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# Restoring EU's habitats

A comparison of the restoration obligations regarding  
terrestrial natural habitats of the Habitats Directive and  
the proposed Nature Restoration Regulation

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# Table of contents

Summary .....	4
Sammanfattning .....	5
Preface .....	6
Abbreviations .....	7
1 Introduction.....	8
1.1 Purpose and research question.....	9
1.2 Limitations.....	10
1.3 Material and state of research.....	11
1.4 Method.....	12
1.5 Outline .....	12
2 The Habitat Directive .....	14
2.1 Designating sites.....	14
2.1.1 Stage 1 – National proposal list .....	15
2.1.2 Stage 2 – Establishment of sites of Community importance (SCI) .....	15
2.1.3 Stage 3 – Designation of special areas of conservation (SAC) .....	17
2.1.4 Questions in cases regarding designation of sites .....	18
2.1.4.1 Social and economic requirements .....	18
2.1.4.2 Sites not yet designated as SACs .....	19
2.2 Conserving sites.....	20
2.2.1 Establishing conservation measures.....	22
2.2.2 Non-deterioration .....	23
2.2.2.1 Cases regarding Article 6(2).....	24
2.2.3 Plans and Projects .....	26
2.2.3.1 Mitigation measures in Article 6(3) .....	26
2.2.3.2 Compensatory measures in Article 6(4) .....	27
2.2.3.3 Cases regarding Article 6(3) and (4) .....	27
3 EU nature restoration regulation.....	28
3.1 Commission proposition.....	28
3.1.1 Definitions.....	28
3.1.2 Restoration targets and obligations .....	28
3.1.2.1 Restoration measures and targets of Article 4 .....	29
3.1.2.2 Deterioration and non-fulfilment of Article 4 .....	30
3.1.2.3 Summary of Articles 6, 9 and 10.....	30
3.2 Changes by the Council.....	31

3.2.1	Definitions.....	31
3.2.2	Restoration targets and obligations .....	32
3.2.2.1	Restoration measures and targets of Article 4 .....	32
3.2.2.2	Deterioration and non-fulfilment of Article 4 .....	33
3.2.2.3	Articles 6, 9 and 10.....	34
3.3	Amendments by the Parliament .....	34
3.3.1	Definitions.....	35
3.3.2	Restoration targets and obligations .....	35
3.3.2.1	Restoration measures and targets of Article 4 .....	35
3.3.2.2	Deterioration and non-fulfilment of Article 4 .....	35
3.3.2.3	Articles 6, 9, 10 and 10a.....	36
3.4	Provisional Agreement .....	36
3.4.1	Definitions.....	37
3.4.2	Restoration obligations and targets .....	37
3.4.2.1	Restoration measures and targets of Article 4 .....	37
3.4.2.2	Deterioration and non-fulfilment of Article 4 .....	38
3.4.2.3	Articles 6, 9, 10 and 10a.....	39
4	Comparing the restoration obligations.....	40
4.1	When should a site be restored? .....	40
4.2	To what extent do the sites need to be restored? .....	42
4.3	What if the site deteriorates? .....	43
5	Concluding comments .....	45
	Bibliography.....	46

## Summary

The thesis explores the legal impact of the proposed Nature Restoration Regulation compared to existing obligations under the Habitats Directive, focusing on terrestrial habitats. Using a doctrinal legal method, it analyses the statutes' provisions and potential differences.

The European Commission views the Habitats Directive as essential in EU nature conservation alongside the Birds Directive. The directive establishes two main protection categories: strict species protection and habitat preservation. Central to the directive is the creation of the Natura 2000 network, comprising Special Areas of Conservation. Member States propose and designate sites for inclusion, aiming to maintain or restore them to favourable conservation status.

The Commission proposed the Nature Restoration Regulation in 2022, aiming to restore ecosystems and meet climate objectives. On November 9, 2023, a provisional political agreement on the proposed Nature Restoration Regulation was reached by the Council and Parliament. The Provisional Agreement, a compromise between the Council's General Approach and the Parliament's amendments, maintains the Union's restoration targets for land and sea areas by 2030 and 2050 set by the Commission. Article 4 outlines targets and obligations for terrestrial, coastal, and freshwater ecosystems, requiring continuous improvement until reaching "good condition.", including priority for Natura 2000 sites and derogation clauses for the restoration targets. Additionally, measures to prevent deterioration and non-fulfillment obligations are specified.

The comparison between the restoration obligations of the Habitats Directive and the Nature Restoration Regulation aims to assess the legal impact of the latter if implemented. Three sub-questions are explored: when a site should be restored, to what extent, and the consequences of deterioration. The Habitats Directive lacks specific restoration rules, often clarified through case law or in non-binding guidance documents. Restoration obligations typically arise when sites deteriorate from their designated state. The Nature Restoration Regulation sets clear restoration targets and deadlines, with derogation clauses for specific cases. It expands restoration obligations beyond Natura 2000 sites and include specific restoration targets of urban, agricultural, and forest ecosystems. The Nature Restoration Regulation provides a clearer legal framework for restoration, especially outside Natura 2000 sites. However, uncertainties may persist due to overlaps with the Habitats Directive, potentially leading to legal challenges.

# Sammanfattning

I uppsatsen undersöks den rättsliga inverkan av den föreslagna förordningen om restaurering av natur jämfört med befintliga skyldigheter enligt habitatdirektivet, med fokus på livsmiljöer på land. Med hjälp av en rättsdogmatisk metod analyseras författningarnas bestämmelser och potentiella skillnader.

Europeiska kommissionen anser att habitatdirektivet vid sidan av fågeldirektivet är av avgörande betydelse för EU:s naturskydd. I direktivet fastställs två huvudsakliga skyddskategorier: strikt artskydd och bevarande av livsmiljöer. En central del i direktivet är inrättandet av Natura 2000-nätverket, som består av särskilda bevarandeområden. Medlemsländerna föreslår och utser områden som ska ingå, med målet att bibehålla eller återställa dem till en gynnsam bevarandestatus.

Kommissionen föreslog 2022 förordningen om restaurering av natur, som syftar till att restaurera ekosystem och uppfylla klimatmålen. Den 9 november 2023 nådde rådet och Europaparlamentet en preliminär politisk överenskommelse om den föreslagna förordningen om återställande av natur. Den preliminära överenskommelsen, som är en kompromiss mellan rådets allmänna riktlinje och parlamentets ändringar, bibehåller unionens mål för restaurering av land- och havsområden till 2030 och 2050 som framställts i kommissionens förslag. Artikel 4 beskriver mål och skyldigheter för land-, kust- och sötvattensekosystem, med krav på kontinuerlig förbättring tills "gott tillstånd" har uppnåtts, inklusive företräde för Natura 2000-områden och undantagsklausuler från de satta restaureringsmålen. Dessutom specificeras åtgärder för att förhindra försämring och bristande uppfyllelse av skyldigheterna.

Jämförelsen mellan restaureringsskyldigheterna i habitatdirektivet och förordningen om restaurering av natur syftar till att bedöma den rättsliga effekten av den senare om den genomförs. Tre underfrågor undersöks: när ett område ska restaureras, i vilken utsträckning och konsekvenserna av försämring. Habitatdirektivet saknar särskilda regler för restaurering, som istället klargörs genom rättspraxis eller i icke-bindande vägledande dokument. Restaureringsskyldigheter uppstår vanligtvis när områden försämrats från sitt utpekade tillstånd. I förordningen om restaurering av natur fastställs tydliga mål och tidsfrister för restaurering, med undantagsklausuler för särskilda fall. Skyldigheterna utvidgas till att omfatta mer än Natura 2000-områden och inkluderar även särskilda mål för restaurering av ekosystem i städer, jordbruk och skogar. Förordningen ger en tydligare rättslig ram för restaurering, särskilt utanför Natura 2000-områden. Osäkerheter kan dock kvarstå på grund av överlappningar med habitatdirektivet, vilket kan leda till rättsliga utmaningar.

# Preface

Remembering back, it feels like it was last year I got the phone call that I was offered a spot in the law program because of a good result in the course UJIK and made the move from Mora to Lund. It was never my plan to study law, I simply had an interest in it, so I will continue to wait for someone to tell me they mixed me up with someone else. The impostor syndrome I have is still strong.

But five, bumpy, years have passed, and I have gained some lifelong friends and relationships. So, I want to say a big thank you to Lundatöserna, you know who you are, I could not have done this without you. To the wonderful Culpakören, without this amazing choir I would have gotten insane. To have two hours every week dedicated to singing has been worth its weight in gold. Another large thank you to my partner for listening, or at least pretending, to all my complaints. I also want to dedicate a thank you to my family, even though you are so far away you have supported me in the best possible way.

The process of writing this thesis has resembled my years in Lund, bumpy. Writing is not something that comes natural to me, and I'd like to blame some of that on my dyslexia. So, thank you to my supervisor Han Somsen for guiding me along the process.

Växjö, 7<sup>th</sup> of February 2024,

Erika Duhlbo

# Abbreviations

AG	Advocate General
Birds Directive	Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds
Commission	European Commission
Council	Council of the European Union
Court of Justice	Court of Justice of the European Union
ENVI	European Parliament Committee on the Environment, Public Health and Food Safety
EU	European Union
Habitats Directive	Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora
Nature Restoration Regulation	Proposal for a Regulation of the European Parliament and of the Council on nature restoration
Parliament	European Parliament
SAC	Special area of conservation
SCI	Site of Community importance
UN	United Nations

# 1 Introduction

As someone with family that owns and manages forest it caught my attention when the non-partisan interest and business organisation for farmers and foresters in Sweden, Lantbrukarnas riksförbund, published a report regarding restoration stating that closer to 5 million hectares of land would be affected by the proposed European Union (EU) Nature Restoration Regulation with the way Sweden has reported the status of habitat types.<sup>1</sup> According to the report, around 16 % of Sweden's agricultural and forest land will be affected by the proposed EU Nature Restoration Regulation.<sup>2</sup>

The EU has in recent years increasingly recognized the urgent need for nature restoration as a cornerstone of environmental sustainability and biodiversity conservation.<sup>3</sup> With ecosystems facing unprecedented pressures from human activities such as deforestation, urbanization, and climate change, joint efforts are essential to reverse habitat degradation and protect endangered species. The EU's commitment to nature restoration aligns with international conservation agendas, including the United Nations (UN) Sustainable Development Goals, the UN Convention on Biological Diversity and the Council of Europe Convention on the Conservation of European Wildlife and Natural Habitats.

Nature restoration encompasses a wide range of activities aimed at revitalizing ecosystems, from reforestation and wetland restoration to rewilding land. These initiatives not only safeguard biodiversity but also mitigate changes made by climate change such as heat islands and urban flooding.<sup>4</sup>

According to a fitness check of the Birds<sup>5</sup> and Habitats<sup>6</sup> Directives published in 2016 only 16 % of the habitats listed in Annex I to the Habitats Directive had a favourable conservation status.<sup>7</sup> In 2020 it was reported that 15 % of habitats in the EU showed a good conservation status while 81 % had a not

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<sup>1</sup> Gunnar Lindén et al, *Återskapa förindustriell tid eller utvecklas för framtidens behov? : Restaurering av natur och dess effekter för de gröna näringarna och samhället* (LRF 2023), 5f.

<sup>2</sup> Ibid, 8.

<sup>3</sup> See for example 'Nature restoration' (European Council) <<https://www.consilium.europa.eu/en/policies/nature-restoration/#why>> (accessed 2024-02-06).

<sup>4</sup> 'Nature protection and restoration' (European Environmental Agency) <<https://www.eea.europa.eu/en/topics/in-depth/nature-protection-and-restoration>> (accessed 2024-02-06).

<sup>5</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (hereafter Birds Directive).

<sup>6</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (hereafter Habitats Directive).

<sup>7</sup> Milieu, IEEP and ICF, *Evaluation Study to support the Fitness Check of the Birds and Habitats Directives* (2016), 15.



good conservation status.<sup>8</sup> Of those habitats not in good conservation status, 36 % are deteriorating and only 9% are improving.<sup>9</sup> To take Sweden as a national example, the report shows that around 20 % of habitats have a good status.<sup>10</sup> Out of the Swedish habitats not in good condition, over 40 % are deteriorating and around 30 % are stable.<sup>11</sup>

In 2020 the European Commission launched the EU Biodiversity Strategy for 2030. The strategy is a part of the EUs international commitments and in line with the 2030 Agenda for Sustainable Development and with the objectives of the Paris Agreement on Climate Change. The strategy sets a target stating that at least 30 % of the land and 30 % of the sea should be protected in the EU. Another target was to introduce an EU Nature Restoration plan with key commitments by 2023. One of those key commitments was to propose legally binding EU nature restoration targets. Those targets would include a target of at least 30 % of degraded ecosystems should be restored and reach favourable conservation status, or at least show a positive trend, by 2030.<sup>12</sup>

As the Commission states in the EU Biodiversity Strategy for 2030, the EU already has a legal framework for the protection and restoration of habitats, one of those frameworks is the Habitats Directive. But the restoration made has been small-scale.<sup>13</sup> On the basis of the reported fitness check of the Birds and Habitats Directives, is not unreasonable to question what the restoration obligations of the Habitats Directive entail and what the proposed Nature Restoration Regulation might bring to the table.

## 1.1 Purpose and research question

The purpose of this thesis is to see what the added legal value of the new proposed EU Nature Restoration Regulation will be as compared to the restoration obligations that follows from the Habitats Directive. The following research question has therefor been formulated in order to fulfil the purpose:

What are the restoration obligations of the Habitats Directive relating to terrestrial natural habitats, and how do they compare with the proposed Nature Restoration Regulation?

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<sup>8</sup> European Environment Agency, ‘State of nature in the EU: Results from reporting under the nature directives 2013-2018’ (2020) EEA Report No 10/2020, 41.

<sup>9</sup> Ibid, 53.

<sup>10</sup> Ibid, 44.

<sup>11</sup> Ibid, 56.

<sup>12</sup> European Commission, ‘Communication from the commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: EU Biodiversity Strategy 2030 Bringing nature back into our lives’ COM (2020) 380 final.

<sup>13</sup> Ibid.

## 1.2 Limitations

Due to the nature and the scope of the thesis a number of limitations has been made. A strict limitation to only cover the Habitats Directive and the Nature Restoration Regulation has been necessary to focus on achieving the purpose of the thesis. Other legal instruments that could have or does have an influence on nature restoration in the EU have not been considered. This includes for example the Council of Europe Convention on the Conservation of European Wildlife and Natural Habitats and the UN Convention on Biological Diversity.

The Habitats Directive protects natural habitats, habitats of species and species. For the purpose of the thesis the main focus will be on the protection of natural habitats. Seeing as the Natura 2000 network include both natural habitats and the habitats of species, habitats of species is mentioned at times for the provisions that does not differentiate between the two categories of habitats. The Natura 2000 network also include protected habitats of species under the Birds Directive which has been left outside this thesis for the same reasons as just mentioned. Other aspects of the Habitats Directive, such as implementation issues and management obligations are also left outside the scope of this thesis.

In the Nature Restoration Regulation natural habitats has been divided into terrestrial, coastal and freshwater ecosystems in Article 4, and marine ecosystems in Article 5. The Habitats Directive does not make this distinction. Due to the scope of the thesis, marine ecosystems will not be covered which is reflected by wording of “terrestrial natural habitats” in the research question. Furthermore, Articles 6-10 concerns ecosystem specific restoration obligations. In order to best compare the restoration obligations of the Habitats Directive to those of the Nature Restoration Regulation the focus will be on the more general Article 4 as it is the most similar to the Habitats Directive.

A comparison between restoration obligations of the Habitats Directive and the Nature Restoration Regulation could be made with a various of different perspectives. As an example, it would be possible to take a biological or ecological perspective and research what restoration obligations would be best and most effective to reach the aims of the legal instruments. Such a perspective could also bring another dimension to the purely legal research that this thesis presents.

### 1.3 Material and state of research

The material used in this thesis can be divided into the material used in relation to the Habitats Directive, and the material used for the Nature Restoration Regulation.

For the Habitats Directive the focus has been the use of the Directive itself as the primary source of law. To further understand the thoughts and aim of the provision's, guidance documents from the European Commission has also been used, especially for Article 6. In order to contextualise the restoration obligations of the Habitats Directive has judgments of the Court of Justice and opinions from Advocate Generals been presented. Legal doctrine in the form of scholarly writing discussing the Habitats Directive and its restoration obligations has been used as a secondary source to problematise the provisions of the Habitats Directive and bring up the legal discussions surrounding it.

The state of research regarding the Habitats Directive can be described as comprehensive. This is expected as the Directive was adopted in 1992 and the Court of Justice has dealt with a large number of legal cases relating to the Habitats Directive in different aspects. Most of the research which covers environmental and biodiversity EU law covers the Habitats Directive and its protection of natural habitats and of flora and fauna. There has also been a wide amount of research made in regards to the restoration obligations of the Habitats Directive in different perspective.

A mentionable amount of the scholarly writing cited in this thesis regarding the restoration obligations of the Habitats Directive is written by An Cliquet and/or by Hendrik Schoukens. An Cliquet is a professor at Gent University of international environmental and biodiversity law. She is also the coordinator of the Legal Working Group of the Society of Ecological Restoration. Hendrik Schoukens is currently preparing a doctoral thesis on the legal aspects of ecological restoration under the supervision of An Cliquet. Both An Cliquet and Hendrik Schoukens also edited and contributed to the book *The Habitats Directive in its EU Environmental Law Context* together with other researchers from different European universities.

For the Nature Restoration Regulation has the thesis primarily used the preparatory work in the form of the final proposal from the Commission, the General Approach from the Council, the amended version from the Parliament and finally the Provisional Agreement provided by the Council. It is only natural that there is a lack of legal sources regarding the Nature Restoration Regulation since it is still in the legislative process and not yet voted on by the Parliament at the moment of writing this thesis.

There are a few articles regarding the relationship between the Birds and Habitats Directives and the Nature Restoration Regulation, but since the

Provisional Agreement is since November 2023 most of those articles use the first proposal from the Commission as the reference.

## 1.4 Method

The method used in this thesis will be a doctrinal legal method. Hutchinson presents the doctrinal legal research method as a method for the researcher to verify the authority and status of the legal doctrine that is being examined.<sup>14</sup> A way to describe what doctrinal research is “the research process used to identify, analyse and synthesise the content of the law.”<sup>15</sup>

The focus in this thesis is to understand the legal restoration obligations of the Habitats Directive and of the proposed Nature Restoration Regulation. In order to identify, analyse and synthesise the restoration obligations to then be able to identify any possible differences the thesis will focus on the content of the relevant articles in respective legal framework. For the Habitats Directive case law from the Court of Justice and secondary sources will be used to further explore what these obligations mean in practice. As the Nature Restoration Regulation is still, at the time of writing this thesis, in the legislative process the focus is to analyse the written proposed legislation in its different versions.

Another reason as to why it is relevant to use a doctrinal legal method for this thesis is the principle of primacy of EU law. The principle is a fundamental principle of the EU and entails that EU law prevails and must be applied by the national courts in cases of conflict between national law and EU law.<sup>16</sup> It is therefore relevant in all EU countries, including Sweden, to understand the content of EU law.

## 1.5 Outline

The main body of the thesis consist of chapter 2 and 3 with a following chapter 4 comparing the content of the two earlier chapters. The last chapter 5 consists of concluding comments.

In chapter 2 the nature protection of the Habitats Directive is presented starting with the process of designating sites which are to be protected in the Natura 2000 network and the conservation obligations of Article 4, which includes restoration, of those sites.

The following chapter 3 is about the Nature Restoration Regulation. The chapter starts with a presentation of Article 6 of the Nature Restoration

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<sup>14</sup> Terry Hutchinson, ‘1. Doctrinal research: Researching the jury’ in Dawn Watkins and Mandy Burton (eds.), *Research methods in law* (Routledge 2013), 7f.

<sup>15</sup> Ibid, 9.

<sup>16</sup> Verica Trstenkak, ‘National Sovereignty and the Principle of Primacy in EU law and Their Importance for the Member States’ (2013) 4(2) *Beijing Law Review* 71, 72.

Regulation in the Commission's proposal which concerns restoration of terrestrial natural habitats. The following parts of the chapter presents the changes made in the General Approach of the Council and the Amendments made by the Parliament to Article 6. Finally, chapter 3 presents the final Provisional Agreement which is going to be voted on by the Parliaments at first reading.

Chapter 4 is where the research question is answered through comparing the restoration obligations of the Habitats Directive and the Nature Restoration Regulation through three sub-questions.

## 2 The Habitat Directive

The European Commission has called the Habitats Directive the cornerstone of European nature conservation legislation together with the Birds Directive.<sup>17</sup> The aim of the Habitat Directive is to contribute to biodiversity in the EU through measures of conservation of natural habitats and of flora and fauna at a favourable conservation status.<sup>18</sup> The Habitat Directive consists of two main categories of protection provisions, the strict species protection, and the habitat protection.

At the time of its adoption in 1992 the Habitat Directive was initially made to be a compliment to the Birds Directive.<sup>19</sup> On the contrary to the Birds Directive, the Habitat Directive opens up in Article 1 with the definitions of a list of terms that recur throughout the provisions of the Directive.<sup>20</sup> These terms and definitions have been subject to different interpretations as they need to be applied to the facts in each case.<sup>21</sup>

### 2.1 Designating sites

The foundation of the habitat protection in the Habitat Directive is the establishment of the Natura 2000 network consisting of special areas of conservation (SAC).<sup>22</sup> A SAC is according to its definition a site of Community importance (SCI) which has been designated by the Member States.<sup>23</sup> These sites are to be maintained or restored at a favourable conservation status by the means of necessary conservation measures, and the Member States are obligated to contribute to the Natura 2000 network by designating sites in their national territory.<sup>24</sup> It is the Member States that have the responsibility of guaranteeing that the SACs in their territory are maintained or restored at a favourable conservation status as a part of the larger network.<sup>25</sup>

For the establishment of the Natura 2000 network Article 4 in the Habitat Directive describes a three-stage process. The different stages consist of a national proposal list, the establishment of SCI and finally the national designation of sites as SAC. The obligations of the different stages are divided

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<sup>17</sup> European Commission, *The EU birds and habitats directives – For nature and people in Europe* (2015) 11.

<sup>18</sup> Habitats Directive, Art. 2(2).

<sup>19</sup> See *ibid*, fifteenth recital in the preamble.

<sup>20</sup> *Ibid*, Art. 1.

<sup>21</sup> Agustín García-Ureta, *EU Biodiversity Law: Wild Birds and Habitats Directives* (Europa Law Publishing 2020) 221.

<sup>22</sup> Habitats Directive, Art. 3(1).

<sup>23</sup> *Ibid*, Art. 1(1).

<sup>24</sup> *Ibid*, Art 1(1) and Art. 3

<sup>25</sup> Agustín García-Ureta, 223.

between the Member States and the Commission, and all stages have dedicated deadlines of when the obligations are supposed to be fulfilled.

### 2.1.1 Stage 1 – National proposal list

The first stage of the establishment of the Natura 2000 network is for Member States to propose a national list of sites. The the list is composed of two types of sites, natural habitats which are listed in Annex I, and habitats of species that are listed in Annex II that are native to its territory. The sites are selected on the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information.<sup>26</sup>

The criteria for assessing sites of natural habitats, listed in Annex I, specifically include a criteria on the degree of conservation and the restoration possibilities for the site.<sup>27</sup> In the list, Member States classifies the sites they propose as eligible to be identified as SCIs according to the sites relative value for the conservation of each natural habitat in Annex I or each species in Annex II.<sup>28</sup> The list of sites will show the sites containing the priority natural habitat types and species selected by the Member States.<sup>29</sup> Prioritised natural habitat types and species are indicated in Annex I and Annex II and are defined as natural habitats that are in danger of disappearance and species which the Community has particular responsibility for the conservation of in view of the proportion of their natural range which falls within Europe.<sup>30</sup>

The national list was to be transmitted to the Commission within three years of the notification of the Habitat Directive.<sup>31</sup> Several Member States failed with the deadline, resulting in cases of infringement.<sup>32</sup>

### 2.1.2 Stage 2 – Establishment of sites of Community importance (SCI)

The second stage is that the Commission establishes a draft list of SCIs from the national proposal list of sites. The selection of SCIs in the draft is based on criteria in Annex III (Stage 2) and in agreement with the Member State. The draft list should identify which sites hosts one or more of the priority natural sites or species.<sup>33</sup>

According to the assessment in Annex III (Stage 2) all the sites identified by Member States in Stage 1 which contain priority natural habitats or species

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<sup>26</sup> Habitats Directive, Art. 4(1).

<sup>27</sup> Ibid, Annex III Stage 1(A) point (c).

<sup>28</sup> Ibid, Annex III Stage 1(C).

<sup>29</sup> Ibid, Annex III Stage 1(D).

<sup>30</sup> Ibid, Art. 1(d and h).

<sup>31</sup> Ibid, Art. 4(1) second section.

<sup>32</sup> An Cliquet, '17. EU Nature Conservation Law: Fit for Purpose' in Marjan Peeters and Mariolina Eliantonio (eds.), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020), 271.

<sup>33</sup> Habitats Directive Art. 4(2).

“will be considered” as SCIs.<sup>34</sup> When assessing the Community importance of sites on the Member State’s lists other than those which host priority natural habitats or species, there are five criteria that are taken into account. The criteria include the relative value of the site at a national level, geographical situation of the site in relation to migration routes, the area of the site, the number of natural habitat types and species present on the site listed in Annex I and Annex II, and the global ecological value of the site.<sup>35</sup> The European Commission can use the assessment as a way to examine whether the Member State has followed the selection criteria in the Habitats Directive. The fact that the creation of the draft list of SCIs is made in agreement with the Member State suggests that the Commission is unable to add more sites or extend those sites the Member State has indicated that hosts priority natural habitats or species.<sup>36</sup>

If a Member State hosts priority natural habitats and species in sites that represent more than 5% of the national territory may request that the criteria in Annex III (Stage 2) on selecting SCIs in their territory be applied more flexibly.<sup>37</sup>

The list of selected SCIs should identify the areas which hosts one or more of the prioritised natural habitats or species, and the list is then to be adopted by the European Commission according to the procedure in Article 21.<sup>38</sup>

According to the procedure in Article 21, the European Commission submits the draft list of SCIs to the committee which deliver its opinion on the draft.<sup>39</sup> The committee consists of representatives of Member States with the mission of assisting the European Commission.<sup>40</sup> If the committee agrees with the draft, the European Commission shall adopt it. If the opinion of the committee is not in accordance with the draft the Commission shall submit the draft to the Council.<sup>41</sup>

The list of SCIs was to be established within six years of the notification of the Habitat Directive.<sup>42</sup> However since Stage 1 of the establishment of national proposal lists was prolonged as a result of Member States failing to meet the obligation in Article 4(1), the establishment of SCIs was delayed as

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<sup>34</sup> Ibid, Annex III Stage 2(1).

<sup>35</sup> Ibid, Annex III Stage 2(2).

<sup>36</sup> Agustín García-Ureta, 239.

<sup>37</sup> Habitats Directive, Art. 4(2) second section.

<sup>38</sup> Ibid, Art. 4(2) third section.

<sup>39</sup> Ibid, Art. 21(1).

<sup>40</sup> Ibid, Art. 20.

<sup>41</sup> Ibid, Art. 21(2).

<sup>42</sup> Ibid, Art. 4(3).



well. By 2004 most of the region's lists were established by the European Commission.<sup>43</sup>

### 2.1.3 Stage 3 – Designation of special areas of conservation (SAC)

The final stage of the establishment of the Natura 2000 network is for the Member States to designate the selected SCIs in the list established by the European Commission as SAC. The obligation of designating sites is found in Article 4(4) which states that once a SCI has been adopted in accordance with Article 4(2) “the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most”<sup>44</sup>. The obligation of designating the list of SCI into SAC also includes establishing priorities for the conservation of the sites.<sup>45</sup> The priorities of the sites should be set out by the Member States beforehand for the designation of the SACs.<sup>46</sup> The Court of Justice has not clarified whether the Member States should establish priorities for each separate SAC.<sup>47</sup>

Even though the Habitat Directive requires the Member States to designate the SCI to become SAC and ultimately a part of the Natura 2000 network, the SCI are subject to Article 6(2), (3) and (4) as soon as a site is listed as an SCI.<sup>48</sup>

The Natura 2000 Standard Data Form is the documentation of the Natura 2000 network on a Union level and the resulting database provides the information of the Natura 2000 sites on the basis of Article 4(1) and the site assessment criteria of Stage 1 in Annex III. Each site that is proposed, designated, or classified must have a completed Standard Data Form. In accordance with Annex III, A(c), the Standard Data Form include a sub-criterion for the restoration possibilities of each site. The purpose of the sub-criterion is to evaluate to what extent the restoration of a habitat type on the site is possible. The evaluation is divided into two steps, firstly its feasibility from a scientific point of view, secondly whether it is cost-effective from a nature conservation point of view. A ranking of each site is then to be made using ‘best expert judgement’ of the following: I: restorations easy, II:

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<sup>43</sup> An Cliquet (2020), 271.

<sup>44</sup> Habitats Directive, Art. 4(4).

<sup>45</sup> Ibid, Art. 4(4).

<sup>46</sup> Agustín García-Ureta, 243.

<sup>47</sup> Henrik Schoukens and Hans Erik Woldendorp, ‘3. Site Selection and designation under the Habitats and Birds Directives: a Sisyphean task?’ in Charles-Hubert Born et al (eds.), *The Habitats Directive in its EU Environmental Law Context: European Nature’s Best Hope?* (Routledge 2015), 53.

<sup>48</sup> Habitats Directive, Art 4(5).

restoration possible with an average effort, and III: restoration difficult or impossible.<sup>49</sup>

#### 2.1.4 Questions in cases regarding designation of sites

The procedure of designating sites was not without ambiguities, leading to several cases in the Court of Justice. Two of the more discussed legal questions connected to the process of designating sites was whether social and economic requirements could be regarded when identifying and later choosing sites, and later what responsibility Member States have of sites that have not yet designated as SAC according to Article 4(5).

##### 2.1.4.1 *Social and economic requirements*

A reason for the uncertainty of whether social and economic requirements could, or should, be taken into account when identifying and later choosing sites as SCI and designating them as SAC is Article 2(3) of the Habitats Directive. According to Article 2(3) “Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.”<sup>50</sup>

In the preliminary ruling in the case of *First Corporate Shipping* there was a question whether economic, social, and cultural requirements and regional and local characteristics should be taken into account in Stage 1 when Member States decide which sites to propose to the Commission under Article 4(1) in the Habitats Directive.<sup>51</sup> The Court of Justice stated that if Member States were to take economic, social, and cultural requirements and characteristics into account when selecting and defining the sites that are to be included in the list or proposed SCI during Stage 1, the Commission would not have an exhaustive list of possible SACs.<sup>52</sup>

In his Opinion in *First Corporate Shipping* the Advocate General stated that the purpose of Stage 1 is to enable the Commission and Member States to fulfil the following stages and that therefor “no consideration of an economic or social nature being capable of influencing the eligibility of a site to appear on that list” in Stage 1.<sup>53</sup> However the Advocate General stated a possibility of justifying not selecting sites as SCI, and later being designated as SAC,

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<sup>49</sup> Commission Implementing Decision 2011/464/EU of 11 July 2011 concerning a site information format for Natura 2000 sites (notified under document C(2011) 4892) [2011] OJ L198/39.

<sup>50</sup> Habitats Directive Art. 2(3).

<sup>51</sup> Case C-371/98 *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd (First Corporate Shipping)* [2000] ECR I-9235, para 11.

<sup>52</sup> *Ibid*, para 24.

<sup>53</sup> *Ibid*, Opinion of AG Léger, para 48.

based on social and economic requirements if the sites does not host priority species or habitat types.<sup>54</sup>

In the case of *Stadt Papenburg*, the Court of Justice was asked the question whether a Member State could refuse the Commission's draft list of SCIs in Stage 2 on other grounds other than nature conservation.<sup>55</sup> The court stated that the first paragraph of Article 4(2) does not provide for requirements other than those relating to nature conservation be taken into account when the Commission, in agreement of the Member States, sets up the draft list of SCIs.<sup>56</sup> According to the court if "the Member States were permitted to refuse to give their agreement on grounds other than environmental protection, the achievement of the objective referred to in Article 3(1) of the Habitats Directive would be put in danger"<sup>57</sup>. In this way the Court of Justice clarified that social and economic requirements could not be taken into account in Stage 2, as opposed to what the Advocate General suggested in his Opinion in *First Corporate Shipping*.

In her Opinion the Advocate General pointed out that even though economic and social requirements cannot be taken into account when selecting sites in Stage 2 and 2, Article 6(3) and (4) of the Habitats Directive provides for such interests to be taken into account at a later stage.<sup>58</sup>

#### 2.1.4.2 *Sites not yet designated as SACs*

According to Article 4(5), sites which has been places on the list of selected SCI are subject to Article 6(2), (3) and (4).<sup>59</sup>

In the case of *Dragaggi* the Court of Justice was asked whether Article 4(5) was applicable as soon as a site was placed on the Commission's list of selected SCI, or if Article 4(5) was not applicable on those sites until the list has been adopted by the Commission.<sup>60</sup> The court clarified that sites must be on the list of selected SCI adopted by the Commission in order to be guarded by the protective measures of Article 6(2), (3) and (4).<sup>61</sup>

As a reminder to the Member States of their duty of cooperation the court stated that the Member States should still protect sites as soon as they propose them during Stage 1.<sup>62</sup> If the Member States do not protect their suggested sites, it could jeopardise the objectives of seeking the conservation of natural

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<sup>54</sup> Ibid, para 51.

<sup>55</sup> Case C-226/08 *Stadt Papenburg v Bundesrepublik Deutschland (Stadt Papenburg)* [2010] ECR I-131, para 18.

<sup>56</sup> *Stadt Papenburg*, para 31.

<sup>57</sup> *Stadt Papenburg*, para 32.

<sup>58</sup> Ibid, Opinion of AG Sharpston para 36-37.

<sup>59</sup> Habitats Directive Art. 4(5).

<sup>60</sup> Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, para 20.

<sup>61</sup> Ibid, para 25.

<sup>62</sup> Ibid, para 26; Henrik Schoukens and Hans Erik Woldendorp, 49f.

habitats and wild fauna and flora. The court held that it could lead to particularly serious situations where priority natural habitats or species could be affected because of threats to them, and early implementations of conservation measures would be appropriate.<sup>63</sup>

In the latter case of *Bund Naturschutz*, the Court of Justice that Member States cannot authorise interventions “which may pose the risk of seriously compromising the ecological characteristics of a site”<sup>64</sup> during Stage 1.

The result of *Dragaggi* and *Bund Naturschutz* was the conclusion that Member States have a responsibility to protect SCIs even before the Commission has adopted the list of SCI.<sup>65</sup> Another conclusion drawn from the court’s ruling is that the obligation to protect proposed sites does not mean a total ban on changes to a site.<sup>66</sup>

## 2.2 Conserving sites

Once sites have been designated as SACs the Member States have the responsibility to maintain or restore the SACs at a favourable conservation status.<sup>67</sup> With conservation, according to the definition in the Habitats Directive, means the measures it takes to maintain or restore the natural habitats at a favourable conservation status.<sup>68</sup> For a natural habitat to have a favourable conservation status, according to its definition, it must fulfil the three following requirements:

- its natural range and areas it covers within that range are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable as defined in (i)<sup>69</sup>

According to the Commission, the attainment of favourable conservation status is an overall objective and can only be defined and achieved at the level of the national range of the habitat type, not at a site level. The objective of achieving favourable conservation status can therefor only be considered at

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<sup>63</sup> *Dragaggi and Others*, para 27.

<sup>64</sup> Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, para 46.

<sup>65</sup> Agustín García-Ureta, 242.

<sup>66</sup> Henrik Schoukens and Hans Erik Woldendorp, 50.

<sup>67</sup> Habitats Directive, Art. 3(1).

<sup>68</sup> *Ibid*, Art 1(a).

<sup>69</sup> *Ibid*, Art. 1(e).

an appropriate level, “for example the national, biogeological or European level.”<sup>70</sup>

The Habitats Directive is binding for the Member States to the result it aims to achieve, but the Member States have the choice of choosing their methods of achieving the result.<sup>71</sup> For the Habitats Directive, the general aim is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.<sup>72</sup> While there is no specific definition of restoration or any targets regarding restoration in the Habitats Directive, all measures that are taken in accordance with the Habitats Directive have to be designed to maintain or restore natural habitats at a favourable conservation status.<sup>73</sup> Similarly, the Natura 2000 network is set up to enable the natural habitats concerned to be maintained, or where appropriate, restored at a favourable conservation status in their natural range.<sup>74</sup> The wording of restoring sites ‘where appropriate’ is not meant to signal that Member States have the choice of not restoring sites, but rather an indication regarding the state of the site. If the site is in the state of favourable conservation status that state should be maintained, and if the site is in unfavourable conservation status it should be restored to reach a favourable status.<sup>75</sup>

The obligation of conserving sites is stated in Article 6 and consists of three main parts. The obligation to establish necessary conservation measures is stated in Article 6(1) and only applies once a site has been designated as a SAC. Article 6(2) expresses a non-deterioration obligation and Article 6(3) and (4) concerns plans and projects.<sup>76</sup> As mentioned earlier, Article 6(2), (3) and (4) also applies to SCI which has not yet been designated as SAC by the Member States.<sup>77</sup>

Member States also have an obligation according to Article 11 to continually observe the conservation status of the SACs in their territory, especially the priority habitats and species.<sup>78</sup> If it is warranted by natural development, noted by the surveillance of the conservation status of the natural habitat, a SAC may be considered for declassification.<sup>79</sup> On a six-year basis the Member States have the obligation of drawing up a report which covers the

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<sup>70</sup> European Commission, Directorate-General for Environment, *Managing Natura 2000 sites – The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC* (2019), 16.

<sup>71</sup> Ibid, 10.

<sup>72</sup> Habitats Directive, Art. 2(1); An Cliquet, Kris Decler and Hendrik Schoukens, ‘15. Restoring nature in the EU: The only way is up?’ in Charles-Hubert Born et al (eds.), *The Habitats Directive in its EU Environmental Law Context: European Nature’s Best Hope?* (Routledge 2015) 273.

<sup>73</sup> Habitats Directive, Art. 2(2).

<sup>74</sup> Ibid, Art. 3(1).

<sup>75</sup> An Cliquet, Kris Decler and Hendrik Schoukens, 274.

<sup>76</sup> Habitats Directive, Art. 6.

<sup>77</sup> Ibid, Art. 4(5)

<sup>78</sup> Ibid, Art. 11.

<sup>79</sup> Ibid, Art 9.

implementation measures taken in accordance with the Habitats Directive. The report should include what conservation measures the Member State has established and implemented in accordance with Article 6(1) and an evaluation of what impact those measures had on the conservation status of the natural habitats of Annex I and the result of the surveillance carried out under Article 11.<sup>80</sup>

### 2.2.1 Establishing conservation measures

Article 6(1) establishes an obligation for Member States to establish and implement necessary conservation measures, which also includes restoration measures according to the definition of conservation. According to the paragraph, those measures should if needed involve “appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites”<sup>81</sup>. Based on the definition of conservation, the obligation to establish conservation measures also implicitly include an obligation to establish and implement restoration measures if it is deemed as necessary.<sup>82</sup>

In its guidance on Article 6 of the Habitats Directive the Council described that Article 6(1) focuses on the establishment of positive and proactive measures for all SACs.<sup>83</sup> When establishing the conservation measures for a site, it is important to distinguish the site-level conservation objectives of the site from the conservation measures. The site-level conservation objectives are meant to define the conservation condition of the habitat types desired to reach on the specific site in order for the site to contribute to achieving favourable conservation status. These conservation objectives can be defined as targets and should be established on the basis of the conservation assessment of each habitat type on the site as recorded in the Natura 2000 Standard Data Form. The conservation measures on the other hand are the means needed to reach the site’s conservation objectives and are more likely to change over time. According to the guidance, the wording of ‘necessary conservation measures’ should be understood as all necessary conservation measures must be taken.<sup>84</sup>

An analogy could be made with Article 9 which states that SACs can be declassified due to natural developments, and that it could therefore be possible to also delist habitats from the Natura 2000 Standard Data Form because of such natural developments. Cliquet, Decleer and Schoukens argue that this is not the case if the destruction of a habitat on a site is caused by

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<sup>80</sup> Ibid, Art. 17.

<sup>81</sup> Ibid, Art. 6(1).

<sup>82</sup> An Cliquet, Kris Decleer and Hendrik Schoukens, 275.

<sup>83</sup> European Commission (2019), 15.

<sup>84</sup> Ibid, 17f.

poor, or the lack of, implementation of management measures by the Member State.<sup>85</sup>

### 2.2.2 Non-deterioration

Article 6(2) expresses an obligation of non-deterioration of natural habitats and habitat of species. According to the paragraph, the Member States have an obligation to take appropriate steps to avoid the deterioration of natural habitats.<sup>86</sup> According to Cliquet, Decler and Schoukens this obligation is often easily overlooked by Member States when converting conservation objectives into site-level if the conservation objectives were only defined on a national level, and not tailored to each site.<sup>87</sup>

According to the Commission, Article 6(2) expresses a preventative principle. The provision in the paragraph is not limited to only intentional acts or to human activities and in order to fulfil the obligation measures could in some cases have to be implemented outside of SACs in order to avoid deterioration in the protected sites.<sup>88</sup>

Article 6(2) does not imply what form of deterioration of habitats is to be avoided in the terms that there is no mention of an effect in relation to the objectives of the Habitats Directive.<sup>89</sup> While there is no definition of deterioration in the Habitats Directive, the Commission stated in its guideline that “[d]eterioration is any form of degradation affecting a habitat.”<sup>90</sup> Deterioration is assessed on a case-by-case basis, but the Commission stated that it follows from the obligation of Article 6(2) that “the ecological characteristics of the site must not be allowed to deteriorate below their level at the time of designation”<sup>91</sup> and if the condition of the site has been improved since its designation the improved condition should be the reference. To examine whether deterioration has occurred on a site, Member States may use the site-level conservation measures as a reference and if the Natura 2000 Standard Data Form of the site is up to date, possible deterioration could also be assessed by comparing the conservation condition to the state of the site.<sup>92</sup>

Cliquet, Decler and Schoukens have discussed the possible obligation of restoration of a partial deterioration of a habitat of a site. They advocate that partial deterioration is not permitted under Article 6(2) seeing as partial

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<sup>85</sup> An Cliquet, Kris Decler and Hendrik Schoukens, 276.

<sup>86</sup> Habitats Directive Art. 6(2)

<sup>87</sup> An Cliquet, Kris Decler and Hendrik Schoukens, 276.

<sup>88</sup> European Commission (2019), 25f.

<sup>89</sup> Ibid, 25-28. A comparison can be made with disturbance of species which is to be avoided “in so far as such disturbance could be significant in relation to the objectives of this Directive” according to Art. 6(2).

<sup>90</sup> Ibid, 29.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid, 28

deterioration of a habitat in a site could lead to further deterioration in the site.<sup>93</sup>

### 2.2.2.1 Cases regarding Article 6(2)

In the case of *Grüne Liga* the authorisation for a bridge was given before the relevant site was included in the list of SCI and the bridge was constructed and finished. Before the construction work started the site was included in the list of SCI. The Court of Justice was asked what requirements that follows from Article 6(2) in a subsequent review of an authorisation that was granted for a project and to what date the review should relate.<sup>94</sup> The court clarified that to what date the review should relate to could not date back to a time before the site was on the list of SCIs. Further the court stated that the objective of Article 6(2) could not be fully fulfilled if the review only regarded the conservation status of natural habitats and disregarding factors that have caused or are likely to continue to cause significant deterioration after the date for which the site was included in the list of SCIs.<sup>95</sup> When doing a subsequent review of a plan or project which is likely to have had a significant effect on the site, the procedure “must take into account all factors existing at the date of the inclusion of that site in the list of SCIs and all implications arising or likely to arise following the partial or total implementation of the plan or project on the site in question after that date as well.”<sup>96</sup>

According to Schoukens, this could imply that Member States also need to consider interim losses “which result from the fact that the damaged nature was not able to perform its duties” before the effect of the restoration measure has taken place. Schoukens also makes the conclusion that the court’s understanding of Article 6(2) in the *Grüne Liga* case is in line with the approach set by the Environmental Liability Directive<sup>97</sup>, especially regarding that compensatory measures should be put in place to compensate interim losses of natural resources while there is a pending recovery.<sup>98</sup>

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<sup>93</sup> An Cliquet, Kris Decler and Hendrik Schoucens, 277.

<sup>94</sup> Case C-399/14 *Grüne Liga Sachsen eV and Others v Freistaat Sachsen (Grüne Liga)* EU:C:2016:10, para 29.

<sup>95</sup> *Grüne Liga*, paras 59-60.

<sup>96</sup> *Ibid*, para 60.

<sup>97</sup> Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (the Environmental Liability Directive) establishes according to its Article 1 a framework of environmental liability based on the ‘polluter-pays’ principle to prevent and remedy environmental damage. The Environmental Liability Directive supports, amongst others, the Habitats Directive in holding operators liable for environmental damages to protected natural habitats.

<sup>98</sup> Hendrik Schoukens, ‘Non-Regression Clauses in Times of Ecological Restoration Law: Article 6(2) of the EU Habitats Directive as an unusual ally to restore Natura 2000?’ (2017) 13(1) *Utrecht Law Review* 124, 147.



In the infringement case *Commission v Ireland*, regarding a habitat of the Red Grouse that was deteriorated due to overgrazing, the Court of Justice stated that national authorities are obliged to “take measures [...] to ensure that damaged habitats are allowed to recover”<sup>99</sup> according to oblige the obligation of non-deterioration in Article 6(2).

According to Verschuuren, it is in cases such as *Commission v Ireland* where there is a site that is deteriorating or if a site is in the threat of deteriorating, there is a legal obligation to take measures to stop any further deterioration from occurring and to restore the site to a favourable conservation status.<sup>100</sup>

In the case of *Commission v Spain* regarding open-faced mines for which the operation was authorised before the site was protected by the Habitats Directive, the Court of Justice stated that the mines implementation falls under the obligation in Article 6(2) even though the projects did not need to go through a prior assessment of the implications of the projects.<sup>101</sup> The failure of a Member State to take actions to prevent deterioration from such ongoing projects constitutes a failure to fulfil the obligation of non-deterioration under Article 6(2).<sup>102</sup>

In the case *Cascina Tre Pini* in Italy a Natura 2000 site faced deterioration mostly due to its location close to the airport of Milan-Malpensa. The question in the Court of Justice was if that site could be declassified due to its deterioration.<sup>103</sup> In her opinion, Advocate General Kokott stated that a Member State’s failure to fulfil its non-deterioration obligation of Article 6(2) does not motivate the withdrawal of the site’s protective status. “Member States should rather take the necessary measures to restore the site.”<sup>104</sup> In its judgement, the Court of Justice stated that not all degradation of a Natura 2000 site justifies its declassification. It is essential that the degradation of the site should make the site irretrievably unsuitable to ensure the conservation of natural habitats or the setting up of the Natura 2000 network, so that the site no longer contribute to the achievement of the objectives of the Habitats Directive.<sup>105</sup> The court stated that “[o]n the contrary, it is for that State to take measures necessary to safeguard that site.”<sup>106</sup>

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<sup>99</sup> Case C-117/00 *Commission v Ireland* [2002] ECR I-5335, para 31.

<sup>100</sup> Jonathan Verschuuren, ‘Climate Change: Rethinking Restoration in the European Union’s Birds and Habitats Directives’ (2010) 28(4) *Ecological Restoration* 431, 432.

<sup>101</sup> Case C-404/09 *European Commission v Kingdom of Spain*, EU:C:2011:764, paras 125.

<sup>102</sup> European Commission (2019), 31.

<sup>103</sup> Case C-301/12, *Cascina Tre Pini Ss* [2014] EU:C:2014:213, paras 12-16.

<sup>104</sup> *Ibid*, Opinion of AG Kokott, para 50.

<sup>105</sup> *Ibid*, paras 30-31.

<sup>106</sup> *Ibid*, para 36.

According to Schoukens, the court’s decision underscores the potential of Article 6(2) as groundwork for recovery claims in the context of degraded Natura 2000 sites.<sup>107</sup>

### 2.2.3 Plans and Projects

Article 6(3) states that plans and projects that are likely to have a significant effect of sites shall be subject to an appropriate assessment of the implications for the site in view of the site’s conservation objectives. The national authorities should only allow the plan or project if the assessment establishes that the plan or project “will not adversely affect the integrity of the site concerned”<sup>108</sup>. Article 6(4) expresses that a plan or project may still be carried out despite a negative assessment if there are no alternative solutions, and it is necessary for “imperative reasons of overriding public interest”<sup>109</sup> that the plan or project is carried out. In order to allow the plan or project the Member States have the obligation to take all compensatory measures necessary to protect the overall coherence of Natura 2000. The Member States must also inform the Commission of the compensatory measures.<sup>110</sup>

According to the Commission, Article 6(3) and (4) establishes safeguards governing plans and projects that are likely to have a significant negative effect on a Natura 2000 site.<sup>111</sup> In the guidance to Article 6 the Commission sets out a reminder that even if a plan or project does not fall within the scope of the provision in Article 6(3), they still need to be compatible with Article 6(1) and (2).<sup>112</sup> The Commission has stated that since Article 6(4) should be interpreted strictly and is only applicable if all conditions are met as it is an exemption to the general rule in Article 6(3).<sup>113</sup>

#### 2.2.3.1 *Mitigation measures in Article 6(3)*

In its guidance to Article 6 the Commission expressed that if a plan or project cannot be accepted due to the identification of adverse effects on the integrity of the site during the assessment, it could be possible to proceed depending on the degree of effect. Mitigation measures could be introduced to the effects that was identified in the appropriate assessment to either avoid or reduce them to a level where they no longer adversely affect the integrity of the site.<sup>114</sup>

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<sup>107</sup> Hendrik Schoukens (2017), 147.

<sup>108</sup> Habitats Directive Art. 6(3).

<sup>109</sup> Ibid, Art. 6(4).

<sup>110</sup> Ibid, Art. 6(4).

<sup>111</sup> European Commission (2019), 8.

<sup>112</sup> Ibid, 33.

<sup>113</sup> Ibid, 54.

<sup>114</sup> Ibid, 48.

### 2.2.3.2 *Compensatory measures in Article 6(4)*

The compensatory measures that must be taken in accordance with Article 6(4) are intended to offset the negative effects of the plan or project and are an addition to the other conservation measures of the Habitat Directive. The compensatory measures are there for intended to go further than the other conservation measures.<sup>115</sup> In order to ensure that the overall coherence of the Natura 2000 network is protected the Commission has stated the general principle that a plan or project should not irreversibly affect a site before the compensatory measures has been set in place.<sup>116</sup> As an example of compensatory measures, the Commission has mentioned the re-creation of a comparable habitat or an addition to the Natura 2000 network with a new site which is comparable with the original site. The Commission also mentioned the restoration of another natura 2000 site as an example of compensatory measures.<sup>117</sup>

### 2.2.3.3 *Cases regarding Article 6(3) and (4)*

In the case of *Stadt Papenburg* the Court of Justice was asked if maintenance works which had been authorised before the expiry of the time-limit for transposition of the Habitats Directive must undergo an assessment of their implications pursuant to Article 6(3) or (4) if the maintenances are continued after the site is included in the list of SCI.<sup>118</sup> The court stated that depending on the regularity or nature of the maintenance works at issue, those maintenance works could be considered as one and the same project for the purpose of Article 6(3). In that case it would not be subject to the requirement of prior assessment for implications of the project for the site concerned.<sup>119</sup>

In the case of *Grüne Liga* the Court of Justice was asked if accounts could be taken of the fact that the structure was permitted to be constructed, and put into service, in the context of supplementary proceedings seeking to remedy an error found in a subsequent review under Article 6(2) or an impact assessment under Article 6(3).<sup>120</sup> The court stated that the fact that the planning decision approving the plan or project was immediately enforceable does not amend the requirements of the review under Article 6(2). The review must also take into account the risks of deterioration that could be significant which may have arisen because the plan or project already has been carried out. Regarding Article 6(4), the court stated that the requirement to check for alternative solutions may not be amended because of the fact that the plan or project has already been implemented.<sup>121</sup>

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<sup>115</sup> Ibid, 57f.

<sup>116</sup> Ibid, 60.

<sup>117</sup> Ibid, 61.

<sup>118</sup> *Stadt Papenburg*, para 7 point (5).

<sup>119</sup> *Stadt Papenburg*, para 47–46.

<sup>120</sup> *Grüne Liga*, para 29.

<sup>121</sup> Ibid, para 78.

## 3 EU nature restoration regulation

### 3.1 Commission proposition

In the light of the EU Biodiversity Strategy 2030, the Commission presented the proposal for a regulation on nature restoration in June 2022. According to the explanatory memorandum, the proposed Nature Restoration Regulation sets out an overarching objective to “contribute to the continuous, long-term, and sustained recovery of biodiverse and resilient nature across the EU’s land and sea areas by restoring ecosystems and to contribute to achieving Union climate mitigation and climate adaptation objectives and meet its international commitments.”<sup>122</sup>

In Article 1, the Nature Restoration Regulation states that it establishes a framework within which Member States shall put in place effective restoration measures which together shall cover at least 20 % of the Union’s land and sea areas by 2030, and by 2050 all ecosystems that are in need of restoration.<sup>123</sup>

#### 3.1.1 Definitions

In Article 3 the proposed regulation presents a list of definitions. According to the definitions, ‘restoration’ is the process of assisting the recovery of an ecosystem towards or to ‘good condition’. For a habitat type to the highest level of condition attainable and to its ‘favourable reference area’.<sup>124</sup>

For an ecosystem to reach ‘good condition’ the key characteristics of the ecosystem should reflect high level of ecological integrity, stability, and resilience necessary to ensure its long-term maintenance.<sup>125</sup>

The ‘favourable reference area’ is the total area of a habitat type in a geographical region at a national level that is considered the minimum necessary to ensure the long-term viability of the habitat type and all its significant ecological variations in its natural range. If the area is not sufficient, it means the area necessary to re-establish the habitat type.<sup>126</sup>

#### 3.1.2 Restoration targets and obligations

Chapter two of the proposed regulation states the restoration targets and obligations on the restoration of terrestrial, coastal and freshwater ecosystems (Article 4), of marine ecosystems (Article 5), of urban ecosystems (Article 6), of the natural connectivity of rivers and natural functions of related

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<sup>122</sup> European Commission, ‘Proposal for a regulation of the European parliament and of the Council on nature restoration’ COM (2022) 304 final, Explanatory memorandum, 3.

<sup>123</sup> Ibid, Art 1(2).

<sup>124</sup> Ibid, Art. 3(3).

<sup>125</sup> Ibid, Art. 3(4).

<sup>126</sup> Ibid, Art. 3(5).

floodplains (Article 7), of pollinator populations (Article 8), of agricultural ecosystems (Article 9), and of forest ecosystems (Article 10).<sup>127</sup> For the purpose of the scope of the thesis Article 4 will be the main focus, but a brief summary of Articles 6, 9 and 10 will also be presented.

### *3.1.2.1 Restoration measures and targets of Article 4*

According to Article 4(1) Member States shall put in place the necessary restoration measures to improve to good condition areas of habitat types listed in Annex I which are not in good condition.<sup>128</sup> Annex I consist of a list of all the terrestrial, coastal and freshwater habitat types listed in Annex I of the Habitats Directive divided in to six groups for those habitat types.<sup>129</sup> By 2030 such measures shall be put in place on at least 30 % of the area of each group of habitat types listen in Annex I which are not in good condition. By 2040 the measures shall be put in place on at least 60 % and on at least 90 % by 2050.<sup>130</sup>

For areas that are not covered by the habitat types listed in Annex I, Member States should put in place the restoration measures that are necessary to re-establish those habitat types. These measures are to be put in place on the additional overall surface needed to reach the total favourable reference area of each group of habitat type listed in Annex I. The measures shall be put in place of at least 30 % of the additional surface by 2030, at least 60 % by 2040 and 100 % of the surface by 2050.<sup>131</sup>

When Member States are quantifying the favourable reference area of each habitat type, they should take into account the documented losses over at least the last 70 years and the projected changed to environmental conditions due to climate change.<sup>132</sup>

For the terrestrial, costal, and freshwater habitats of the species listed in Annexes II, IV and V to the Habitats Directive, Member States are obliged to put in place restoration measures that are necessary to improve the quality and quantity of those habitats. The restoration measures include re-establishing the habitats and enhancing the connectivity until sufficient quality and quantity of those habitats is achieved.<sup>133</sup>

According to Article 4(4) the determination of the most suitable areas for restoration measures in accordance with Article 4 (1), (2) and (3) are based on the best available knowledge and the latest scientific evidence of the

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<sup>127</sup> Ibid, Art. 4-10.

<sup>128</sup> Ibid, Art. 4(1).

<sup>129</sup> Ibid, Annex I.

<sup>130</sup> Ibid, Art. 4(1).

<sup>131</sup> Ibid, Art. 4(2).

<sup>132</sup> Ibid, Art. 11(2)(a)(iii).

<sup>133</sup> Ibid, Art. 4(3).

condition of the habitat types listed in Annex I. As referred to in Article 1(e) of the Habitats Directive, the condition of the habitat types should be measured by the structure and functions which are necessary for the long-term maintenance including the typical species of the habitat types. In areas where a habitat type listed in Annex I are in unknown condition; they shall be considered as being in not good condition.<sup>134</sup>

### *3.1.2.2 Deterioration and non-fulfilment of Article 4*

Areas which are subject to restoration measures in accordance with Article 4 (1), (2) and (3) should show a continuous improvement in the condition of the habitat types until good condition is reached. Member States have an obligation to ensure that areas which have reached good condition do not deteriorate.<sup>135</sup> Member States shall also ensure that areas where the habitat types listed in Annex I occur do not deteriorate.<sup>136</sup>

The non-fulfilment of the non-deterioration obligation in Article 3 (6) and (7) is justifiable outside of Natura 2000 sites if it is caused by (a) force majeure, (b) an unavoidable transformation of the habitat due to climate change, or (c) a plan or project of overriding public interest for which no less damaging alternative solutions are available.<sup>137</sup> For Natura 2000 sites the justifiability of non-fulfilment is the same as outside Natura 2000 sites besides (c) which instead states a plan or project authorised in accordance with Article 6(4) of the Habitats Directive.<sup>138</sup>

### *3.1.2.3 Summary of Articles 6, 9 and 10*

According to the Commission's explanatory memorandum of the proposal, Articles 6-10 contains further specific targets and obligations other than those of Article 4 and 5 and will require additional restoration measures. The restoration targets of Articles 6-10 are meant to complement the targets of Articles 4 and 5 and will therefor also have an effect on the areas which are covered by habitat types protected in the Habitats Directive.<sup>139</sup> According to a legal assessment of the proposal made by the Legal Working Group of the Society for Ecological Restoration Europe, this clearly indicates a hierarchy between Articles 4 and 5 and the following articles 6-10.<sup>140</sup>

Article 6 concerns restoration of urban ecosystem and sets a target that there should be no not loss of urban green space by 2030 compared to 2021. There

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<sup>134</sup> Ibid, Art. 4(4).

<sup>135</sup> Ibid, Art. 4(6).

<sup>136</sup> Ibid, Art. 4(7).

<sup>137</sup> Ibid, Art. 4(8).

<sup>138</sup> Ibid, Art. 4(9).

<sup>139</sup> Ibid, Explanatory memorandum, 13.

<sup>140</sup> An Cliquet et al, *Legal assessment of the Proposal for an EU Nature Restoration Law: Report by the Legal Working Group of the Society for Ecological Restoration Europe* (Society for Ecological Restoration 2023), 12.

also targets of increasing the total national area of urban green space of 3 % by 2040 and 5 % by 2050, with 2021 as the reference.<sup>141</sup>

Article 9 concerns the restoration of agricultural ecosystems and includes targets of restoring and rewetting organic soils in agricultural used constituting drained peatlands. The targets set in the proposal are that the restoration measures shall be put in place on at least 30 % of such areas by 2030, 50 % by 2040 and 70 % by 2050.<sup>142</sup>

Article 10 concerns the restoration of forest ecosystems and sets out targets binding Member States to achieve an increasing trend at a national level of a selection of indicators in forest ecosystems as set out in Annex VI by 2030.<sup>143</sup>

## 3.2 Changes by the Council

On 20 June 2023 the Council presented its general approach to the Commission proposal. The relevant amendments made by the Council will be presented below.

### 3.2.1 Definitions

In general, the amendments made by the Council to the definitions in Article 3 is the inclusion of references to definitions in other directives, such as the Habitats Directive, and references to other Articles in the Restoration Regulation.

For the definition of ‘restoration’ the Council the restoration of ecosystems is done through improving habitat types to ‘good condition’.<sup>144</sup>

For a habitat type to have the status of ‘good condition’ its key characteristics, in particular its structure and functions and its typical species or typical species composition reflect the high level of ecological integrity, stability, and resilience necessary to ensure its long-term maintenance and therefore contribute to reaching or maintaining favorable conservation status according to Article 1(e) of the Habitats Directive.<sup>145</sup>

For the definition of ‘favorable reference area’, the Council made a reference clarifying that where a habitat type is listed in Annex I of the Habitats Directive, the act of re-establishing such habitat types contributes to reaching favourable conservation status of said habitat type.<sup>146</sup>

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<sup>141</sup> COM (2022) 304 final, Art. 6.

<sup>142</sup> Ibid, Art. 9.

<sup>143</sup> Ibid, Art. 10.

<sup>144</sup> European Council, ‘General Approach on the Nature Restoration Regulation’ Brussels 20 June 2023 (hereafter “General Approach”), Art. 4(3).

<sup>145</sup> Ibid, Art. 4(4).

<sup>146</sup> Ibid, Art. 4(5).

### 3.2.2 Restoration targets and obligations

The part of the Restoration Regulations which covers restoration targets and obligations is structurally the same as the Commission proposition with the addition of two articles. Article 5a concerns energy from renewable sources, and Article 5b which concerns national defence.<sup>147</sup> The new Articles represents different interest which will affect the application of Article 4 in different ways.

#### 3.2.2.1 *Restoration measures and targets of Article 4*

The obligations of putting restoration measures in place in Article 4(1), (2) and (3) of the Council's General Approach broadly have the same content as the Commission proposition.

For the targets in Article 4(1) the Council chose to make new subparagraphs for (a) the target of 2030 and, (b) the targets of 2040 and 2050. For the 2030 target the Council made a change so that the restoration measures shall be in place on at least 30 % of the total area of all habitat types listed in Annex I that are not in good condition.<sup>148</sup> In comparison, the targets of 2040 and 2050 have not been changed and therefore states that the restoration measures shall be put in place on at least 60 %, respectively 90 %, of the area of each group of habitat types listed in Annex I that is not in good condition.<sup>149</sup>

When Member States quantifies the favourable reference area for the purpose of the obligation of Article 4(2), they should according to the General Approach take into account records of historical distribution. The timeline of looking at losses dating back at least 70 years was removed.<sup>150</sup>

In Article 4(4) the Council made an addition stating that where it is appropriate, the diversity of situations in various regions as referred to in Article 11(9a) should be taken into account for the determination of most suitable areas for restoration measures. The Council also removed the presumption that if the condition of a habitat type listed in Annex I was unknown, it would be considered as not in good condition.<sup>151</sup> Instead the new Article 4(4a) introduces a new obligation stating that by 2030 the condition of at least 90 % of area distributed overall by habitat types listed in Annex I is known. By 2040 the condition of all areas of habitat types listed in Annex I shall be known.<sup>152</sup>

The new Article 5b(1) concerning national defence states that Member States can exempt areas which are used for activities with the sole purpose of

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<sup>147</sup> Ibid, Art. 5a and Art. 5b.

<sup>148</sup> Ibid, Art. 4(1) point (a).

<sup>149</sup> Ibid, Art. 4(1) point (b).

<sup>150</sup> Ibid, Art. 11(2)(a)(iii).

<sup>151</sup> Ibid, Art. 4(4).

<sup>152</sup> Ibid, Art. 4(4a).



national defence when putting in place restoration measures for the purpose of Article 4(1), (2) and (3). This exemption can however only be used if the restoration measures are deemed to be incompatible with the continued military use of these areas.<sup>153</sup>

### 3.2.2.2 *Deterioration and non-fulfilment of Article 4*

For the non-deterioration obligation in Article 4(6) the Council changed the absolute non-deterioration to that Member States shall ensure that areas which has reached good condition do not significant deterioration.<sup>154</sup> The Council entirely changed the formulation of Article 4(7) introducing the obligation for Member States to put in place the necessary measures with the aim of preventing significant deterioration of areas where habitat types listed in Annex I occur. This obligation is only relevant for those areas which are in good condition or places necessary to achieve the restoration targets in Article 4(1).<sup>155</sup>

Article 4(8) which establishes when the non-fulfilment of the non-deterioration obligations is justified has been slightly changed in by the Council. The content is virtually the same as before with some additional clarifications regarding force majeure and the inclusion of plans in the same sub-paragraph as projects. Another change by the Council is that Article 4(8) only concerns the obligations set out in Article 4(6). An additional sub-paragraph was also added by the Council stating that actions from third countries for which the concerned Member State is not responsible is a justifiable cause for the non-fulfilment of the obligations in Article 4(6).<sup>156</sup>

Since Article 4(8) no longer concerns the obligation in Article 4(7), a new paragraph was added by the Council with essentially the same content as Article 4(8). Article 4(8a) establishes that the obligation to put in place the necessary measures to prevent significant damage set out in Article 4(7) does not apply to deteriorations caused by the same causes listed in Article 4(8).<sup>157</sup>

The added Article 5a on energy from renewable energy have an impact of Article 4(8) in that plants to produce renewable energy, the grid and the plants connection to the grid, and storage assets shall be resumed as being of overriding public interest. Member States may also in certain circumstances exempt them from the requirement in Article 4(8) that no less damaging alternative solutions are available.<sup>158</sup>

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<sup>153</sup> Ibid, Art. 4(4a).

<sup>154</sup> Ibid, Art. 4(6).

<sup>155</sup> Ibid, Art. 4(7).

<sup>156</sup> Ibid, Art. 4(8).

<sup>157</sup> Ibid, Art. 4(8).

<sup>158</sup> Ibid, Art. 5a.

Similarly, the new Article 5b of national defence states that plans and projects for the purpose of national defence are presumed as being of overriding public interest for the purpose of Article 4(8). Such plans and projects may also be exempted from the requirement in Article 4(8) that no less damaging alternative solutions are available. If this exemption is applied, the Member States shall put in place measures to mitigate the impacts on the affected habitat types.<sup>159</sup>

### 3.2.2.3 *Articles 6, 9 and 10*

For Article 6 regarding restoration of urban ecosystems, the Council mainly made changes to the set targets and changed the reference from 2021 to the year of entry into force of the Nature Restoration Regulation. The obligation of ensuring no net loss of urban green space remains and Member States are to achieve an increasing trend in the total area of urban green space.<sup>160</sup>

Article 9 regarding restoration of agricultural remains unchanged with the exemption of the targets regarding restoration measures that should be put into place by 2040 and 2050 which have been decreased by 10 percentage points each in comparison to the proposition. An exemption to the targets of rewetting peatlands has also been included stating that it may be justified to rewet a reduced number of areas due to significant negative impacts on infrastructure, buildings, climate adaptations or other public interests.<sup>161</sup>

Article 10 regarding restoration of forest ecosystems largely remains the same in the terms of content. A non-fulfillment paragraph has been added stating that the non-fulfillment of the obligations, regarding the increasing trend of different indicators, is justified if it is caused by large-scale force majeure and unavoidable habitat transformations directly caused by climate change.<sup>162</sup>

## 3.3 Amendments by the Parliament

The European Parliament adopted its amendments to the Commissions' proposal for a Nature Restoration Regulation on 12 July 2023.<sup>163</sup>

Much of the amendments made by the Parliament are identical to those made by the Council, so only the amendments which differentiates from the Council's' will be presented.

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<sup>159</sup> Ibid, Art. 5b(2).

<sup>160</sup> Ibid, Art. 6.

<sup>161</sup> Ibid, Art. 9.

<sup>162</sup> Ibid, Art. 10.

<sup>163</sup> European Parliament, Amendments adopted by the European Parliament on 12 July 2023 on the proposal for a regulation of the European Parliament and of the Council on nature restoration (COM(2022)0304 – C9-0208/2022 – 2022/0195(COD)) (hereafter “Amendments”).

### 3.3.1 Definitions

A new definition the Parliament has included is for ‘deterioration’. According to its definition, deterioration means the cause of net adverse effect of the habitat type covered by Article 4(6) and (7) in so far that effect could be significant in relation to achieving the overall objectives of Article 4.<sup>164</sup>

### 3.3.2 Restoration targets and obligations

Article 4(10a) is new and states that in measures taken in accordance under Article 4, Member States shall take into account economic, social and cultural requirements and regional and local particularities in accordance with Article 2(3) of the Habitats Directive.<sup>165</sup>

#### 3.3.2.1 *Restoration measures and targets of Article 4*

Compared to the Council’s General Approach, the amendments made by the Parliament to Article 4(1) and (2) narrows down its content. Article 4(1) according to the Parliaments’ amendments states that Member States shall aim to put in place restoration measures in Natura 2000 sites which are necessary to move towards reaching favourable conservation status of the habitat types listed in Annex I which are not in good condition.<sup>166</sup> The obligation of putting in place measures of re-establishing habitat types according to Article 4(2) is according to the amendments limited to areas necessary to ensure the fulfilment of Article 4(1).<sup>167</sup>

#### 3.3.2.2 *Deterioration and non-fulfilment of Article 4*

Article 4(6) in the Parliament’s Amendments states that Member States shall endeavour to ensure that the total national area is in good condition, and that the total amount of area with a sufficient quality of the habitats of the species referred to in Article 4(1), (2) and (3) does not significantly decrease over time.<sup>168</sup> In comparison to the Council which changed the content of Article 4(7), the Parliament chose to remove it.<sup>169</sup>

The for the non-fulfilment of Article 4(6) according to Article 4(8) one new cause for justification was added by the Parliament. According to Article 4(8) point (ca), in exceptional circumstances the non-fulfilment of the obligations in Article 4(6) linked to the realisation or continuation of activities of public

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<sup>164</sup> Ibid, Art. 3(7a)

<sup>165</sup> Ibid, Art. 4(10a).

<sup>166</sup> Ibid, Art. 4(1).

<sup>167</sup> Ibid, Art. 4(2).

<sup>168</sup> Ibid, Art. 4(6).

<sup>169</sup> Ibid, Art. 4.

interest, provided that such non-fulfilment does not jeopardise the restorations targets in Article 4(1), (2) and (3).<sup>170</sup>

### 3.3.2.3 *Articles 6, 9, 10 and 10a*

There are no mentionable differences between the Parliament's amendments to Article 6 regarding restoration of urban ecosystems and Article 10 regarding restoration of forest ecosystems in comparison to the General Approach by the Council.<sup>171</sup> Notable however is that the Parliament removed Article 9 in its amendments.<sup>172</sup>

The Parliament introduced a new article in its amendments regarding an obligation of planting three billion additional trees. According to Article 10a, when identifying and implementing restorations measures to meet the objectives set out in Articles 4, 6, 9 and 10 Member States shall contribute to the achievement of the Union objective of planting at least three billion additional trees by 2030. Trees that are planted for harvesting purposes do not count for that objective.<sup>173</sup>

## 3.4 Provisional Agreement

On 9 November 2023 the Council and Parliament reached a provisional political agreement (hereafter 'Provisional Agreement') on the Nature Restoration Regulation.<sup>174</sup> The provisional overall compromise text was endorsed by the Permanent Representatives Committee on 22 November 2023,<sup>175</sup> and adopted by the ENVI on 29 November 2023 with 53 votes to 28 against and 4 abstentions.<sup>176</sup> The Provisional Agreement will be voted on by the full Parliament at first reading, which is scheduled for the Plenary session on 26-29 February 2024.<sup>177</sup> If the Parliament adopts the Provisional

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<sup>170</sup> Ibid, Art. 4(8) point (ca).

<sup>171</sup> Ibid, Art. 6 and 10.

<sup>172</sup> See *ibid* and the lack of an Article 9.

<sup>173</sup> Ibid, Art. 10a.

<sup>174</sup> European Council, 'Nature restoration: Council and Parliament reach agreement on new rules to restore and preserve degraded habitats in the EU' <<https://www.consilium.europa.eu/en/press/press-releases/2023/11/09/nature-restoration-council-and-parliament-reach-agreement-on-new-rules-to-restore-and-preserve-degraded-habitats-in-the-eu/>> (accessed 2024-01-28) and European Parliament, 'EU Nature restoration law: MEPs strike deal to restore 20% of EU's land and sea' <<https://www.europarl.europa.eu/news/en/press-room/20231031IPR08714/eu-nature-restoration-law-meps-strike-deal-to-restore-20-of-eu-s-land-and-sea>> (accessed 2024-01-28).

<sup>175</sup> European Council, 'Proposal for a Regulation of the European Parliament and of the Council on nature restoration – Letter to the Chair of the European Parliament Committee on the Environment, Public Health and Food Safety (ENVI)', 22 November 2023, (Hereafter "Provisional Agreement").

<sup>176</sup> ENVI, 'Result of votes and roll-call votes 29 November 2023', p. 2.

<sup>177</sup> European Parliament, 'Nature restoration law: Parliament-Council deal backed by Environment MEPs' <<https://www.europarl.europa.eu/news/en/press-room/20231127IPR15440/nature-restoration-law-parliament-council-deal-backed-by-environment-meps>> (accessed 2024-01-28).

Agreement, the Council will then approve and adopt the Parliament's position to the Nature Restoration Regulation.<sup>178</sup> The Nature Restoration Regulation will, according to its Article 23, enter into force 20 days after its publication in the Official Journal of the European Union.<sup>179</sup>

The Provisional Agreement is a compromise between the Council's General Approach and the Parliament's amendments to the original propositions. So as to not repeat too much of what has already been brought up, the following will primarily focus on the compromises in the Provisional Agreement and any supplements not found in the Council's or the Parliament's documents.

The subject matter of the Regulation in Article 1 in the Provisional Agreement is nearly identical to that of the Council's General Approach. An additional subparagraph, Article 1(1) point (ba), states that the Regulation lays down rules to contribute to enhancing food security.<sup>180</sup> The Provisional Agreement includes Union target of putting in place restoration measures in 20 % of land and 20 % of sea areas by 2030, and in all ecosystems in need for restoration by 2050.<sup>181</sup>

### 3.4.1 Definitions

Article 3 which includes the definitions for the Regulation has not been altered with in comparison to the Council's General approach except for one new definition for 'very common and widespread habitat type'. According to its definition, a 'very common and widespread habitat type' is a habitat type which occurs in several biogeological regions in the Union with a range exceeding 10 000 km<sup>2</sup>.<sup>182</sup>

### 3.4.2 Restoration obligations and targets

#### 3.4.2.1 *Restoration measures and targets of Article 4*

The restoration targets of Article 4(1) in the Provisional Agreement correspond with how the Committee structured the paragraph in its General Approach. In accordance with the Parliament's position to Article 4(1) in its Amendments, a subparagraph states that priority shall give priority to restoration measures in areas located in Natura 2000 sites until 2030.<sup>183</sup>

Unlike the original proposition from the Commission, the General Approach and the Amendments, the Provisional Agreements includes a derogation clause from Article 4(1), points (a) and (b). According to Article 4(1a) Member States may exclude those very common and widespread habitat types

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<sup>178</sup> Provisional Agreement.

<sup>179</sup> COM/2022/304 final, Art. 23.

<sup>180</sup> Provisional Agreement, Art 1(1) point (ba).

<sup>181</sup> Ibid, Art 1(2).

<sup>182</sup> Ibid, Art 3(7a).

<sup>183</sup> Ibid, Art 4(1).

that covers more than 3 % of their European territory from the relevant group of habitat types. The derogation is only applicable if it is ensured that the percentage which the very common and widespread habitat type covers does not prevent the favorable conservation status of each of those habitat types, as determined in Article 1(e) of the Habitats Directive, from being achieved or maintained at a national biogeological level.<sup>184</sup>

In the areas that the derogation from Article 4(1), points (a) and (b), is applied Member States must by 2050 put in place restoration measures on a percentage which represents at least 80 % of the area that is not in good condition, for each of those habitat types. Member States must also put in place restoration measures on at least one third of that percentage by 2030 and on at least two thirds by 2040.<sup>185</sup>

If the derogation from Article 4(1) is applied, the obligation set forward in Article 4(1) point (a) shall apply to the total area of all remaining habitat types listed in Annex I that is not in good condition.<sup>186</sup>

Similarly, Article 4(2) in the Provisional Agreement is equivalent to that of the Council's General Approach, but there has been a derogation clause added. If a Member State considers that it is not possible to put in place restoration measures that are necessary to achieve the favorable reference area of a specific habitat type to 100 % by 2050, they may set the presentence level between 90 % and 100 % in their national restoration plans.<sup>187</sup> If that derogation is applied to specific habitat types, the obligation of Article 4(2) to put in place restoration measures applies to the remaining habitat types that are part of the groups of habitat types listed in Annex I to which the specific habitat types belong.<sup>188</sup>

#### *3.4.2.2 Deterioration and non-fulfilment of Article 4*

In comparison to the formulation of Article 4(6) in the Council's General Approach, the Provisional Agreement includes a reformulation stating that Member States shall "put in place measures which shall aim to ensure" the continuous improvement of those areas which are subject to restoration measures. For the areas which has reached good condition, without prejudice to the Habitats Directive, Member States also have the obligation of putting in place measures which shall aim to ensure that they do not significantly deteriorate.<sup>189</sup> Article 4(7) of the Provisional Agreement corresponds to that of the Council's General Approach with the exemption that the Provisional Agreement refers to the restoration targets set out in Article 4(10), while the

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<sup>184</sup> Ibid, Art 4(1a).

<sup>185</sup> Ibid, Art 4(1a).

<sup>186</sup> Ibid, Art 4(1b).

<sup>187</sup> Ibid, Art 4(2a).

<sup>188</sup> Ibid, Art 4(2b).

<sup>189</sup> Ibid, Art 4(6).

Council's General Approach refers to the restoration targets set out in Article 4(1).<sup>190</sup>

In the absence of alternatives and only outside Natura 2000 sites, the Provisional Agreement includes a possibility for Member States of applying the non-deterioration requirements of Article 4(6) and (7) at the level of each biogeographical region of their territory for each habitat type.<sup>191</sup>

The non-fulfillment requirements of Article 4(8), (8a) and (9) of the Provisional Agreement corresponds to the Council's General Approach with the exemption for a reformulation of the first sentence of Article 4(8) which means that it has the same formulation as Article 4(8a).<sup>192</sup>

### *3.4.2.3 Articles 6, 9, 10 and 10a*

In the Provisional Agreement Article 6, 10 and 10a correspond to the earlier changes made by the Council and Parliament. An exemption is an addition to Article 10 which states that the risk of forest fires should be taken into account while implementing the restoration measures in forest ecosystems.<sup>193</sup>

Article 9 in the Provisional Agreement includes a few additions compared to the Commissions General Approach. The first change is an addition stating that while implementing the restoration measures of the Article, Member States must take into account climate change, the social and economic needs of rural areas, and the need to ensure sustainable agricultural production in the EU.<sup>194</sup> Regarding the rewetting targets of the Article, the Provisional Agreement includes a clarification stating that the targets does not imply an obligation for farmers and private landowners, for whom rewetting remains voluntary, to rewet their land without any prejudice to obligations stemming from national law.<sup>195</sup>

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<sup>190</sup> Ibid, Art 4(7) compared to General Approach, Art. 4(7).

<sup>191</sup> Provisional Agreement, Art 4(7a).

<sup>192</sup> Ibid, Art 4(8), (8a) and (9) compared to General Approach, Art 4(8), (8a) and (9).

<sup>193</sup> Provisional Agreement, Art 4(8), (8a) and (9) compared to General Approach Art 6, 10 and 10a.

<sup>194</sup> Provisional Agreement, Art 4(8), (8a) and (9) compared to General Approach, Art 10a(1).

<sup>195</sup> Provisional Art 4(8), (8a) and (9) compared to General Approach, Art 10a(4) sixth subparagraph.

## 4 Comparing the restoration obligations

The purpose of comparing the restoration obligations of the Habitats Directive and with those of the Nature Restoration Regulation is to, in a more concrete way, understand what legal value the Nature Restoration Regulation will bring if it is implemented. In a larger picture both statutes need to work together within EU law, especially since both contain restoration obligations towards Member States.

As a starting point, it is worth to have a reminder of the aims of both statutes. The aim of the Habitats Directive is according to its Article 2 to contribute to biodiversity in the EU by the conservation of natural habitats and of flora and fauna. For natural habitats this conservation is done through the establishment of the Natura 2000 network. This also entails that any conservation measures the Member States are obligated to use under the Habitats Directive towards natural habitats, will be concentrated on the conservation of the Natura 2000 network. On the other hand, the Nature Restoration Regulation aims, according to Article 1, to contribute to the long-term and sustained recovery of biodiverse and resilient ecosystems in across the Member States through the restoration of degraded ecosystem. While both statutes regulate within similar, and often the same, areas of law they come from different backgrounds. The focus of the Habitats Directive is not primarily to restore natural habitats, it is to protect sites and in those protected sites to conserve the habitats at a favorable conservation status which in turn could include restoration.

In order to compare the restoration obligations of the Habitats Directive and the Nature Restoration Regulation, the following three sub-questions will be discussed to be able to draw a conclusion on the overall research question of the thesis.

- When should a site be restored?
- To what extent does the site need to be restored?
- What if the site deteriorates?

### 4.1 When should a site be restored?

There are a few instances when a Member State has an obligation to restore a natural habitat according to the Habitats Directive. Seeing as the Habitats Directive lacks specific rules regarding restoration, something that has been seen as a flaw of the Habitats Directive different scholars,<sup>196</sup> these obligations have mostly been clarified through case law of the Court of Justice and in non-binding guidance documents from the Commission.

In order to establish conservation measures under Article 6(1) of the Habitats Directive Member States largely depend on the data regarding the ecological values of the site that is reported in the Natura 2000 Standard Data Form and the conservation objectives of the sites. These conservation

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<sup>196</sup> See for example Jonathan Verschuuren, 436; An Cliquet, Kris Decler and Hendrik Schoukens, 282.



measures could include restoration measures, as it is not possible to declassify a site if the site has been destroyed due to the lack of conservation measures.

The second time when restoration could be obliged is when the habitat has deteriorated in relation to its condition in, for example, the Natura 2000 Standard Data Form or the state the site was in when it was first included in the list of SCI. This is supported by the case *Cascina Tre Pini* in which the Court of Justice stated that Member States must take the necessary measures to safeguard sites that are deteriorating according to the obligation of Article 6(2) of the Habitats Directive.<sup>197</sup>

Based on the Nature Restoration Regulation's definition of restoration, it is possible to draw a conclusion from the Court's statement in the infringement case of *Commission v Ireland*<sup>198</sup> that the obligation of Article 6(2) in the Habitats Directive implies that national authorities should take passive restoration measures in order to let natural habitats recover if the deterioration of the habitat was caused by, for example, overgrazing.

Mitigation measures in order to be able to allow a plan or project under Article 6(3) could also be in the form of restoration measures. These mitigation measures are however voluntary in the way that it is not necessary to mitigate the possible effect a plan or project could have on a site's integrity if the plan to implement the plan or project is cancelled.

Compensatory measures with Article 6(4) of the Habitats Directive are a requirement and these measures could be through restoration of another existing Natura 2000 site. The purpose of these compensatory measures is however not to restore sites, but to compensate for the damage the plan or project will have on the effected site. The affected site itself is not going to be restored, which is also reflected in the non-fulfilment clause of Article 4(9) in the Nature Restoration Regulation.

One large difference between the Habitats Directive and the Nature Restoration Regulation is the designation process of the Habitats Directive and that Article 6(1) is only applicable once a site has been designated as SAC and that the obligations of Article 6(2), (3) and (4) applies to sites on the list of SCI. For the Nature Restoration Regulations, the area's most suitable for restoration is to be determined based on the scientific knowledge, historical records and the latest scientific evidence of the conditions of the habitat types. Although the Nature Restoration Regulation contains derogation clauses regarding the binding targets of Article 4, the lack of designation process still leaves less room for the Member States to influence which sites are ultimately going to be subject to restoration obligations.

Another difference is the priority habitat types of the Habitats Directive which is a concept that is not included in the Nature Restoration Regulation.

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<sup>197</sup> *Cascina Tre Pini*, para 32.

<sup>198</sup> *Commission v Ireland*, para 31.

The habitat types listed in Annex I of the Nature Restoration Regulation, and there for the habitat types that are object to the restoration obligations in Article 4 of the Regulation, reflect those of Annex I to the Habitats Directive. The lack of priority habitat types entails that natural habitats in sites that could have been designated to become part of the Natura 2000 network, but ultimately wasn't, will be therefore object to the restoration obligations of the Nature Restoration Regulation if they are not in good condition.

There are in very few cases that the Habitats Directive will entail an obligation to restore natural habitats outside the Natura 2000 network. One examples would be if the restoration of an area outside a Natura 2000 site is necessary in order to fulfil the obligation of non-deterioration of Article 6(2) in relation to that Natura 2000 site. With the exemption that the restoration measures put in place according to Article 4(1) until 2030 should be focused on Natura 2000 sites, does the Nature Restoration Regulation essentially only differentiate between Natura 2000 sites and non-Natura 2000 sites when it comes to the non-fulfillment of the non-deterioration requirements of the Regulation. The effect of that, in combination with the lack of a priority status of habitat types, will most likely be that a larger number of sites which contains the relevant habitat types will be subject to restoration measures.

In addition to the areas that are subject to the restoration measures under Article 4, the Nature Restoration Regulation also include ecosystem specific restoration obligations, including the restoration of urban, agricultural and forest ecosystems. The restoration obligations under those provisions will concern sites that were never considered under the Habitats Directive.

## 4.2 To what extent do the sites need to be restored?

The restoration obligations of Article 4(1) and (2) in the Nature Restoration Regulation reference natural habitats reaching good condition and aiming to reach the favorable reference are of the habitat types while the Habitats Directive have an overall objective of conservating sites at a favorable conservation status. The edited versions of the Nature Restoration Regulation, including the Provisional Agreement, reference that the status of good condition habitat types contributes to reaching or maintaining favorable conservation status according to the Habitats Directive. Regarding the achievement of reaching favorable reference area of the habitat types, the Nature Restoration Regulation reference that the re-establishment of habitat types will contribute to reaching favorable conservation status. From the way that the terminology of the Nature Restoration Regulation is formulated and defined it is clear that the legislators does not want uncertainties to occur regarding to what state a natural habitat may need to be restored. A fair conclusion that can be drawn is that if a habitat type is in good condition and has reached its favorable reference area, it most likely also has a favorable conservation status.

One clear distinction the Nature Restoration Regulation has, and the Habitats Directive lacks, are targets set in percentages and deadlines regarding in how large areas and when restoration measures need to be put into place. The latest version of the Nature Restoration Regulation, the Provisional Agreement, does however include derogation clauses for the targets of Article 4 meaning that the targeted percentages could in some circumstances be reduced. In comparison to the Parliament's amendments which stated that the restoration measures of Article 4(1) should only be put in place in Natura 2000 sites, the Provisional Agreement's derogation clauses seem like a more effective alternative in relation to the aim of the Nature Restoration Regulation.

The degree of restoration needed in a site according under the obligation of Article 6(2) in the Habitats Directive largely depends on the degree of deterioration of the site. According to the case law of *Grüne Liga*<sup>199</sup>, the condition of a site in the Natura 2000 network cannot be compared with a condition the site had before it was included in the list of SCI when reviewing whether the site has deteriorated. This cut-off should not in itself hinder the need of restoration of the site if the natural habitat present has started to deteriorate, but if the site was in a better condition before it was included in the list of SCI the cut-off could imply the possibility that the degree of deterioration on the site could be disproportional from a historical perspective.

### 4.3 What if the site deteriorates?

The immediate answer regarding the consequence if a Member State lets a site deteriorate is that it could be seen as an infringement. Not all forms of deterioration are however strictly prohibited.

Under the Habitats Directive sites can be considered for declassification if it is warranted by natural developments. As was made clear in the case *Cascina Tre Pini*<sup>200</sup>, a site can however not be considered for declassification if the natural deterioration of the site is the product of the Member State's failure of protecting the site. In those instances, the Member State must take measures to restore that site.

In regards to the Nature Restoration Regulation, sites that are subject to restoration measures should continue to improve and areas which has reached good status should not significantly deteriorate. Member States also have an obligation of putting in place measures to prevent significant deterioration of areas where the habitat types in Annex I to the Regulation occurs and are in good condition. There are also non-fulfillment provisions regarding the non-deterioration obligations which slightly differ depending on if the site in question is within or outside Natura 2000. The common causes of deterioration which can justify deterioration is force majeure, habitat transformation due to climate change. For Natura 2000 sites, plans and projects authorized in accordance with Article 6(4) of the Habitats

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<sup>199</sup> *Grüne Liga*, paras 59-60.

<sup>200</sup> *Cascina Tre Pini*, paras 12-16.

Directive is also listed. For other sites deterioration caused by plans and projects of overriding public interest and by actions, or inactions, from third countries is listed.

Worth to note is that the Nature Restoration Regulations Article 4(8) and (8a) which lists plans or projects of overriding public interest as justifiable caused for deterioration in sites outside Natura 2000 does not include a provision regarding compensatory measures, as compared to Article 6(4) of the Habitats Directive.

## 5 Concluding comments

So, what legal value will the Nature Restoration Regulation bring if it survives the vote in Parliament and later in the Council?

This can be answered in a few ways. Firstly, the Nature Restoration Regulation will bring more concrete restoration obligations and targets that the Habitats Directive lacks. The Habitats Directive was not created with a focus on restoration so the uncertain legal situation that is the restoration obligations of the Habitats Directive will hopefully become less unclear. The provisions regarding the restoration of terrestrial natural habitats in the Provisional Agreement have been edited to make their relation to the Habitats Directive more visible and will lead to a better legal certainty regarding when a natural habitat in a Natura 2000 site should be restored.

Secondly, and possibly the largest contribution, habitats outside Natura 2000 sites will “finally” be subject to binding restoration obligations. Understandably, there are more justifiable causes for the non-fulfillment of the non-deterioration provisions in comparison to habitats inside Natura 2000 sites, but it is still a large step forward towards the aim of recovery of biodiverse and resilient ecosystems across the Member States’ land.

Will there be uncertainties? Probably, seeing as the Habitats Directive and the Nature Restoration Regulation will partly regulate within the same area of law and therefore also regulate the same situations. Even if the Commission produces a guidance of the Nature Restoration Regulation the Member States will inevitably have national legal procedures, which will result in preliminary rulings at the Court of Justice.

Something which was not the focus of the thesis, but would be interesting to explore further, is what the consequences of Articles 4(6), (9) and (10) will be. There are no similar provisions in the Habitats Directive so they will introduce completely new obligations on the Member States.

It remains to see whether the Provisional Agreement passes in the Parliament, and after that in the Council. The Provisional Agreement was adopted by the ENVI, but that does not guarantee an adoption at Parliament.

As an end note, should the process of adopting the Nature Restoration Regulation be put on hold or delayed, time might realistically run out to reach the set targets by 2030.

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