https://doi.org/10.1017/S0376892913000039 (13.04.2021).; Niedziałkowski, K., *et al*. Assessing participatory and multi-level characteristics of biodiversity and landscape protection legislation: the case of Poland. Journal of Environmental Planning and Management, 2015, pp. 1905-1909. https://doi.org/10.1080/09640568.2015.1100982 (13.04.2021).; Šobot, A., Lukšič, A. A. The Impact of Europeanisation on the Nature Protection System of Croatia: Example of the Establishment of Multi-Level Governance System of Protected Areas Natura 2000. Soc. ekol. Zagreb, 25(3), 2016, p. 236. https://doi.org/10.17234/SocEkol.25.3.2 (26.04.2021).

derogation consents are becoming a rule, e.g. in case of national infrastructure development projects. The opposition stems from the understanding that the Habitats Directive poses constraints to sustainable development, an increasing number of politicians but also business people argue the conservation objectives and rules to be too rigid which ultimately lead to disproportionate costs[218]. Strict application of the precautionary principle by the CJEU leaves little room for leverage at the permit level[219] which might lead to further impropriate implementation of the Habitats Directive on national level. As mentioned above, this seems to be the case in Germany, but also in Estonia.

In cases where governments and Memeber States have failed to involve all key stakeholders or have not managed to balance interests in society by other means, the management of commonly used resources create conflicts, as this has become evident in many EU Member States. It could be argued that in the strive of robust establishment of N2000, leaving marginal, if any room of discretion to the Memeber States, the EC achieved the purpose of establishing the network for nature protection on scientific grounds but by doing so, created in many ways unnecessary conflicts all over Europe. Better guidelines for the creation of N2000, publicity and stakeholders' involvement were largely missing.

As the designation of N2000 was methodologically not harmonised and the EC did not set guidelines for participatory, the procedures and stakeholders' involvement varied across the EU. In some countries, the influence of publicity had a significant impact on N2000 site designation, but in the majority of the Member States the impact of NGOs was rather modest – with the exception of ENGOs, whose impact was significant. Even if the initial intention was to exclude all considerations of economic, social and cultural requirements and regional and local characteristics in the designation procedure, some of the Member States (e.g. France, Finland, Belgium and Nederlands) seem to have taken those considerations into account after all, due to overwheming pressure of land owners and other interest groups such as hunters and fishers.

Considering how N2000 as formed (as described in the 1st Chapter, the establishment of N2000 differed significantly from country to country, criteria of how to select the sites was absent and proper guidelines of how to ensure public involvement were missing), the management of N2000 sites should be thoroughly reassessed and harmonized. In addition, as demonstrated above, more attention is needed to harmonise and improve the implementation of the EU biodiversity policy throughout the EU. It is not just about improving and harmonising the

[218] Schoukens, H., Cliquet, A. (2016).
[219] Schoukens, H., Bastmeijer, K. *Op cit*, pp. 137, 143.

implementation of Habitats Directive 6, but rather about modernizing the system in a way that it results in more comprehensive approach in relation to planning and assessing environmental impacts, more efficient implementation in practice and better balanced decisions in as early stages as possible concerning EU-wide policies and investments (i.e. plans and projects).

Furthermore, scrutinising activities in order to promote public participation and the involvement of all relevant stakeholdes are called for. In theory, it is argued that the planning and management of N2000 sites and the ways in which ecological objectives are related to social and economic activities will, in the long term, determine the success of European nature conservation policies[220] and that there is a need to adapt specific conservation policies that ecompass network-based approaches in order to select the most efficient measures for achieving objectives set via establishing N2000[221].

According to Aarhus Convention Articles 6 and 7, the public must be involved at an early stage, before final solutions can be developed. This principle applies to spatial planning, programmes and policies as well where strategic decisions are made. By analogy, it is logical that also environmental considerations (and other considerations) must be taken into account at an early stage through public participation. The requirement of Aarhus Convention to take the outcome of public participation into account underlines the need to establish a system for evaluating comments so that the proposals of the public are taken into consideration[222]. The involvement of publicity and NGOs serves larger purpose, as they act as watchdogs of proper application of the EU and domestic legislation and of balancing puclic interests in best possible way. Following this, the EC has taken an initiative to improve scrutiny of the EU acts related to the environment and has issued a legislative proposal of amending the Aarhus regulation[223], seeking to improve access to justice. With this proposal, a more coherent action is taken in order to enhance the opportunities to request review of the actions of the State and more power is given

[220] Beunen, R., De Vries, J. R. The governance of Natura 2000 sites: the importance of initial choices in the organisation of planning processes. Journal of Environmental Planning and Management 54(8), 2011, p. 1055. http://dx.doi.org/10.1080/09640568.2010.549034 (12.04.2021).
[221] Mazaris, A. D., et al. Evaluating the Connectivity of a Protected Areas' Network under the Prism of Global Change: The Efficiency of the European Natura 2000 Network for Four Birds of Prey. PLoS ONE 8(3), 2013, p. 9. https://doi.org/10.1371/journal.pone.0059640 (12.04.2021).
[222] United Nations Economic Commission for Europe. The Aarhus Convention: An Implementation Guide (second edition), Jun 2004, pp. 119-125, 174. https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition (12.04.2021).
[223] European Commission 14.10.2020 COM(2020) 642 final. 2020/0289 (COD). Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. https://ec.europa.eu/environment/aarhus/pdf/legislative_proposal_amending_aarhus_regulation.pdf (21.04.2021).

to ENGOs to increase the confidence that EU-wide public resources are managed prudently and with high quality decision-making. Definately, the EC proposal is a big step forward to scrutinise proper application of environmental legislation. The EC proposal also demonstrates the strive for greater transparency of information, wider dissemination of knowledge and capacity building of competent authorities, which would enhance the quality of decision-making. In this regard, data publication of N2000 by the EC in geographical information system (GIS) format[224] is a huge step forward.

Sustainability and good balance between the interests of biodiversity protection, economy, social and cultural considerations, seem to be best ensured via promotion and execution of democracy ideals in their best meaning. As mentioned hereinabove, transparancy, social inclusion, accessibility to the information and open data, dissimenation of knowledge, capacity building of competent authorities seem to be the key elements to lift the management system of N2000 to the next level. This way, different public interests are openly argued about, thoroughly weighed against each other and decision are made on the basis of best and most comprehensive information available, thus lifting the quality of the decisions. As the EC also proposed, widening the rights of ENGOs, complements the aforementioned concept of openness as the scrutiny of proper implementation of environmental legislation in put in place as well as high standand for decision-making is set.

The new system should be agile, though, because the planning procedures under which projects are carried out are dynamic in nature and could alter in time. In other words, environmental, social, economic, cultural, regional considerations and the weight of a particular public interest could change over time. Therefore, there is a need for a planning solutions for common-pool goods, where the interests at the level of EU and at the level of Memeber States are balanced every time when a plan or a project is approved. This objective is best achieved by more comprehensive approach to legislation related to planning and environmental assessment, whereas the Memeber State level of decision-making must be integrated to the EU level decision-making system.

[224] European Commission, Access to Natura 2000 data. https://ec.europa.eu/environment/nature/natura2000/access_data/index_en.htm (21.04.2021).

3.2 Better Integration of EU Policies and Proper Application of Derogation Clause

As the current derogation procedure under Article 6 of the Habitats Directive is time-consuming and rarely used, Memeber States are still inconsistantly following the EC guidelines and the CJEU case-law in relation to derogation procedure, a better strategy is needed to achieve sustainable development goals. EC has ascertained that the general objectives of the Habitats and Birds Directives are not met and some of the species and habitat types continue to decline or remain endangered[225]. Same is concluded in 2010 study[226] by Kruess, A., *et al*, in which the failure of stopping biodiversity loss was determined. The public interests should be balanced and conflicts resolved in a more efficient and transparent way by choosing the best possible alternative. Although flexible permitting strategies are also discussed, this might most likely lead to a more unsound development and in continuation of the ongoing biodiversity decline[227].

Article 6 of the Habitats Directive is applied on the country-specific (in most cases, county- or municipaly-specific) plans or projects, but more comprehensive view of the project or a plan in contex of the EU environmental policy is needed. The N2000 should be assessed at the level of biogeographical region together with and in context of the EU transport policy (e.g. the TEN-T), as well as the EU energy policy (e.g. wind and solar farms) which have large impact on the objectives of the Habitats Directive. This view, though, is absent at present. When looking for alternatives for the derogation clause, especially in the light of large infrastructure projects where adverse impact on N2000 site(s) is likely to happen (e.g., the case of *Rail Baltica*), more generic and comprehensive planning strategy, which incorporates adaptive management techniques in an early planning stage, might overcome the regulatory challenges in this regard. More integrated and comprehensive approach would follow the spirit of principle of comparing strategic alternatives of policies that have large and long-term impacts either to environment or to economy, social and cultural considerations of the EU and the Member States.

It has been argued that policies other than conservation, e.g. agricultural land use,[228] climate

[225] European Commission, Fitness Check of the EU Nature Legislation (2016), p. 87.; European Commission COM(2015) 219 final, p. 19.
[226] Kruess, A., *et al*. Ist der Rückgang der biologishen Vielfalt gestoppt? Eine Bilanz des Artn- und Biotopschutzes. Natur und Landschaft, 85(07), 2010, p. 286. 10.17433/7.2010.50153027.282-287 (25.04.2021).
[227] Schoukens, H., Cliquet, A. (2016).
[228] Koutseris, E. Sustainable resources management in the context of agro-environmental EU policies: Novel paradigms in Thessaly, Greece. WIT Transactions on Ecology and the Environment, 99, 2006, p. 204. 10.2495/RAV060201 (12.04.2021).

change,[229] or noise protection[230] can affect conservation and management under N2000, as well. Thus, a better integration of different policies and the management of N2000 should be seriously considered as an option[231]. In order to integrate EU policies that encompass conflicts towards each other (e.g. TEN-T, energy policy, agriculture policy, forestry policy and environment policy) should be aseessed as a coherent whole, when it is needed. So, instead of derogation mechanism set forth under Article 6 of the Habitats Directive where a specific case is narrowly examined and assessed, more effective and comprehensive resolution mechanism should be applied. In order to assess the compensatory measures for N2000, a more generic view must be taken when implementing plans or projects that have wider and cross-boarder impact. In regard to cross-boarder environmental impact assessment and cross-boarder planning, specific tools should also be considered.

Drawing parallels with the SEA and EIA Directives which in principle set forth that all relevant impacts and consirerations must be taken into account as early as possible so that the best alternative could be found, the same should apply to biodiversity policy and to other EU-wide policies. Therefore, the EU transport, energy, agriculture, forestry and environmental policies must be aligned and the feasibility of strategic objectives of different EU strategies and goals must be tested against each other. Hence, close collaboration within the EU and together with the Member States is needed to overcome this challange. For example, in the first phase of detemining development projects and transport networks, which are of most importance in the light of economic and social development, one must consider environmental restrictions and find right balance between different interests in as early stage as possible.

To illustrate, one of the major transport project, Rail Baltic in Estonia is stopped due to improper Natura assessment procedures (a proper AA was missing). It was clear outright, though, that the corridor of RB was in immediate proximity of N2000 site, as the AECOM 2011 study illustrated, and therefore its viablility depended on the fact whether it was possible to build the corridor near by N2000 sites or not. By the time the EU TEN-T corridor related to RB was fixed in 2013, county plans in Estonia had just begun (2012) but a proper SEA nor EIA was not

[229] De Koning, J., *et al*. Natura 2000 and climate change—Polarisation, uncertainty, and pragmatism in discourses on forest conservation and management in Europe. Environmental Science & Policy, 39, 2014, pp. 132-136. https://doi.org/10.1016/j.envsci.2013.08.010 (13.04.2021).
[230] Votsi, N.-E. P., *et al*. The distribution and importance of Quiet Areas in the EU. Applied Acoustics, 127, 2017, pp. 209-213. http://dx.doi.org/10.1016/j.apacoust.2017.06.007 (13.04.2021).
[231] Votsi, N.-E. P., *et al*. Integrating environmental policies towards a network of protected and quiet areas. Environmental Conservation, 41(4), Dec 2014, pp. 324-326. https://doi.org/10.1017/S0376892913000362 (13.04.2021); Blicharska, M., Orlikowska, E. H., et al. Contribution of social science to large scale biodiversity conservation: A review of research about the Natura 2000 network. Biological Conservation, 199, 2016, p. 117. http://dx.doi.org/10.1016/j.biocon.2016.05.007 (12.04.2021).

carried out, therefore it was not certain if RB was feasible at all along preferred route. This is a typical example where one branch of the EU policy (transport) does not take into account the priorities of other EU policy (environment) in a proper and reasonable manner. In order to solve such complex issues, the EU must implement scenario-planning tools into practice and more forcefully introduce the issue-solving throught setting common criterias and procedures to all EU policies at the level of the Member States, but also at the level of the EC.

At the national level and in order to assure improvement of the status of all species and habitats in the future, nature conservation activities must be planned in more detail. Conservation management plans must be put in place for all N2000 sites, which elaborate what natural values we hope to see in a particular area today, tomorrow and in the distant future. In addition, more scrutinising activities by the EC to ensure proper implementation of the Habitats Directive are essential, as discussed in previous sections of this paper. It seems evident that the EC should carry out a comprehensive assessment on how derogation procedures are carried out in the Member States in practice and whether the EC guidelines are followed.

In practice, the strict and narrow interpretation of the Habitats Directive derogation procedures and the N2000 assessment, a clear distinction of mitigation and compensatory measures, as well as common understanding of a definition „imperative reasons of overriding interest“ is called for. The most appropriate way of achieving those objectives seem to be better integration of EU-level policies and forceful implementation of comprehensive EU-wide policy-planning toghether with a resolution mechanism to resolve strategic conflicts.

To illustrate, seemingly no real deadlock with regard to the TEN-T exist, as most development projects within the TEN-T still go ahead: currently, there are 30 priority TEN-T projects (axes) that cover all modes of transport (road, rail, maritime, inland waterways, air, logistics, co-modality, innovation)[232]. In addition, most TEN-T network corridors include sub-projects that are being funded and implemented, despite more strategic SEA nor EIA nor AA has not been carried out in relation of the feasibility of development of transport corridors as a whole. As discussed hereinabove, economic considerations only cannot constitute an argument on basis of which the intergrity of N2000 could be interrupted as the criteria “imperative reasons” implies there should more reasons to make an exception. In reality, though, TEN-T projects are pushed through despite their major impact on the protected sites, as the EC opinion in *River Danube* clearly demonstrates. In this opinion, priority habitat was destroyed and compensatory

[232] European Commission, INEA, TEN-T Network. https://ec.europa.eu/inea/en/ten-t/ten-t-projects (12.04.2021).

measures were planned with the impelementation period of 30 years. By analogy, same could be predicted to the Rail Baltica: even if adverse impacts are determined under the AA, derogation would most likely be accepted anyway, because at this stage of the project, no strategic alternatives would not be considered, as those alternatives could result in altering the alignment of the corridor also in Latvia where development activities, including construction, have already commenced.

Recommendations in order to facilitate common approach and legislation changes in planning large investments that have potentially adverse impact on the N2000 are not entirely new, but many of those recommendations are up-to-date also at present times[233]. In the opinion of the author of this paper, the following amendments of managing N2000 network should be considered.

Firstly, at the EU level, a better understanding of environmental impacts of comprehensive policy agendas such as the TEN-T is needed. The EU should proceed carrying out a comprehensive assessment of the entire TEN-T Network and also its energy, agriculture and forestry policy programmes to examine the potential conflict areas in relation to N2000 sites. Such task involves many stakeholders, including the EC and its different braches of policies, the Member States, competent authorities at the EU, but also at the Member State level, as well as other stakeholders and NGO-s. The purpose of this exercise of collaboration would be to clarify the feasibility of all EU-wide policies in light of existing environmental restrictions and to assess the possibilities of achieving EU-wide policy goals in a most sustainable manner.

The main goal of the EU should be that unsustainable projects would not be funded and the best possible strategic approaches would be selected in planning stages as early as possible with inclusion of appropriate assessment of the impact on N2000. The general understanding of where collisions between the EU biodiversity policy and other EU policies exist, is vital. At the present time, the author of this paper is not convinced that there is one. The prerequisite of funding a project or a plan should therefore be the certainty that this project or a plan is part of a larger EU policy and is sustainable: i.e. the project is assessed on a project level and also on the programme level (e.g. TEN-T). To conclude, funding the TEN-T corridor projects should not precede the feasibility assessment of the whole TEN-T corridor in light of the environmental

[233] Byron, H., Arnold, L. TEN-T and Natura 2000: the way forward, An assessment of the potential impact of the TEN-T Priority Projects on Natura 2000, 2008, pp. 67-70.
http://www.birdlife.org/eu/pdfs/TEN_T_report2008_final.pdf (21.04.2021).;
Simenova, V., et al. Natura 2000 and spatial planning, European Commission, 2017, pp. 112-113.
https://ec.europa.eu/environment/nature/knowledge/pdf/Natura_2000_and_spatial_planning_final_for_publication.pdf (12.04.2021).

considerations.

In order to ensure the applicapility of a more integrated approach towards planning and assessing the enivironmental aspects of plans and projects, a conflict-resolving mechanism within the EC is vital in order to balance public interests throughout the EU at more strategical level. For instance, where conflicts between the TEN-T and N2000 are revealed, these conflicts should be resolved at a strategic level within reasonable time-frame and not at a sub-project level. The conflict resolution mechanism as it is carries a risk that the best possible strategic alternative is not selected, on one hand, and the development on more strategic level would be put on hold due to issues of a specific sub-project(s), e.g. in the case of *Rail Baltica* in Estonia.

As demonstrated hereinabove, derogation procedure under the Article 6 of Habitats Directive is not suitable because it is designed and concentrated to resolve the issues within a specific plan or a project that does not ecncompass the whole network involved. In addition, the derogation procedure under Article 6 of the Habitats Directive is time-consuming and duplicates the activities that the Memeber States have already carried out during the planning process, including the EIA and SEA procedures on a more local level. To ensure better integration of management of N2000 sites, a joint task force for N2000 coordination under the administration of the EC should be established with adequate resources provided. It would make sense that more strategic plans, including SEA, EIA and AA procedures carried out in the Member States that have relvance in EU-wide policies, would go through the EC quality assurance procedure within reasonable and fixed time-limit. Thereby, a decision on a more strategic level could be obtained and the EC could resolve conflicts of contradicting policies much earlier and the relevant planning documents could be amended accordingly.

It must also be assured that all projects and plans that have adverse impact on N2000 should correspond to the principle recognized throughout the EU: the promoter of a project should always incur the costs of developing and executing a plan or a project. In the case of projects with the EU funding, the relevant EC services should be scrutinised to the very end. The EC clearly approves this approach, as it points out that environmental costs should include the costs of provision of mitigation/compensation for impacts on N2000 sites, costs of carrying out the SEA and EIA, remediation of any foreseeable environmental damage, and consideration of other impacts on the environment. In this respect, more capacity-building measures should be carried out by the EC across the EU, as there are indications that this principle is not always

complied with, as demonstrated in the previous section of this paper[234].

To conclude, spatial planning and a more integrated environmental assessment should be recognised as key elements for effective implementation of N2000 policy, so that authorities at different levels of planning (the EU and national ones) would cooperate more closely towards common goal which is the implementation of sustainable projects that take into account all public interest in a balanced manner. Integrated spatial planning practices for the N2000 are still called for. Cross-border cooperation on spatial planning should be promoted to enhance the coherence of N2000 across borders, using new relevant GIS-technologies and data to systematically scrutinise the ESA, EIA, AA and spatial planning. More comprehensive approach and better involvement of all stakeholders and actors on the EU but also at national and local level is needed. In theory, major emphasis is on public involvement[235], but also on the transparancy and openness of decision-making, which also ensure scrutiny of proper implementation of the EU environmental legislation.

[234] E.g. RKHKo 3-17-1739/80.
[235] Šobot, A., Lukšič, A. A. (2020), p. 55.

SUMMARY

This master's thesis focused on the balancing of environmental considerations with other public interests such as economic, social and cultural requirements, regional and local characteristics in the establishment and management of N2000. The major emphasis was also given to Article 6 of the Habitats Directive or so-called derogation clause and its implementation in the EU and in Estonia.

N2000 across all EU countries is established to protect core breeding and resting sites for rare and threatened species and rare natural habitat types. According to the Habitats Directive, the measures to protect biodiversity shall take account of economic, social and cultural requirements and of regional and local characteristics. Considering that environmental issues are constructed by historical processes where social, economical and cultural considerations should not be set aside, sustainable development objectives should be achieved by balancing aforementioned interests via procedural measures such as inclusion, participation and ideals of democracy.

In this paper, the basis of the EU and Estonian environmental protection legislation and its core priciples were examined and comparative analysis on the basis of academic literature of the formation of N2000 in EU countries and in Estonia was conducted. The research concluded that the establishment of N2000 was carried out in an incoherent manner throughout the EU. The establishment of N2000 did not adequately balance economic, social and cultural requirements and regional and local characteristics, despite the aim of the Habitats Directive to establish protected areas which do not exclude the traditional use of land. This study brought out the major flaws in the N2000 sites selection process which was lead by the EC and executed by the Member States.

The thesis elaborated on the fact that the Member States had wide freedom in deciding how to carry out the procedures of designating N2000 sites and how to involve relevant stakeholders in this process, but at the same time, the EC failed to provide appropriate guidance materials for N2000 sites designation process. The EC adopted strict approach by requiring that establishment of N2000 must be based on scientific, i.e. ecological, criteria only. This approach, supported by the case law of the CJEU and relatively greater power of ENGOs in the EU decision-making mechanism and the vagueness of message of how N2000 would relate to the future land use requirement, inflamed stakeholders in many EU countries and conflicts between stakeholders, i.e. relevant interest groups, competent authorities, the Member States and the EC

emerged.

This paper demonstrated that the inclusion of relevant stakeholders, NGOs and ENGOs was inconsistent across the EU. In some EU countries, stakeholders' interests were taken into account to a considerable extent, whereas in some countries the participatory activities were modest or even discouraged by the authorities. It is evident that in some of the Member States such as France, Finland Nederlands and Belgium, the „loudest" interest groups influenced the N2000 network sites designation. Thus, other public interests of stakeholders such as of land-owners (forest and agricultural land), hunters and fishermen, were taken into account, after all. During the N2000 network site selection in Finland and in France, the N2000 network site proposal was altered and the area of sites was significantly reduced. On the contrary, in many EU countries, e.g. Croatia, Slovenia, Bosnia and Herzegovina, Greece, Hungary, Poland and Romania, public involvement was rather modest and the process of establishing N2000 network did not have significant impact of NGOs. It was ascertained, that also in Estonia heated debates were held, but due to lack of academic literature about the establishment of N2000 in Estonia further conclusions of how interest groups may have influenced N2000 site designation in Estonia, were not drawn.

This paper confirmed that the establishment, interpretation and implementation of the Habitats Directive in the EU was slow, ineffective and the result – N2000 - reflects relatively greater power of ENGOs. It means that the EU priorities and national priorities may have been in conflict, as certain interest groups were able to influence the decision-making processes more than the others.

With regard to the management of current and already established N2000, Article 6 of the Habitats Directive – a so-called derogation procedure – plays a crucial role in balancing public interests. According to the derogation procedure, a plan or a project that has significant adverse impact on a N2000 site could nevertheless be allowed in case (1) an AA is carried out to identify precise impacts on N2000 site, (2) imperative reasons of overriding public interest exist and (3) appropriate mitigation measures and if relevant, (4) compensatory measures are applied.

This thesis outlined the requirements and criteria for a proper derogation procedure based on the EU legislation, the EC guidance materials and the case law of the CJEU. In this context, the recent case law of Estonian courts was analyzed in order to assess whether Article 6 of the Habitats Directive has been properly executed. In addition, this paper assessed the effectiveness of the derogation procedure layd down by Article 6 of the Habitats Directive.

The relevant analysis identified inconsistencies in interpreting Article 6 of the Habitats Directive by both: the EC and the CJEU. In addition, clearly improper implementation of derogation procedure in Estonia case-law was identified and root causes of why the current derogation procedure is inefficient were highlighted.

Although the EU legislation, as well as the EC guidance and case-law of the CJEU related to the derogation procedure under Article 6 of the Habitats Directive is rather strict, it is not consistent enough. For example, the CJEU ruling *Nomarchiaki and Others* from 2011 leaves too much freedom for defining the overriding public interest, thereby allowing compensatory measures to be taken too easily. Therefore, it undermines the framework of Article 16(1) according to which a Member State has a legal obligation to maintain the concerned protected species in a favourable conservation status. The EC, however, seems to be stuck between the objectives set by the Habitats Directive, on one hand, and the objectives set by other EU-wide policies that might as well constitute the imperative reasons of overriding public interest, such as TEN-T projects. The EC opinion in *Danube* seems to give leverage of further easing of the principles of Articles 6(4) and 16(1) of the Habitats Directive where the EC approved a solution where, *inter alia,* priority habitat type was planned to be destroyed and compensatory measures to alleviate the impact of a projects were envisaged to take 30 years to achieve conservation status B.

The case-law of Estonia demonstrates that, in principle, adverse impacts on N2000 sites are possible and permissable unless these impacts endanger achieving the overall objectives of that particular N2000 site. Therefore, the principle of taking into account the economic, social and cultural requirements and regional and local characteristics, as set forth in Article 2(3) of Habitats Directive, has been applied in a manner that allows even small-scale deterioration of the protected habitat types in N2000 site if overall conservation objectives are not endangered. The author of this paper agrees with this approach and is in the opinion that in such cases an AA should, as a rule, be carried out in order to specify impacts of human activity to N2000 site and when it becomes evident that activities do not endanger achieving objectives of N2000 site or the impacts could be mitigated, some human activity should be allowed also in N2000 sites unless spatial planning of N2000 site management regulation restricts such activity.

This study highlighted two cases in the Estonian case law as examples of improper use of dergogation procedure layd down by Article 6 of the Habitats Directive. In the case 3-17-1739/80, *Hellenurme dam*, the Supreme Court of Estonia released a private enterprise of the obligation to carry out a proper AA and also of incurring the expenses. This decision seems not

only to undermine the principle of carrying out a proper AA according to the Habitats Directive Article 6(3), but also one of the major cornerstone of environmental legislation in EU: the principle of obligation to compensate. According to the domestic and EU legislation, EC guidance materials, academic literature as well as the case-law of CJEU, the promoter of a project should always carry the cost of developing and executing project or a plan, including bearing the costs to finance the EIA, the case 3-17-1739/80 does not make any sense. This case constitutes an example of a project that has adverse impact on N2000 but a project escapes through a „loophole" because it is not considered to be necessary to be included in the EIA and thus paving the way for improper Natura assessment.

Another example where a serious risk of improper derogation procedure exists, is associated with the case 3-19-1697/78, *Linnamäe dam*, where a special use of water permit has been applied and a dispute of whether to demolish the Linnamäe dam built in 2002 on Jägala River is taking place. In principle, the opinion of the EC should be requested in order to maintain the dam. Meanwhile, the dam was taken under heritage protection as an immovable monument in December of 2020 by the Minister of Culture and therefore, the hands of the Estonian Environmental Board (EEB) are tied: the EEB cannot oblige a private enterprise to demolish an immovamble monument, on one hand, but the Ministry of Culture has not initiated a derogation procedure under the Article 6(4) of the Habitats Directive, in which the opinion of the EC should be obtained, and seems to be satisfied with the *status quo*. It only remains to hope that the national ENGOs issue a proper claim to the EC, as the Article 6 of the Habitats Directive has not been followed properly in case, *Linnamäe dam*.

This paper outlines that the EC and the CJEU have little opportunity to enter into the individual requirements for derogating authorisation in the cases where the Member States do not follow legislation in force or interpret the EU law differently from the EC or the CJEU. In addition, there is even no certainty that the EC or the CJEU is informed of all the cases where, EU law is is interpreted by national courts (without asking preliminary judgement of CJEU) and derogation procedure is either carried out or ought to be carried out as both cases 3-17-1739/80, *Hellenurme dam,* and 3-19-1697/78, *Linnamäe dam,* of Estonian courts demonstrate. In the case 3-17-1739/80, *Hellenurme dam*, the EEB who ultimately lost the case, cannot bring a claim against Estonian Supreme Court of Justice to the CJEU, nor is it possible that Estonia brings a claim against itself to the EC. In the case 3-19-1697/78, *Linnamäe dam*, the EEB cannot lawfully bring a claim against the Ministry of Culture, as this issue should be resolved, at the Government, but one could doubt that Ministry of Culture would proceed with proper derogation procedure by preparing a request to the EC for its opinion.

This paper concluded that improper national case law across EU, might be one of the root causes, why the general objectives of the Habitats and Birds Directives are not met and some of the species and habitat types continue to decline or remain endangered. It follows that due to the fact that case law is not always translated nor is the preliminary ruling from the CJEU requested, it makes sense to set a standand that all national case-law with regard to the management of N2000 must be translated and made available to the EC and to the CJEU.

The improper use of derogation procedure seems to be a wider problem though as this issue has been underlined in relevant academic literature, by the EC and by the European Court of Auditors. It has also been argued that the German case-law has weakened the concept of N2000 by allowing derogating authorisations too easily. In the light of the hereinabove mentioned Estonian cases, the same tendency manifests in Estonia, as well. Therefore, a further analysis is needed to assess the fitness of derogation procedures carried out in the Member States, especially in the light of recent development in the CJEU case law with strict distinction between mitigation and compensatory measures, as the 2014 case C-521/12, *Briels and Others* demonstrates.

This thesis highlighted that the Member States are not prone to use the derogation clause under the Article 6 Habitats Directive, which is confirmed by academic literature and the EC statistics. It was also identified that the derogation procedure whereby the opinion of the EC is requested takes way too much time and is therefore inefficient, because during that time a plan or a project must be put on hold. Furthermore, the analysis concluded that the derogation procedure itself is too narrow, as it concentrates only to a specific plan or a project and does not take into account more comprehensive strategic view of related interests of the Memeber States or another policies of the EU. The latter issue is best illustrated in the case 3-18-529/137, *Rail Baltica*, concerning the alignment of Rail Baltica (RB) in Estonia which is part of a TEN-T network project - linking Finland, Estonia, Latvia, Lithuania, Poland, Germany, Nederlands and Belgium - where the Supreme Court of Estonia annulled a county plan and the alignment of the RB in Estonia in section linking Pärnu (a southern city of Estonia) and Estonian-Latvian boarder. As a result, the whole RB project and the development of TEN-T transport corridor might be at risk, since the change of alignment of RB in Estonia could have impact on the alignment of railway in neighbouring countries where development and building activities have already commenced. The worst case scenario is that a project, which is part of the TEN-T, is not feasible and cannot be implemented in one of the Member State, consequently the whole TEN-T transport-corridor becomes not feasible resulting thus to considerable social, environmental and economical damage because the developments are carried out in vain. If environmental

assessment, and the assessment of feasibility of TEN-T corridors in relation to N2000 would be carried out on more strategic level beforehand, aforementioned risk reduces significantly.

The analysis revealed that there is an obvious need to improve the management of N2000 and derogation procedure. This paper firstly discussed the role of participatory requirements and concluded that sustainability and good balance between the interests of biodiversity protection, economy, social and cultural considerations seem to be best ensured via promotion and execution of democracy ideals in their best meaning. Namely, transparency, social inclusion, accessibility to the information and open data, dissimenation of knowledge, capacity building of competent authorities seem to be the key elements to lift the management system of N2000 on to the next level. This way, different public interests are openly argued about, thoroughly weighed against each other and decision are taken on the basis of best and comprehensive information available, thus lifting the quality of decisions. The author also emphasized the role of ENGOs and the widening of their rights (which the EC has also proposed) to scrutinise proper implementation of environmental legislation and elevate the quality of decision-making. Therefore, it is evident that the legislation in relation to spatial planning and environmental assessments, including the AA of N2000, must be enhanced at the EU level.

This thesis underlined the urgent need for more integrated spatial planning and environmental assessment procedures at the level of EU to reduce the risk of collision of EU-wide policies. A prerequisite for funding a project or a plan of EU-level importance should therefore be the certainty that a particular project or plan that is a part of the larger EU policy and is sustainable, but also the policy itselt is sustainable. To achieve this objective, the creation of conflict-resolving mechanism within the EC is vital in order to balance public interests throughout the EU on a more strategical level. For instance, where conflicts between the TEN-T and N2000 are revealed, these conflicts should be resolved at the strategic level within a reasonable time-frame and not at the sub-project level. It would therefore make sense that more strategic plans, including spatial plans, SEA, EIA and AA procedures carried out in the Member States that have relvance in the EU-wide policies would go through the EC quality assurance procedure within reasonable fixed time-limit. Thereby, a decision on a more strategic level could be obtained, the EC could resolve conflicts of contradicting policies much earlier and the relevant planning documents could be amended accordingly.

In addition, it must also be assured at the Member State but also at the EU level that all projects and plans that have adverse impact on N2000 should correspond to the principle recognized throughout the EU that the promoter of a project should always incur the costs of developing

and executing a plan or a project. In the case of projects with the EU funding, the relevant EC services should be scrutinised to the very end. In this respect, more capacity-building measures should be carried out by the EC across the EU, as there are indications that this principle is not always complied with, as was demonstrated in this paper.

In conclusion, the author of this thesis has pointed out the shortcomings of the establishment and management of N2000 across the EU and recommends that Article 6 of the Habitats Directive and derogation procedure thereof should be redesigned. In the opinion of the author of this paper, better integration of EU-wide policies and more efficient and faster resolution procedure with regard to derogation is called for. In addition, it is vital on the level of the EU to monitor and scrutinise proper impelementation of the Habitats Directive and the protection of biodiversity in the light of recent rulings by the CJEU, which set strict and narrow approach to carrying out the AA and distinguish the mitigating and compensation measures that are the basis of proper implementation of derogation procedure under the Habitats Directive Article 6.

Therefore, it makes sense to set a standand that all national case-law related to the management of N2000 must be translated and made available to the EC and to the CJEU as widespread improper application of derogating procedure seems to take place. The EC should carry out a comprehensive assessment of the entire TEN-T Network and also its energy, agriculture and forestry policy programmes to examine the potential conflict areas in relation to N2000 sites. In addition the EC should carry out a comprehensive assessment on how derogation procedures are carried out in the Member States in practice and whether the EC guidelines are followed. Lastly, participatory requirements and a good balance between interests of biodiversity protection, economy, social and cultural considerations must be assured via promotion and execution of democracy ideals in their best meaning.

KOKKUVÕTE

Käesoleva magistritöö eesmärgiks oli välja selgitada, kas Natura 2000 võrgustiku loomine ja haldamine võtab keskkonnakaitseliste huvide kõrval arvesse ka teisi majandusliku, sotsiaalse kultuurilise, piirkondliku ja kohaliku iseloomuga avalikke huvisid. Töö keskendus Loodusdirektiivi artikli 6 ja Natura 2000 erandi rakendamisele nii Euroopa Liidus (EL) kui Eestis. Uurimisprobleem seisnes Natura 2000 võrgustiku loomise ja haldamise kitsaskohtade väljatoomises ning töö peamine eesmärk oli teha ettepanekud praeguse Natura 2000 võrgustiku haldamise parandamiseks.

Vastavalt uurimisprobleemile sõnastati järgmised uurimisküsimused:

1. Kas Natura 2000 võrgustiku loomisel võeti keskkonnakaitseliste huvide kõrval arvesse ka teisi avalikke huvisid?

2. Kas sidusrühmad ja huvigrupid olid kaasatud Natura 2000 võrgustiku loomise juurde?

3. Kas Loodusdirektiivi artiklist 6 tulenev nn „Natura erandi menetlus“ on tõhus?

4. Kas Natura erandi menetlust rakendatakse Eestis kooskõlas ELi ja siseriiklike õigusaktidega ning kas Eesti kohtud järgivad Euroopa Liidu Kohtu praktikat ja Euroopa Komisjoni suuniseid?

5. Millised on võimalused Natura 2000 võrgustiku haldamise parandamiseks ja õigusaktide täiustamiseks?

Käesolev magistritöö on õigusalane uurimus, kus eespool nimetatud uurimisküsimustele vastamiseks on kasutatud analüütilisi, võrdlevaid ja kvalitatiivseid uurimismeetodeid.

Natura 2000 võrgustik on loodud kõigis ELi riikides, et kaitsta haruldasi ja ohustatud liike ning nende looduslikke elupaiku. Loodusdirektiivi kohaselt võetakse bioloogilise mitmekesisuse kaitsemeetmetes arvesse majanduslikke, sotsiaalseid ja kultuurilisi vajadusi ning piirkondlikke ja kohalikke iseärasusi. Sellest tulenevalt oli siinse magistritöö autori lähtekohaks positsioon, et kuivõrd keskkonnaprobleemidega on tihedalt seotud ajaloolised protsessid, kus sotsiaalseid, majanduslikke ja kultuurilisi kaalutlusi ei tohiks alahinnata, tuleb säästva arengu eesmärkide saavutamiseks leida huvide tasakaal läbi avaliku kaasamise, diskussioonis osalemise võimaldamise ja demokraatia põhimõtete rakendamise kaudu.

Magistritöös uuriti ELi ja Eesti keskkonnakaitse õiguslikke aluseid ja põhiprintsiipe ning viidi akadeemilise kirjanduse põhjal läbi võrdlev analüüs Natura 2000 võrgustiku moodustumise kohta ELis ja Eestis. Uurimistöös jõuti järeldusele, et Natura 2000 võrgustiku loomine toimus ELis ebaühtlaselt ja et Natura 2000 võrgustiku loomine ei tasakaalustanud majanduslikke, sotsiaalseid, kultuurilisi, regionaalseid ja kohalikke huvisid, hoolimata Loodusdirektiivi eesmärgist rajada kaitsealad, mis ei välista maa traditsioonilist kasutamist. Töö tõi välja peamised kitsaskohad Natura 2000 võrgustiku alade valiku protsessis, mille eestvedajaks oli Euroopa Komisjon ja elluviijateks liikmesriigid.

Töös järeldati, et liikmesriikidel oli avar valikuvabadus otsustamaks, kuidas viia läbi Natura 2000 võrgustiku alade määramine ja kuidas kaasata sellesse protsessi asjaomased sidusrühmad, kuid samal ajal puudusid liikmesriikidel asjakohased Euroopa Komisjoni juhendmaterjalid Natura 2000 võrgustiku alade määramise täpsema metoodikaga. Euroopa Komisjoni väga ranget lähenemisviisi, et Natura 2000 võrgustiku loomisel tuleb lähtuda ainult teaduslikust materjalist, st ökoloogilistest kriteeriumitest, toetas ka toonane Euroopa Liidu Kohtu praktika. Keskkonnaorganisatsioonide suhteliselt suurem mõjuvõim ELi tasemel ja ebamäärane informatsioon selle kohta, kuidas hakkab Natura 2000 võrgustik mõjutama maakasutust, tekitas üle terve ELi konflikte sidusrühmade, huvigruppide, riigiasutuste, liikmesriikide ja Euroopa Komisjoni vahel.

Uurimistöö näitas, et asjaomaste sidusrühmade, valitsusväliste organisatsioonide ja keskkonnaorganisatsioonide kaasamine oli terves ELis ebaühtlane. Kui mõnes liikmesriigis võeti sidusrühmade huve olulisel määral arvesse, siis leidus riike, kus kaasamine oli tagasihoidlik või isegi sihipäraselt takistatud. On ilmne, et mõnes liikmesriigis, nagu näiteks Prantsusmaa, Soome, Holland ja Belgia, mõjutasid Natura 2000 võrgustiku alade määramist kõige „valjuhäälsemad“ huvigrupid. Nii võeti Natura 2000 võrgustiku loomisel arvesse erinevate sidusrühmade, näiteks metsa- ja põllumaa omanike, jahimeeste ja kalurite huve. Soomes ja Prantsusmaal muudeti huvigruppide surve tulemusel Natura 2000 võrgustiku alade ettepanekut esialgsega võrreldes arvestataval määral. Samas paljudes liikmesriikides, näiteks Horvaatias, Sloveenias, Bosnia ja Hertsegoviinas, Kreekas, Ungaris, Poolas ja Rumeenias, oli sidusrühmade kaasamine ja kaasatus tagasihoidlik ning Natura 2000 võrgustiku loomisel valitsusvälistel organisatsioonidel olulist mõju ei olnud. Siinses töös leiti, et ka Eestis peeti tuliseid arutelusid Natura 2000 võrgustiku alade üle, samas ei õnnestunud töö autoril teha põhjapanevaid järeldusi selle kohta, kuidas huvigrupid mõjutasid Natura 2000 alade määramist Eestis.

Uurimistöös leidis kinnitust hüpotees, et Loodusdirektiivi kehtestamine, tõlgendamine ja rakendamine toimus ELis aeglaselt ja ebatõhusalt ning selle protsessi lõpptulemus – Natura 2000 võrgustik – peegeldas keskkonnaorganisatsioonide suhteliselt suuremat mõjuvõimu ELis. Teisisõnu, ELi prioriteedid ja riiklikud prioriteedid võisid olla Natura 2000 võrgustiku moodustamisel vastuolus, kuna teatud huvigrupid said ja oskasid otsustusprotsesse rohkem mõjutada kui teised.

Olemasoleva Natura 2000 võrgustiku haldamise juures on Loodusdirektiivi artiklil 6 ehk nn „Natura erandi menetlusel" määrav roll avalike huvide tasakaalustamisel. Natura erandi menetluse kohaselt võib lubada kava või projekti, millel on oluline negatiivne mõju Natura 2000 võrgustiku alale, elluviimist juhul, kui (1) viiakse läbi asjakohane hindamine Natura 2000 alale täpse mõju kindlaks tegemiseks, (2) tuvastatakse üldiste huvide seisukohast eriti mõjuvad põhjused, (3) võetakse tarvitusele asjakohased leevendusmeetmed ja (4) vajadusel võetakse tarvitusele asendusmeetmed.

Töös toodi ELi õigusaktidele, Euroopa Komisjoni juhendmaterjalidele ja Euroopa Liidu Kohtu praktikale tuginedes välja Natura erandi menetluse olulised tingimised ja kriteeriumid. Samuti analüüsiti Eesti kohtute hiljutist praktikat, et hinnata, kas Loodusdirektiivi artikkel 6 ja selles sätestatud tingimusi Eestis nõuetekohaselt täidetakse. Lisaks hinnati Natura erandi menetluse tõhusust.

Läbi viidud analüüs tuvastas ebajärjepidevuse Loodusdirektiivi artikli 6 tõlgendamisel nii Euroopa Komisjoni kui ka Euroopa Liidu Kohtu praktikas. Lisaks tuvastati Natura erandi menetluse ebaõige rakendamine Eesti kohtupraktikas ning toodi välja põhjused, miks praegune erandimenetlus tervikuna on ebaefektiivne.

Kuigi ELi õigusaktid, Euroopa Komisjoni suunised ja Euroopa Liidu Kohtu praktika Loodusdirektiivi artikli 6 ja Natura erandi menetluse rakendamise kohta on ranged, ei ole need piisavalt järjepidevad. Näiteks jätab Euroopa Liidu Kohtu 2011. aasta otsus asjas *Nomarchiaki jt* üldiste huvide määratlemiseks liiga palju vabadust, võimaldades seeläbi asendusmeetmete rakendamise liiga lihtsasti. Seeläbi õõnestab viidatud lahend Loodusdirektiivi artikli 16 lõikes 1 sätestatud raamistikku, mille kohaselt on liikmesriigil õiguslik kohustus säilitada asjaomaste kaitstavate liikide soodne kaitseseisund. Euroopa Komisjon näib aga olevat jäänud kimbatusse, kas kaitsta Loodusdirektiivis sätestatud eesmärke ja põhimõtteid või lubada Loodusdirektiiviga vastuolus olevaid ELi-ülese tähtsusega projekte teiste üldiste huvide seisukohast eriti mõjuvatel põhjustel, nt TEN-T transpordivõrgustiku projektide puhul. On ilmne, et Euroopa Komisjoni

arvamus *Doonau* kaasuses annab hoobi Loodusdirektiivi artikli 6 lõikes 4 ja artikli 16 lõikes 1 sõnastatud põhimõtete edasiseks rakendamiseks: Euroopa Komisjon kiitis nimelt heaks projekti, kus muuhulgas kavatseti hävitada prioriteetsed elupaigatüübid ning kus kavandatud asendusmeetmed projekti mõju leevendamiseks ja B-kaitseseisundi saavutamiseks võtavad aega vähemalt 30 aastat.

Uurimistöös analüüsitud Eesti kohtupraktika näitab, et põhimõtteliselt on kahjulik mõju Natura 2000 aladele lubatav, välja arvatud juhul, kui need mõjud ohustavad konkreetse Natura 2000 ala üldiste eesmärkide saavutamist. Analüüsitud juhtumid olid seotud Natura 2000 alale kavandatud elamutega ja eelmises lauses avatud põhimõte ei tohiks laieneda suurematele kavadele või projektidele. Eesti kohtupraktika on seega järgimas Loodusdirektiivi artiklis 2 lõikes 3 sätestatud põhimõtet, mille kohaselt võetakse Natura 2000 alade haldamisel arvesse majanduslikke, sotsiaalseid ja kultuurilisi vajadusi ning piirkondlikke ja kohalikke iseärasusi, ning isegi Natura 2000 ala vähene negatiivne mõju võib olla lubatav kui kaitseala üldiste eesmärkide täitmist ei ohustata. Käesoleva töö autor nõustub selle lähenemisviisiga ja on arvamusel, et analoogsetel juhtudel tuleks reeglina läbi viia kohane Natura hindamine, et täpsustada inimtegevuse mõju ulatust ja kui selgub, et tegevus ei ohusta Natura 2000 ala eesmärkide täitmist või selle tegevuse mõjusid saab leevendada, peaks inimtegevus olema lubatav ka Natura 2000 aladel, välja arvatud juhul, kui ruumilise planeerimise dokumendid või kaitsekorralduseeskiri sellise tegevuse täielikult välistavad.

Uurimistöös toodi muuhulgas välja kaks kaasust Eesti kohtupraktikast, illustreerimaks Loodusdirektiivi artikli 6 ja selles sätestatud Natura erandi menetluse ebaõiget rakendamist. Asjas 3-17-1739/80*, Hellenurme tamm*, vabastas Eesti Riigikohus eraettevõtte asjakohase Natura hindamise koostamise kohustusest ja sellega seotud kulude kandmisest. See otsus näib õõnestavat mitte ainult Loodusdirektiivi artikli 6 lõikes 3 toodud asjakohase Natura hindamise koostamise mõtet ja loogikat, vaid ka üht keskkonnaõiguse tuumaks olevat põhimõtet „saastaja maksab" ehk keskkonna kasutamisega seotud kulude kandmise põhimõtet, mis kehtib terves ELis. Kuivõrd ELi ja siseriiklike õigusaktide, Euroopa Komisjoni juhendmaterjalide, teaduskirjanduse ja Euroopa Liidu Kohtu praktika põhjal võib väita, et projekti elluviija peab alati kandma projekti või kava väljatöötamise ja elluviimise kulud, sh asjakohase keskkonnamõju ja Natura hindamise kulud, siis on Riigikohtu seisukoht asjas 3-17-1739/80*, Hellenurme tamm*, arusaamatu. See kaasus on ilmekas näide, kuidas projekt, millel on kahjulik mõju Loodusdirektiivis sätestatud eesmärkide täitmisele ja Natura 2000 võrgustiku alale, pääseb asjakohasest Natura hindamisest selle tõttu, et kohus ei pea vajalikuks Natura hindamist

keskkonnamõju hindamise tingimuste juurde lisada, sillutades sellega teed ebaõigele halduspraktikale Natura hindamise küsimuses.

Teine ilmekas näide ebaõigest Natura erandi menetluse kohaldamisest Eestis puudutab kaasust 3-19-1697/78, *Linnamäe tamm*, kus vee erikasutusloa vaidluses on kõne all küsimus, kas lammutada aastal 2002 renoveeritud Linnamäe tamm Jägala jõel. On ilmne, et antud juhtimis tuleks läbi viia kohane Natura erandi menetlus ning kui tahta tammi säilitada, tuleb selleks küsida vajalik arvamus Euroopa Komisjoni käest. Samas on Linnamäe tammi teema riigisiseselt väga pingestatud: kultuuriminister võttis Linnamäe tammi 2020. aasta detsembris muinsuskaitse alla kui kinnismälestise ja selle tõttu on Keskkonnaameti käed seotud: Keskkonnaamet ei saa kohustada eraettevõtet kinnismälestist lammutama, kuid kultuuriministeerium ise ei ole algatanud Loodusdirektiivi artikli 6 lõike 4 kohast erandimenetlust, mille järgi tuleks tammi säilitamiseks küsida Euroopa Komisjoni arvamus, ja tundub, et Kultuuriministeerium on praeguse olukorraga rahul. Siinses kaasuses jääb vaid loota, et mõni Eesti keskkonnaorganisatsioon esitab Euroopa Komisjonile pöördumise, et Linnamäe tammi puhul ei ole Loodusdirektiivi artiklit 6 nõuetekohaselt järgitud.

Magistritöös tuuakse välja, et nii Euroopa Komisjonil kui ka Euroopa Liidu Kohtul on käesolevaga vähe võimalusi sekkuda riigisisestesse Natura erandi menetlustesse ja nende menetluste raames sätestatavatesse tingimustesse, seda ka juhul, kui liikmesriigid kalduvad kõrvale kehtivast õigusest või tõlgendavad EL-i õigust erinevalt Euroopa Komisjoni või Euroopa Liidu Kohtu käsitlusest. Puudub ka kindlus, et Euroopa Komisjoni või Euroopa Liidu Kohut teavitatakse juhtumitest, kus siseriiklikud kohtud tõlgendavad oma otsustes asjakohast ELi õigust, küsimata selleks eelotsust Euroopa Liidu Kohtult, või viiakse pädeva riigiasutuse poolt läbi Natura erandi menetlus või peaks see menetlus kehtiva õiguse kohaselt läbi viidama, nagu ka kaasused 3-17-1739/80, *Hellenurme tamm* ja 3-19-1697/78, *Linnamäe tamm*, ilmestavad. Kohtuasjas 3-17-1739/80, *Hellenurme tamm*, ei saa Keskkonnaamet, kes kohtuasja kaotas, pöörduda Euroopa Liidu Kohtusse Eesti Riigikohtu vastu ega ole ka võimalik, et Eesti esitab kaebuse iseenda vastu Euroopa Komisjonile Loodusdirektiivi väära kohaldamise pärast. Kohtuasjas 3-19-1697/78, *Linnamäe tamm*, ei saa Keskkonnaamet õiguspäraselt Kultuuriministeeriumi vastu nõuet esitada, kuna see küsimus tuleks lahendada Vabariigi Valitsuse tasemel. Samas on põhjust kahelda, et Kultuuriministeerium alustab nõuetekohast Natura erandi menetlust ja valmistab selleks Vabariigi Valitsusele ette materjalid Euroopa Komisjoni arvamuse saamiseks.

Töös jõuti järeldusele, et ebaõige siseriiklik kohtupraktika ja sellest johtuv edasine halduspraktika võib olla vähemalt üks juurpõhjuseid, miks Loodusdirektiivi üldised eesmärgid on jäänud täitmata. Kuivõrd Eestis on kokku ligikaudu 400 tammi, mis mõjutavad oluliselt kalade, loomastiku ja taimestiku seisundit, võib vaid üks Loodusdirektiivi artikli 6 ebaõige kohaldamine kohtus kaasa tuua arvestatavad tagajärjed. On oluline märkida, et töös leiti ka, et alati ei küsi Eesti kohtud eelotsust Euroopa Liidu Kohtult, kui Loodusdirektiivi artiklit 6 rakendamist puudutav kaasus kohtusse jõuab. Selle tõttu on siinse töö autor seisukohal, et ELi tasemel tuleks kehtestada nõue, et Loodusdirektiivi rakendamist puudutav riigisisene kohtupraktika tõlgitakse ja tehakse kättesaadavaks Euroopa Komisjonile ja Euroopa Liidu Kohtule.

Natura erandi menetluse ebaõige kasutamine näib olevat laiem, kogu võrgustikku hõlmav probleem, seda on rõhutatud nii teaduskirjanduses, Euroopa Komisjoni kui ka Euroopa Kontrollikoja analüüsides. Teaduskirjanduses on välja toodud, et Saksamaa kohtupraktika on Natura 2000 võrgustikku nõrgestanud, lubades Natura erandeid liiga kergekäeliselt. Eespool nimetatud Eesti juhtumite valguses avaldub sama tendents ka Eestis. Sellest tulenevalt leiab töö autor, et ELi liikmesriikides on tarvis läbi viia analüüs Natura erandi rakendamise sobivuse hindamiseks, pidades selle juures silmas Euroopa Liidu Kohtu praktika arengut, mis rangelt eristab leevendusmeetmeid asendusmeetmetest, nagu ilmneb 2014. a kohtuasjas C 521/12, *Briels jt*.

Uurimistöö tõi välja, et liikmesriigid ei ole agarad Loodusdirektiivi artiklis 6 sätestatud Natura erandi menetluse kasutajad, mida kinnitab nii teaduskirjandus kui ka Euroopa Komisjoni enda statistika. Erandimenetlus, mille korral küsitakse Euroopa Komisjoni arvamust, võtab ebamõistlikult palju aega ja on selle tõttu ebaefektiivne, kuivõrd vastust oodates tuleb vastav kava või projekt ootele panna. Lisaks jõuti analüüsis järeldusele, et Natura erandi menetlus on liiga kitsa fookusega, kuna see keskendub ainult konkreetsele kavale või projektile ega võta arvesse terviklikku strateegilist vaadet liikmesriikide huvide ega ELi ülese poliitika kohta. Seda järeldust ilmestab hästi kaasus 3-18-529/137, *Rail Baltica*, mis käsitleb Rail Baltica (RB) projekti ja selle asukohta Eestis (ühtlasi on tegu osaga TEN-T transpordivõrgustikust, mis ühendab Soomet, Eestit, Lätit, Leedut, Poolat, Saksamaad, Hollandit ja Belgiat), kus Riigikohus tühistas RB maakonnaplaneeringu Pärnut ja Eesti-Läti piiri ühendaval lõigul.. Nimetatud otsuse tulemusel võib kogu RB projekt ja sellega seoses ka TEN-T transpordikoridori arendamine ohtu sattuda, kuna RB trassi muutmine Eestis võib mõjutada raudtee asetsemist naaberriikides, kus arendus- ja ehitustegevus on juba alanud. Halvima võimaliku stsenaariumi järgi võiks TEN-T transpordivõrgustiku osaks oleva projekti teostamatuks muutumine muuta kogu vastava TEN-

T transpordikoridori teostamatuks, mille tulemuseks oleks märkimisväärne sotsiaalne, majanduslik ja keskkonnakahju, sest senised arendused oleksid sellisel juhul ellu viidud asjatult. RB kaasuse abil järeldab töö autor, et kui terve TEN-T transpordikoridori teostatavuse ja keskkonnamõju hindamine viidaks läbi strateegilisemal tasandil, mille käigus hinnataks ka TEN-T-võrgustiku kokkupuutepunkte Natura 2000 võrgustikuga, väheneks eelmainitud risk märkimisväärselt.

Uurimistöös järeldati, et tulenevalt välja toodud suurtest ja eripalgelistest probleemidest on ilmnevajadus parandada Natura 2000 võrgustiku haldamist ja Natura erandi menetlust. Töös käsitleti kaasamise rolli poliitikakujundamises ja sellega kaasnevaid nõudeid ning järeldati, et jätkusuutlikkuse ja bioloogilise mitmekesisuse kaitse, majanduse, sotsiaalsete ja kultuuriliste kaalutluste vahelise tasakaalu saavutamiseks näib kõige paremini sobivat demokraatia põhimõtete edendamine ja elluviimine. Läbipaistvus, sotsiaalne kaasatus, teabele ja avaandmetele juurdepääs, teadmiste levitamine, pädevate asutuste suutlikkuse parandamine võiksid olla peamised vahendid Natura 2000 võrgustiku haldamise paremaks korraldamiseks. Eespool nimetatud tegevuste kaudu vaieldakse avalike huvide üle avalikult, huvisid kaalutakse põhjalikult ja otsus tehakse parima kättesaadava teabe põhjal, mis kokkuvõttes tõstab otsuste kvaliteeti. Töö autor rõhutas ka keskkonnaorganisatsioonide olulist rolli ja vajadust nende õigusi laiendada (selle on välja pakkunud ka Euroopa Komisjon), et tagada keskkonnaõiguse nõuetekohane rakendamine ja otsuste parem kvaliteet. Magistritöös jõuti järeldusele, et ruumilise planeerimise ja keskkonnamõju hindamisega seotud õigusakte, sealhulgas Natura 2000 võrgustiku alade asjakohast hindamist, tuleb ELi tasandil tõhustada.

Magistritöö rõhutas tungivat vajadust sidusama ruumilise planeerimise ja keskkonnamõju hindamise regulatsiooni järele ELi tasandil, et vähendada ELi-üleste poliitikasuundade vastandumist ja põrkumist. Samuti tuleks töö autori hinnangul üle vaadata ELi-ülese tähtsusega projektide rahastamise eeldused ja tagada, et enne konkreetse projekti rahastamise otsustamist on olemas kindlus, et nii konkreetne projekt on jätkusuutlik ning osa laiemast ELi poliitikast kui ka vastav ELi poliitikasuund tervikuna on jätkusuutlik. Selle eesmärgi saavutamiseks on esmatähtis asjakohase konfliktide lahendamise mehhanismi loomine Euroopa Komisjoni juurde, et tasakaalustada kogu ELi avalikke huve strateegilisemal tasandil. Näiteks kui ilmnevad vastuolud ja konfliktikohad TEN-T transpordivõrgustiku ja Natura 2000 võrgustiku vahel, tuleks need konfliktid lahendada strateegilisel tasandil mõistliku aja jooksul, mitte iga all-projekti, nagu näiteks RB, tasandil eraldi. Selle tõttu on mõttekas, et strateegilised plaanid, sealhulgas ruumilise planeerimise, keskkonnamõju strateegilise hindamise, keskkonnamõju hindamise ja Natura hindamise menetlused, mis viiakse läbi liikmesriikides, kuid mis omavad

tähtsust kogu ELis hõlmava poliitika mõttes, läbiksid Euroopa Komisjoni kvaliteedikontrolli mõistliku ja kindlaks määratud tähtaja jooksul. Otsustusprotsessi strateegilisemale tasemele viimine aitaks Euroopa Komisjonil lahendada võimalikud konfliktikohad palju varem ning vastavaid planeerimisdokumente saaks operatiivselt muuta.

Käesolevas töös rõhutati vajadust ELi-üleselt kinni pidada põhimõttest, et kõigi Natura 2000 võrgustikku negatiivselt mõjutavate projektide ja kavade puhul järgitaks ELis tunnustatud põhimõtet, mille järgi projekti elluviijal lasub alati kohustus kanda kõik projektiga kaasnevad kulud, sh Natura hindamisega seotud kulud. ELi rahastatud projektide puhul tuleks eelmainitud põhimõtte järgmist kontrollida lõpuni välja. Euroopa Komisjon peaks kogu ELis rakendama meetmeid institutsionaalse suutlikkuse suurendamiseks , sest siinses töös leidub viiteid sellele, et eelmainitud põhimõtet alati ei järgita.

Kokkuvõtteks saab magistritöös läbi viidud analüüsi põhjal öelda, et Natura 2000 võrgustiku loomist ja haldamist ilmestavad mitmed puudujäägid ning Loodusdirektiivi artiklit 6 ja selles sätestatud Natura erandi menetlust tuleb muuta. Töö autori arvates on ilmselge vajadus kogu ELi hõlmavate poliitikasuundade parema integreerituse ning Natura erandite tõhusama ja kiirema menetluse järele. Lisaks on ELi tasandil siinse töö autori hinnangul oluline jälgida ja kontrollida Loodusdirektiivi nõuetekohast rakendamist ja bioloogilise mitmekesisuse kaitset, pidades silmas Euroopa Liidu Kohtu hiljutisi otsuseid, mis kehtestavad range ja kitsa tõlgenduse Natura asjakohase hindamise kohta ja eristavad selgelt leevendus- ja asendusmeetmed, mis on omakorda Loodusdirektiivi artikli 6 kohase nõuetekohase Natura erandi menetluse rakendamise aluseks.

Sellele aitaks kaasa liiduülese nõude kehtestamine, et kohtulahendid, mis puudutavad Loodusdirektiivi rakendamist, tuleb tõlkida ja teha kättesaadavaks nii Euroopa Komisjonile kui Euroopa Liidu Kohtule. Euroopa Komisjon peaks läbi viima kogu TEN-T transpordivõrgustiku, aga ka energia-, põllumajandus- ja metsanduspoliitika programmide põhjaliku hindamise, et selgitada välja võimalikke seoseid ja konflikte Natura 2000 võrgustiku aladega. Lisaks peaks Euroopa Komisjon läbi viima põhjaliku analüüsi selle kohta, kuidas Natura erandi menetlusi liikmesriikides praktikas läbi viiakse ning kas liikmesriigid Euroopa Komisjoni suuniseid Loodusdirektiivi rakendamisel järgivad. Lõpetuseks on töö autori arvates vajalik ka tagada piisav avalikkuse kaasamine ja leida hea tasakaal bioloogilise mitmekesisuse kaitse, majanduse, sotsiaalsete ja kultuuriliste kaalutluste vahel demokraatia põhimõtete ja printsiipide elluviimise kaudu.

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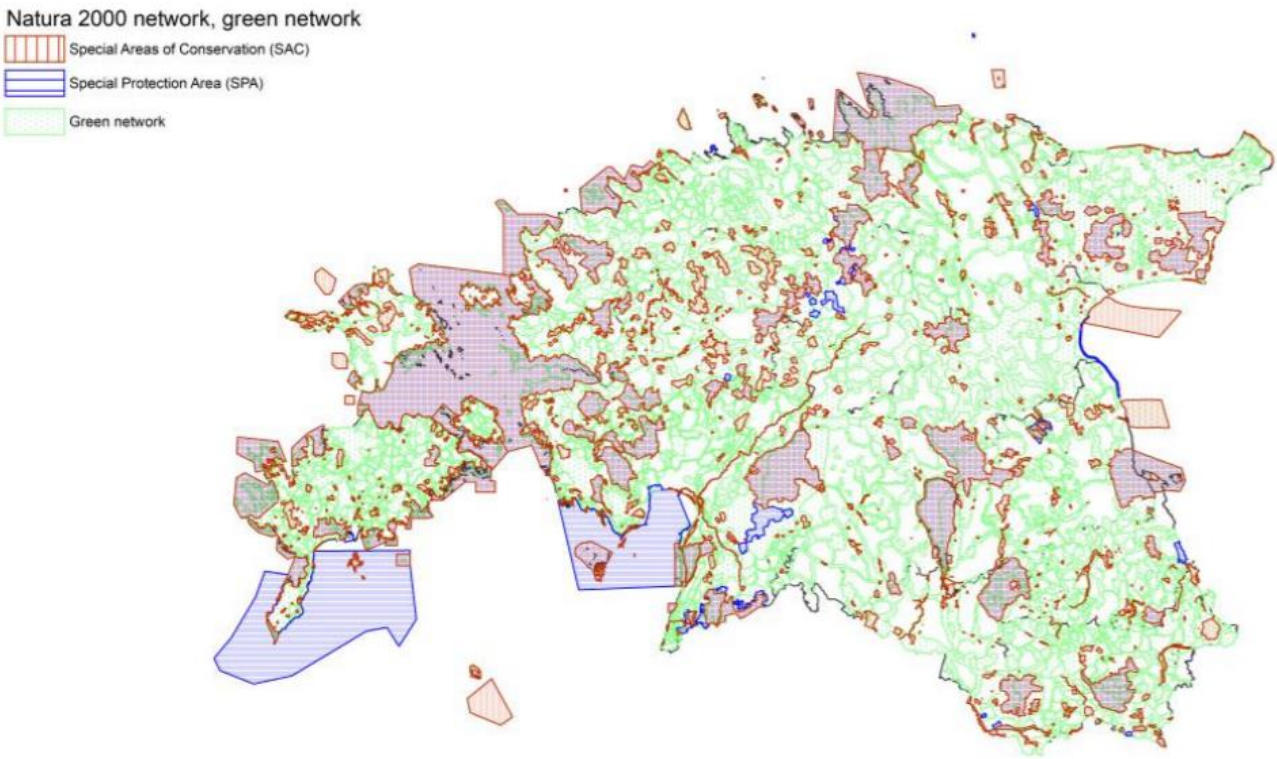
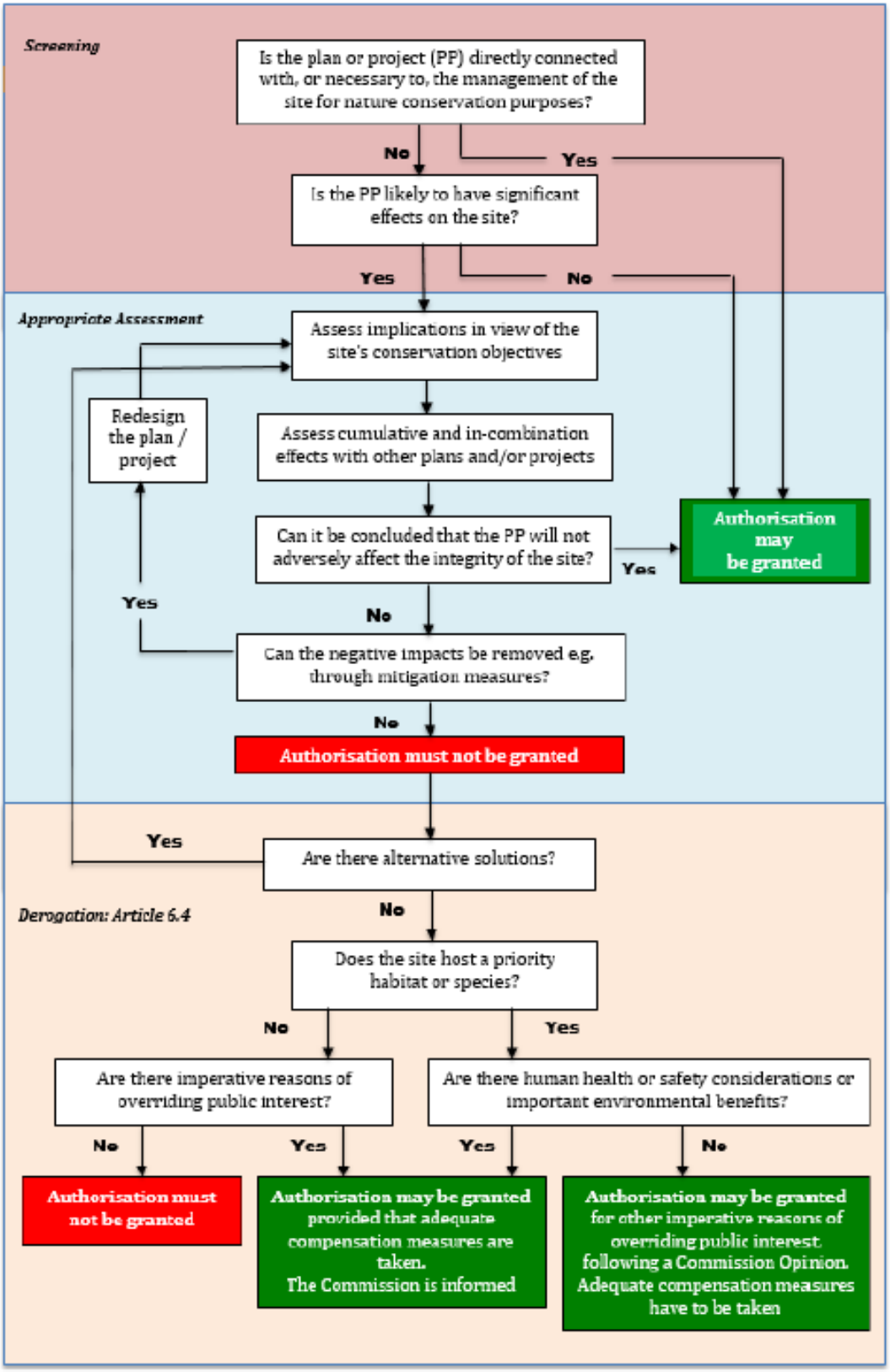
Annex 1 – NATURA 2000 NETWORK SITES IN ESTONIA



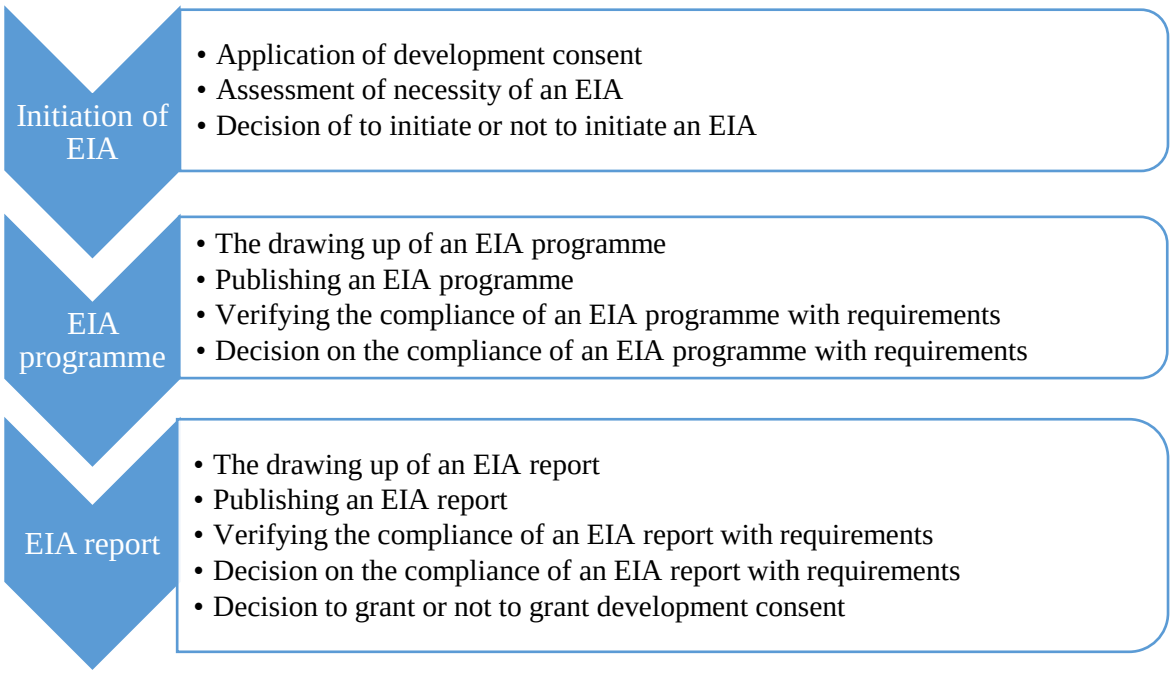
Source: Ministry of the Environment. Prioritised Action Framework (PAF) for Natura 2000 in Estonia pursuant to Article 8 of the Habitats Directive for the Multiannual Financial Framework period 2021–2027, p. 7. https://www.envir.ee/sites/default/files/paf_estonia_2020_2027.pdf (26.04.2021).

Annex 2 – STEP-WISE PROCEDURE FOR CONSIDERING PLANS AND PROJECTS (Natura 2000)



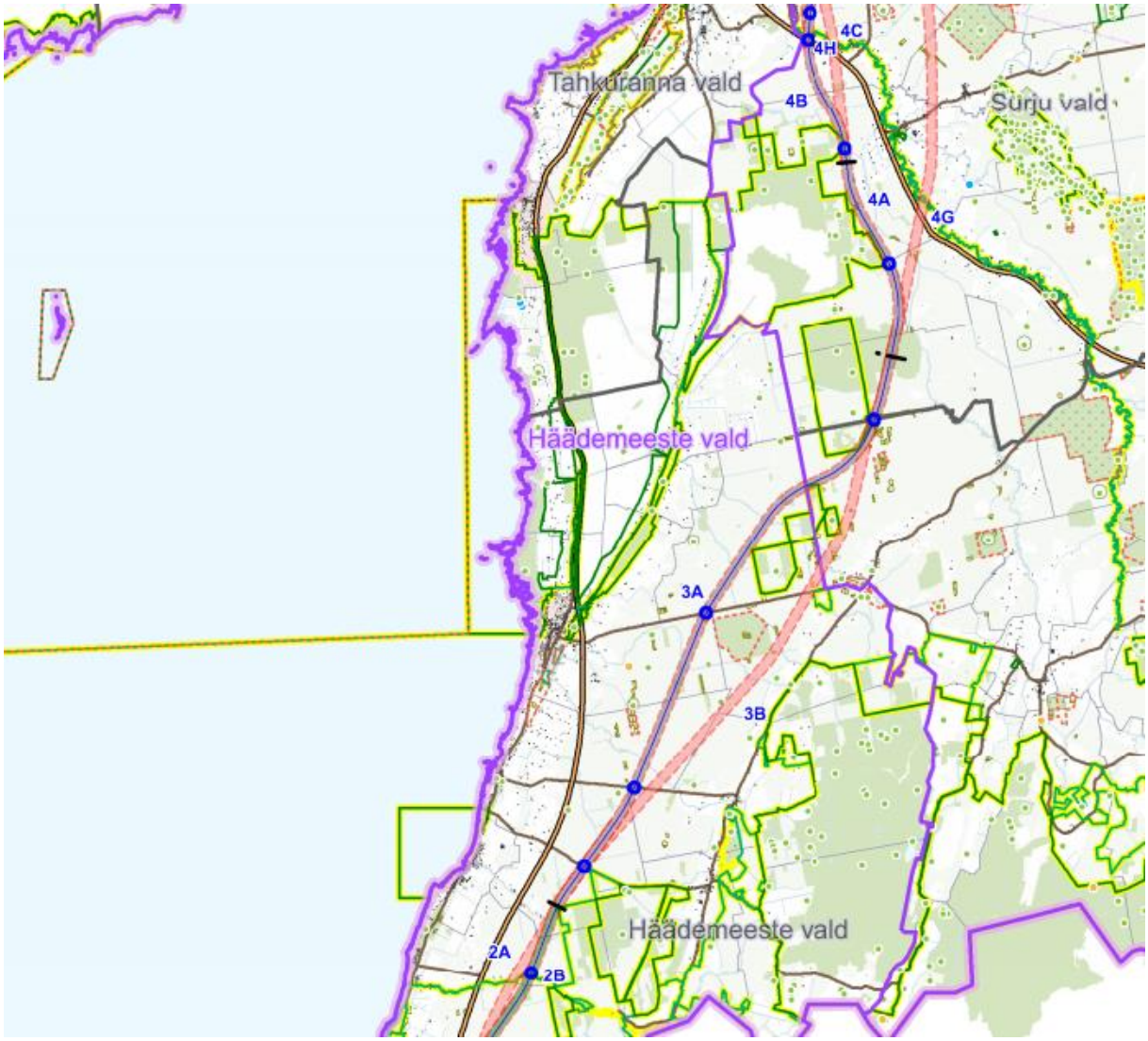
Source: Annex II of European Commission 21.11.2018 notice "Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC".

Annex 3 – STEP-WISE PROCEDURE FOR CARRYING OUT EIA



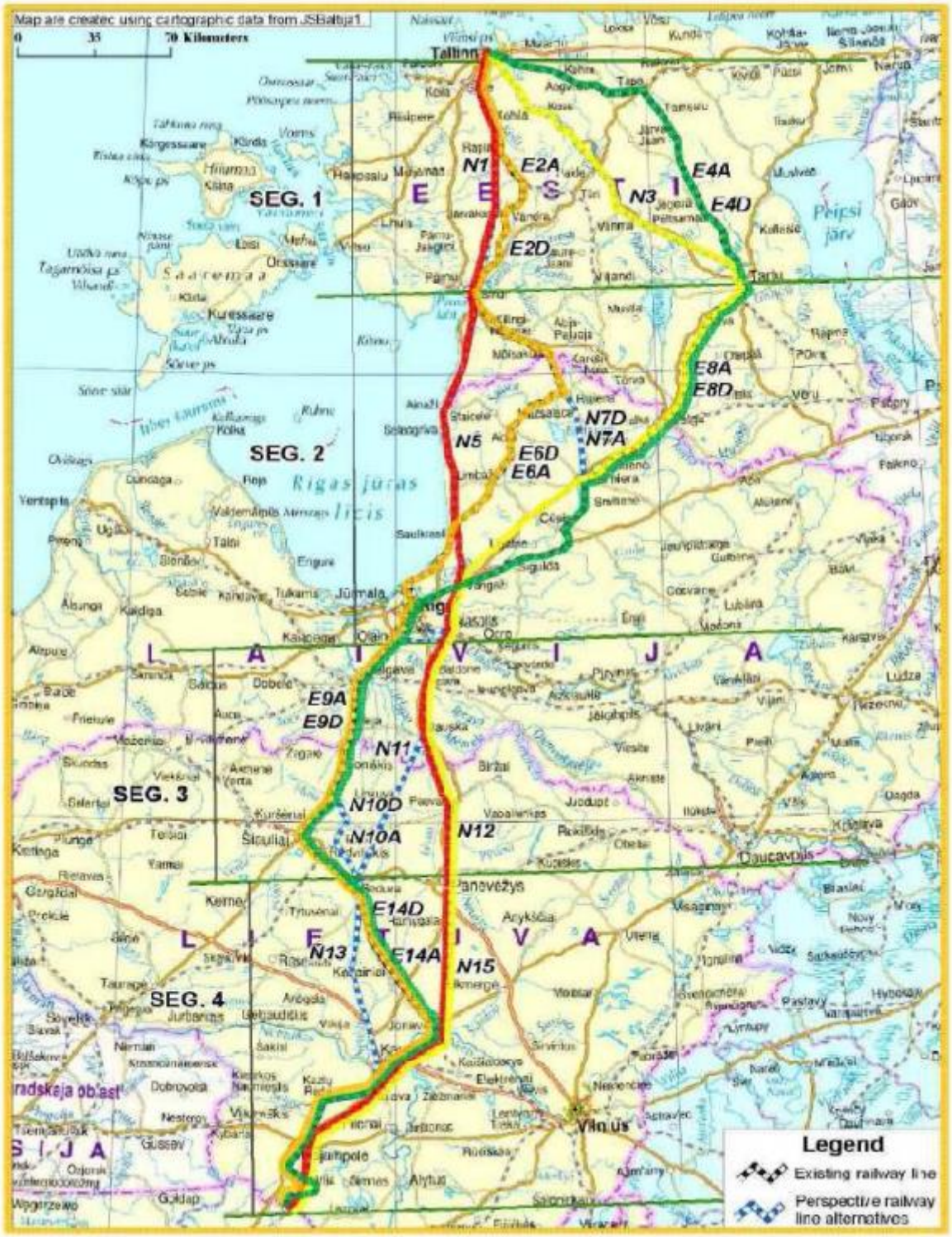
On basis of EIA Act, sec 3[2].

Annex 4 – RAIL BALTICA ROUTE OPTIONS: SECTIONS 3A, 4A AND 4H (anulled)



Natura 2000 areas marked with green and yellow boundaries; red is route that was initaially compared to the sections 3A, 4A and 4H (which are annulled)

Annex 5 – RAIL BALTICA ALTERNATIVE ROUTE OPTIONS



Source: AECOM Study, p. 133, Figure 21 – Route Options.

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Tallinnas, 28.04.2021