

2017

## NATURA 2000 - The European Union Mechanism for Nature Conservation. Some Legal Issues.

Maria Kenig-Witkowska

*University of Warsaw*, [george.witkowski@wp.pl](mailto:george.witkowski@wp.pl)

Follow this and additional works at: <https://readingroom.law.gsu.edu/jculp>

 Part of the [Comparative and Foreign Law Commons](#), [Environmental Law Commons](#), [Land Use Law Commons](#), and the [Urban Studies Commons](#)

---

### Recommended Citation

Kenig-Witkowska, Maria (2017) "NATURA 2000 - The European Union Mechanism for Nature Conservation. Some Legal Issues," *Journal of Comparative Urban Law and Policy*: Vol. 2 : Iss. 1 , Article 10.  
Available at: <https://readingroom.law.gsu.edu/jculp/vol2/iss1/10>

This Article is brought to you for free and open access by Reading Room. It has been accepted for inclusion in Journal of Comparative Urban Law and Policy by an authorized editor of Reading Room. For more information, please contact [mbutler@gsu.edu](mailto:mbutler@gsu.edu).

## **NATURA 2000 – THE EUROPEAN UNION MECHANISM FOR NATURE CONSERVATION. SOME LEGAL ISSUES.**

Maria Magdalena Kenig-Witkowska\*

**KEY WORDS:** Natura 2000, Nature Conservation, Environmental Protection, Habitats Directive, Birds Directive, European Union

### **I. NATURA 2000 – AN OVERVIEW**

Natura 2000 is the European Union (EU) initiative aimed at conserving the natural heritage of Europe, considered the cornerstone of the European Union nature conservation policy and law. The EU Member States are obliged to designate Natura 2000 – a coherent ecological network of special areas of conservation by Directive 92/43/EWG<sup>1</sup> on the conservation of natural habitats and of wild fauna and flora (so called the Habitats directive) and Directive 79/409/EWG on the conservation of wild birds (so called the Birds directive).<sup>2</sup> It is worth mentioning that Natura 2000 serves as the EU instrument for implementing the 1979 Convention on the Conservation of European Wildlife and natural Habitats (so called Bern Convention), to which the EU adheres by a decision of 1981.<sup>3</sup> The principal objective of both directives proposed by the European Commission was to respond to a continuing deterioration of European nature.<sup>4</sup> They represent the real cornerstone of the EU nature conservation policy aimed at protecting the species and natural habitats and wild fauna and flora that occur in the European territory of the Member States, in order to attain the European Union's environmental objectives such as the improvement of living conditions, ensuring biodiversity as well as sustainable development.<sup>5</sup>

The Natura 2000 network has been established on the ground of the Article 3 provision of the Habitats Directive, which states that a coherent

---

\* Maria Magdalena Kenig-Witkowska, Professor, University of Warsaw Faculty of Law and Administration

<sup>1</sup> OJ 1992 L 206/7, later amended

<sup>2</sup> OJ 1979 L 103/I, as amended by Directive 2006/105, OJ 2006 L 363/368, was repealed by the codifying Directive 2009/147, OJ 2010 L 20/7.

<sup>3</sup> Text of the Convention see: <http://conventions.coe.int/treaty/en/Treaties/Html/104/htm>; Dec. 82/72, of December 3, 1981, OJ 1982 L 38/1.

<sup>4</sup> As the European Commission has pointed out in its statements several times, almost everywhere in Western Europe, habitats and nature protection sites are shrinking dramatically due to urbanization, intensive farming activities, road construction, etc. Ludwig Kramer wrote in his book - EU Environmental Law (Sweet & Maxwell, 7th ed., p. 191, footnote 68), that perhaps the most eloquent example is the French habitat Camargue which lost between 1942-1984, about 1,000 hectares per year of its natural surface. See also: De Sadeleer, N., Habitats Conservation in EC Law: From Nature Sanctuaries to Ecological Networks, (2005) 5 Yearbook of European Environmental Law, pp. 251 –2.

<sup>5</sup> Comp. Preambles to both Directives; also art. 2 of the Habitats Directive.

European ecological network of special areas of conservation must be established under the name Natura 2000. The Natura 2000 is composed of sites hosting the natural habitat types listed in Annex I, and habitats of the species listed in Annex II. The principal aim of the network is to enable natural habitats to be maintained or restored, at a favorable conservation status in their natural range. The network Natura 2000 encompasses also all the areas designated, including those that have been already classified, or special protection areas pursuant to the Birds Directive. They have to be incorporated into the coherent European ecological network.

The Habitats Directive, as an instrument of the Natura 2000 project, imposes an obligation on the EU Member States to determine the areas of occurrence and adequate protection of breeding habitats and habitats important for species. The processes of identifying areas that are eligible to be included in the NATURA 2000 network is based on knowledge about the distribution of habitat types and species listed in Annexes of the Directive. The method of selecting special areas that make up the network is regulated by the Habitats directive's provisions. According to its provisions, the assessment of the importance of such areas for the protection of a given type of habitat and/or species is based on the criteria listed in Annex III of the Habitats Directive. As far as habitats are concerned, criteria such as the degree of representativeness of the natural habitat type in a given area are assumed: the area of the refuge covered by the given type of natural habitat in relation to the total area it occupies in the country; the degree of preservation of the structure and function of the type of natural habitat and the possibility of its restitution. Regarding species, the assessment of the value of the area for the preservation of such species depends on the size and density of the population of the species that occurs in a given area in relation to domestic resources of these species; the degree of conservation of natural habitat features that are important for the species and its restoration; the degree of isolation of the species population in relation to its natural range.

In the case of Natura 2000 sites such as national parks, landscapes or reserves that have their protection plans, some adjustments are assumed that take into account the need for additional protection. For protection of important habitats and species, the protection plans are being developed, which are later included in the implementation of local land-use development plans. However, in relation to these areas that constitute agricultural land, it is necessary to combine the proper conservation status of habitat types and species while maintaining the normal land use. In the case of areas used for agricultural purposes, protection is assumed in the form of ecologically sensitive areas.

The Habitats Directive aims to preserve biodiversity within the European territory of the Member States through the protection of natural habitats and of wild fauna and flora (Article 2). Each of the Member States has a duty to participate in co-creation of the European Ecological Network

Natura 2000 by designating in their territory Special Areas of Conservation - SAC. The natural range of the habitat must not be reduced; it has to preserve the specific structure and functions as well as the proper conservation status of species typical for the habitat.

According to Articles 3 and 4 of the Habitats Directive, and Article 4 of the Birds Directive, Member States create an ecological network – Natura 2000, undertaking particular protection of the so-called Special Areas of Conservation (SAC) and Special Protection Areas (SPA), to ensure favorable conservation status of each habitat type and species throughout their range in the European Union.

Under Article 4 of the Birds Directive, the network must include Special Protection Areas (SPA) designated for 194 particularly threatened species and all migratory bird species. Under the Birds Directive, Member States designate SPA using scientific criteria such as 1% of the population of listed vulnerable species or wetlands of international importance for migratory water flow. Member States must ensure that all the most suitable territories, both in number and surface area, are designated. Site-specific data are transmitted to the European Commission by Member States using Standard Data Forms. Based on that information, the Commission determines if the designated sites are adequate to form a coherent network; these sites then become an integral part of the Natura 2000 network. Under Article 4 of the Habitats Directive, the choice of sites is based on scientific criteria specified in the directive, to ensure that the natural habitat types listed in the directive's Annex I and the habitats of the species listed in its Annex II are maintained or, where appropriate, restored to a favorable conservation status in their natural range.

Annex I to the Birds Directive contains a list of species that are to be subject to particular preventive measures. Member States are obliged to indicate these areas that due to a number and magnitude of birds' species can be recognized as areas of particular protection. The directive, however, does not give the specific criteria for delimitation of areas. Such criteria are developed by national experts in cooperation with local ornithological organizations, using the methodology developed by BirdLife International.<sup>6</sup> When the delimitation takes place, the number and magnitude of a given population is important, but not every case of the existence of protected species. In practice, most of the territories that are protected under the Birds Directive are protected under the Habitats Directive.

In the process of designation of the European ecological network Natura 2000, Member States first carry out comprehensive assessments of each of the habitat types and species present on their territory. They then

---

<sup>6</sup> BirdLife International is a global partnership of NGOs with a focus on birds. Its partners work together to share research and information in order to achieve better conservation results globally. For more information about the organization see: [www.birdlife.org](http://www.birdlife.org)

submit lists of proposed Sites of Community Importance (SCI), meaning the sites which, in the biogeographical regions to which they belong, contribute significantly to the maintenance or restoration at a favorable status of a natural habitat type in Annex I or of species in Annex II and may also contribute to the coherence of Natura 2000 network (Article 1 of the Habitats Directive). Site-specific data transmitted to the Commission must include information such as the size and location of the site as well as the types of species and/or habitat found on this site and warranting its selection. Based on the proposals provided by the Member States, scientific seminars are convened for each biogeographical region, with the aim to determine whether sufficient high-quality sites have been proposed by each Member State.

Once the lists of Sites of Community Importance (SCI) have been adopted, Member States must designate them as Special Areas of Conservation (SAC), as soon as possible and within six years at most. They should give priority to those sites that are most threatened and/or most important for conservation, and take the necessary management or restoration measures to ensure the favorable conservation status of sites during this period. The Commission updates the Union SCI Lists every year to ensure that any new sites proposed by Member States have a legal status of Natura 2000.<sup>7</sup> As soon as sites are placed on the lists of SCI, they are subject to the provisions of Article 6, (2, 3 ,4); they are under a special legal conservation regime.

Crucial for the network's functions, coherence of the Natura 2000 should be ensured by Member States by planning land development and launching a development policy, in particular with a view to improving ecological cohesion, to encourage the management of features of the landscape which are of major importance for wild fauna and flora. To this end, Member States should protect landscape features that, due to their linear or continuous structure like rivers and their banks or traditional field boundaries, or used as stepping stones such as ponds or small woods, are very important for migration, dissemination and genetic exchange of wild species (Article 3 and Article 10 of the Habitats Directive).

## **II. CONSERVATION OF NATURE IN THE CONTEXT OF ENVIRONMENTAL PROTECTION**

Definition of the scope of the overall objective of Natura 2000, namely conservation or restoration, of natural habitats and species of wild fauna and flora aligns with the EU environmental policy (Article 3 of the Treaty on European Union (EU Treaty) in connection with Article 191 of the Treaty on

---

<sup>7</sup> Standard Data Forms Commission Implementing Decision of 11 July 2011 concerning a site information format for Natura 2000 sites (2011/484/EU), OJ L 198, 30/07/2011 P. 0039 – 0070, (repeals Commission Decision 97/266/EC, OJ L 107, 24/04/1997 P.0001 - 0156).

the Functioning of the European Union (TfEU)). These objectives, from the very beginning were a subject of controversies among both theoreticians and practitioners of the European Union environmental law.<sup>8</sup>

Those controversies concern mainly the formula adopted by both EU Treaties concerning the very broad range of definitions of notions that this law contains. The benefit of the adopted formula is that it allows adjusting the EU activities to the changing situation in regards to the needs and means for the accomplishment of the objective of a high-level protection of the environment. On the other hand, its disadvantage is that it does not allow for an unbiased statement what the EU policy on improvement, preservation, and protection of environment is about. Indeed, in environmental laws provisions, the attempts appear to make those definitions of protection and preservation of the environment more precise for the needs of a given document, but such practice, again, creates certain danger of adopting non-uniform standards for the accomplishment of that objective under various sectoral regulations for the environment in force.

Based even on the preliminary analysis the Natura 2000 documents, the question arises if the objective of conservation can be perceived in isolation from the remaining components of objectives contained in Article 191 TFEU, i.e. protection and improvement of the quality of environment, and if yes, up to what extent? In connection with this, further uncertainties appear concerning e.g. the scope of the definition of the protection of environment, which leads to putting such fundamental questions in the field of environment like what is the definition of “environment”? In this context another practical question arises, namely if, for instance, the protection of environment covers the protection of landscape? There are even more such uncertainties. Some of them could be answered, at least to some extent and for the needs of this document being an object of analysis, using the provisions of some environmental directives such as e.g. the Habitats Directive, which sets - though not exhaustively – the scope of the definition of the protection of environment.<sup>9</sup> The Habitats Directive in Article 1 gives, for the purpose of its interpretation, the following definition of “conservation”: “a series of measures required to maintain or restore the natural habitats of species of wild

---

<sup>8</sup> In the doctrine of the European environmental law, environmental protection is considered the principle of the said law. On this subject see: Kiss, A., Shelton, D., *Manual of European Environmental Law*, Oxford University Press 1999; Last, K., *Mechanisms for Environmental Protection – A Study for Habitat Conservation*, in: Ross, A., (ed.) *Environment and Regulation*, Edinburgh University Press, 2000; Kenig-Witkowska, M.M., *Prawo Środowiska Unii Europejskiej. Zagadnienia systemowe*. (EU environmental law. A systemic approach), Warszawa, Wolters Kluwer 2011; Bell, S., McGillivray, *Environmental Law*, Oxford University Press 2006, Chapter 21; Kramer, L., *EU Environmental Law*, Sweet & Maxwell, 7<sup>th</sup>, ed. Chapter 5.

<sup>9</sup> In the preamble of the Habitats Directive, one can read that the preservation, protection and improvement of the quality of the environment, including the conservation of natural habitats and wild fauna and flora are essential objective of general interest pursued by the Community.

fauna and flora at a favorable status, which has been defined in details under letter “e” and “i” of that Article”. It results from those regulations that what matters is a sum of the influences acting on a natural habitat and its typical species that may affect its long-term distribution, structure and functions as well as the long-term survival of its typical species within the territory of member states. According to the Article 1 of the Birds Directive, conservation covers the protection, management and control.

As it seems, and not without the reason, the objective “preservation, protection and improvement of environment” was formulated in just in a way as it was done in Article 191 TfUE, leaving open the possibility of making its elements more precise in the process of implementation of the EU environmental policy. The objective of the protection of environment covers both refraining from activities harmful to the environment as well as activities aiming at ensuring the environment will not suffer from degradation. This formula has a broader meaning than the term preservation of environment that generally refers solely to natural environment. From that point of view, introducing to the text of Article 191 (1) of TfEU of term “preservation” was absolutely necessary, because the term “environment” as understood in the EU legal acts refers not only to natural environment but also to the environment as a product of man. Because the term “protection of the environment” does not necessary contain itself an element of improvement, therefore the element of the improvement of environment was introduced in the first objective, provided in Article 192 (1) of TfUE. Defined in such a way the objective of preservation, protection and improvement of the environment is, as a matter of fact, the record of modern concept of understanding of the protection of environment as a comprehensive process dealing with planning and management of the environment, regulated by norms of material and procedural norms in this field.

It needs to be noticed, that the adoption of such formula seems to provide for means to take measures of very different character, starting from measures with the view to conservation of the environment, to restoration and prevention activities and, in the end, measures of repressive nature. It also needs to be remembered that the formula adopted in the whole text of Article 191 TfUE forces the necessity of limitation of certain measures taking into account differentiated situation in various Member States in the field of environment, as well as their differentiated socio-economic conditions.

It is not only the material scope of the objective of preservation, protection and improvement of the quality of environment that may be subject to questions and uncertainties. Also the spatial range of the EU activities implemented under that objective is not completely clear, particularly when it comes to regional and local environmental problems. As it seems, the provision of item 1, Article 191 TfUE does not set any limitations in this

regard.<sup>10</sup> The only general condition that could be observed is the necessity of application of the precaution principle. Practice in the field accomplishing that objective proves that local and regional conditions have to be taken into account, whose example is Article 2 of the directive 92/43 on the protection of natural settlements and wild fauna and flora, whose provision states it exactly this way.

### **III. NATURA 2000 SITES DESIGNATION IN LIGHT OF THE JURISDICTION OF THE COURT OF JUSTICE OF THE EU**

As it has been mentioned, Natura 2000 network stems from the Habitats Directive (Art. 3) and includes the SPA classified by the Member States pursuant to the Birds Directive and the SAC classified pursuant the Habitats Directive. Member States identify sites according to precise scientific criteria, but the selection procedure varies depending on which of the two directives, the Birds Directive or the Habitats Directive warrants the creation of a particular site.

No doubt, designation of Special Areas of Conservation (SAC) is a key measure of legal protection of conservation areas with a view of the development of coherent European ecological network Natura 2000 (Article 3 (1) Habitats Directive). It contains the areas of special protection designated by Member States, based on the regulations of Birds Directive. Annex I lists various types of natural habitats of the EU interest which require conservation. Annex II lists species and plants that require protection.

SAC are designated according to the procedure laid down in Article 4 of the Habitats Directive. As it appears in practice, such mechanism raises many doubts, and the evidence of that are cases submitted to the EU Court of Justice concerning the interpretation of Article 4. The Court judgments in those cases contributed in a significant way to the unification of practice of application of the regulations of Habitats Directive in the national legal orders.

The EU Court's judgements in regards to the interpretation and use of Article 4 provisions is large, making clear the basic question of criteria set in Article 4 when the designation of SAC takes place. It results from the Court's standpoint that, when the SAC are being designated, economic, cultural or recreational issues must not be taken into account.<sup>11</sup> In regards to SPA, the

---

<sup>10</sup> The Habitats Directive is applicable on all areas under the jurisdiction of the member States including the Continental Shelf and any Economic and Exclusive Zone. According to Article 1 of the Birds Directive its provisions apply in the European territory of the Member States. From the case law of the Court of Justice of the European Union it is clear that it is not sufficient when a Member State implements the said Directive only for those species found in its territory. Comp. for example Case 274/85, *Commission v. Belgium*, 1987 [ECR] 3073.

<sup>11</sup> Case C-371/98: *First Corporate Shipping Ltd.* 2000 [ECR], I-9235; Case C-226/08, 2010 [ECR] I-131.

basic rule resulting from the Court's jurisdiction is the use of ornithological criteria.<sup>12</sup>

In connection with doubts raised by the Commission with regard to the notion "a favorable conservation status" used in Article 4 of the Habitats Directive, the Tribunal is of the opinion that favorable conservation status is in place when: the number of population that enables that species to stay in biocoenosis for a longer time, remains unchanged; natural range of the species is not reduced; and its appropriately large habitat is contained.<sup>13</sup>

The essential basis for the designation of Natura 2000 areas should be the refuge of birds of international range as specified by BirdLife International. In its judgment in the Case C-202/01 the EU Court of Justice sentenced that France does not obey its obligations as listed in Article 4 (1) and (2) of Birds Directive, because it did not take care of the designation as the areas of particular protection that fit more to protection of wild birds as specified in Annex I of the Birds Directive as well as to migrating species and particularly, it did not designate a sufficiently big area within the Plaine des Maures as the area of special protection.<sup>14</sup>

Considering that the sole criterion for designating SPA in the case of the Birds Directive should be natural criterion, it is inadmissible designating smaller areas than stipulated by these criteria. In this context, it needs to be noted that the state must not depart from the duty of classification of a given area by way of its degradation, quoting an argument that given area is not suitable for protection of birds according to the result of latest scientific research. If the duty of classification of a given area was in force before the deterioration then, in the case of restoration of its natural functions, it should be classified as SPA. The duty of classification of the given area does not also cease when that area is subject to protection according to national regulations.<sup>15</sup>

Some decisions concern these elements of Article 4 at a particular stage of designating SAC's result from the European Court of Justice's judgments. First stage is the selection and choice by the State of areas that qualify as the area of community's importance (SCI) and designating them as SACs, and submission of the list to the European Commission. The second stage consists of the development by the European Commission, in cooperation with a given member state, of the draft of designated areas of community's importance, and designation of SAC by Member States.<sup>16</sup>

---

<sup>12</sup> See on the interpretation of Article 4 of the Birds Directive, Case C-535/07, *Commission v. Austria*, 2010 [ECR], I – 09483.

<sup>13</sup> Case C-325/04, *Commission v. Spain*, 2007 [ECR], I-5415.

<sup>14</sup> Case C-202/01, *Commission v. France*, 2002 [ECR] I-11019.

<sup>15</sup> Case C-166/97, *Commission v. France*, 1999 [ECR] I-1719.

<sup>16</sup> See for example Commission Decision 2011/84, OJ 2011 L 40/I.

At the first stage, it is acceptable to be guided solely by natural criteria as specified in Annex III of Habitats Directive, otherwise the European Commission would not be certain if it is in possession of an exhaustive list of areas that could be taken into account as SAC.<sup>17</sup> At the second stage that is about designating, areas of important meaning for EU by the European Commission in cooperation with a Member State, the jurisdiction of the EU Court of Justice in relation to issues stipulated by both Directives is inclined to take into account the natural criterion as the decisive factor for designation of a given area of Natura 2000.<sup>18</sup>

Once the given area is designated as SCI (Site of Community Importance), the given Member State has to immediately, and in a six year period at the latest, designate them as SAC (Article 4 (4)); however, the designation by Member State is of limited importance because legal consequences of designation of SAC apply for the period since the date of including the given area on the Commission list (Article 4 (5)). In such cases, Member States are obliged to take protective measures appropriate for the purpose of safeguarding that ecological interest.<sup>19</sup>

#### **IV. MANAGING NATURA 2000 - PARTICULAR OBLIGATIONS UNDER ARTICLE 6 OF HABITATS DIRECTIVE**

Article 6 of the Habitats Directive lists the obligations resulting from the designation of SAC and SPA crucial for managing Natura 2000 sites.<sup>20</sup> It should be noticed that obligations arising under Article 6 (2), (3), (4) of the Habitats Directive replace any obligations arising under the first sentence of Article 4(4) of the Birds Directive in respect to areas classified pursuant to Article 4 (1) or similarly recognized under Article 4 (2) thereof.<sup>21</sup> According to the provision of art. 6 (1), for SAC, the EU Member States must establish the necessary conservation measures involving, if need be, 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 (art. 6

<sup>17</sup> Case C-371/98, *First Corporate Shipping Ltd.*, 2000 [ECR], I-9235; C-226/08, *Stadt Papenburg*, 2010 [ECR] 00131.

<sup>18</sup> Case C-226/08, *Stadt Papenburg*, 2010 [ECR] 00131

<sup>19</sup> Case C- 117/03 *Dragaggin a.o.* 2005 [ECR] I-167, para 25-29; also Case C-244/05 *Bund Naturschutz in Bayern a.o.* 2006 [ECR] I-8445

<sup>20</sup> See: *Managing Natura 2000 sites: the provision of Article 6 of the "Habitats" directive 92/43 EEC*, Brussels, April 2000; See also: *EU Guidance document on Article 6(4) of the "Habitats Directive" 92/43/EEC. Clarification of the Concept of: Alternative Solutions, Imperative Reasons of Overriding Public Interest, Compensatory Measures, Overall Coherence*, Opinion of the Commission. 2007/2012. This guidance should be read in conjunction with the above-mentioned document *Managing Natura 2000 sites* and intends to further develop and replace the section on Article 6(4) of this earlier publication.

<sup>21</sup> See Article 7 of the Habitats Directive.

(1)). They shall also take appropriate steps to avoid, in the SAC, the deterioration of natural habitats and the habitats of species and avoid disturbance of the species for who the SAC have been designed (art. 6 (2)). Art. 6 (3) states that any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, shall be subject to appropriate assessment of its implication for the site in view of the site's conservation objectives. Competent authorities must agree to any plan or project likely to have a significant effect on the site only after having ascertained that it will not adversely affect the integrity of the given site and, if appropriate, having obtained the opinion of the general public. This provision applies to the plan and project outside the protected area; therefore, it appears to have an external effect. The provision of art. 6 (3) involves a two-stage assessment of the environmental impact. Concerning the plans and projects that would require such an assessment, the EU Court of Justice has adopted a wide interpretation.<sup>22</sup>

Article 6 (4) provides for the only possible derogation from the requirements of Article 6 (2–3). It stipulates that a plan or a project must be carried out in spite of a negative assessment, but for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State must take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. The notion of “imperative reason of overriding public interest” is not defined in the Habitats Directive. Article 6 (4) second subparagraph mentions in this context the following examples: human health, public safety and beneficial consequences of primary importance for the environment. From the wording regarding the “other imperative reasons of overriding public interest” of social, or economic nature, it is clear that only public interests can be balanced against the conservation goals of the Directive. In the Guidance document on Article 6 (4) of the Habitats Directive, “imperative reasons of overriding public interest, including those of social and economic nature” refer to situations where plans or projects prove to be indispensable within the framework of actions or policies aiming to protect fundamental values for the citizens' life, health, safety, environment; within the framework of fundamental policies for the State and the society; within the framework of carrying out activities of economic or social nature, fulfilling specific obligations of public service.<sup>23</sup>

Provision of Article 6 (4) constitutes part of the procedure of assessment by the competent national authorities. It applies when the results of the preliminary assessment under art. 6 (3) are negative or uncertain, i.e., the plan or project will adversely affect the integrity of the site; doubts remain as to absence of adverse effects on the integrity of the site linked to the plan or project. In the case where the site hosts a priority natural habitats type and/or a

---

<sup>22</sup> For example judgments in Cases: C-98/03; C- 209/02; 127/02; C-209/04; C- 418/04.

<sup>23</sup> Guidance document on Article 6 (4) of the “Habitats Directive” ... op.cit. p. 8.

priority species, the only considerations to be raised are relating to human health or public safety, to beneficial consequences of primary importance to the environment or, further to an opinion from the European Commission, to other imperative reasons of overriding public interest.<sup>24</sup>

Based on the regulations of Article 6 (2) of the Habitats Directive, Member States have been obliged to take appropriate actions in order to avoid, within SAC, the deterioration of the condition of natural settlements and settlements of species, as well as in order to avoid harassing birds for whose such areas were designated. It concerns the harassment that may have an importance for the accomplishment of the directive's goals. That regulation replaces, within the scope of general obligation of protection, the Article 4(4) of the Birds Directive.

In principle, the scope of obligations set by Article 4 (4) of Birds Directive and Article 6 (2) of Habitats Directive are convergent.<sup>25</sup> Then, according to Article 1(e) of Habitats Directive, the condition of protection can be taken as appropriate if its natural range and areas in the settlement area are not changed, or are increasing, its structure and functions necessary for its long-term preservation exists, and most likely will exist in a foreseeable future, and if the conditions of the protection of typical species are appropriate.

On the other hand, the condition of protection of species is appropriate, if data on the species' dynamics indicate that they (species) are able to survive in the long run as a solid component of their natural habitats, their natural range of occurrence does not diminish in a foreseeable future, and that it does exist – or will exist – the settlement big enough to enable maintaining its populations for a longer time. These definitions do not say that the structure and functions of the Natura 2000 area cannot be subject to change, but such change must not be unfavorable from the point of view of the protection of habitats and species being the subject of protection in a given area (Article 1 (i)).

From the judgements of the EU Court of Justice pertaining to the aforementioned provisions, one conclusion could be explicitly derived, namely that the ecological coherence of the Natura 2000 network is a condition for protection of types of natural habitats and species that occur in areas covered by the network. This is why coherence should be considered at the biogeographical level. Then, while assessing an impact of the level of protection on the coherence of the network, the importance of a given area is to be taken into account for the preservation of the coherence of network in relation to species and habitats that are protected over there.<sup>26</sup> From there the obligation comes to ensure, for areas of the Natura 2000 network, adequate protection

---

<sup>24</sup> Ibidem, p.22.

<sup>25</sup> Case C-388/05, Commission v. Italy, 2007 [ECR] 07555.

<sup>26</sup> Managing Natura 2000 sites...op.cit.

which consists not only of the necessity of network coherence but also an appropriate level of protection of settlements and species that occur in a given areas. That obligation is valid for all situations that could undermine the achievement of goals of the Habitats Directive. Hence, the conclusion is that a certain level of interference or deterioration could be tolerated under the condition that it would not affect the preservation of settlements and species in the right condition and also keeping in mind the necessity of ensuring coherence of the Natura 2000 network.<sup>27</sup>

According to the EU Court of Justice, an obligation to provide the protection comes into being before any decline of the population of a given protected species or before deterioration of the protected settlement or the settlement of protected species, or whatever dangers in this matter take place.<sup>28</sup> Therefore, the assessment of the feasible level of interference and deterioration of the environment will be extremely difficult, *inter alia* because the situations or events that cause the obligation to take protective actions are interpreted by the Court of Justice of the EU in a broad way. According to the Tribunal, the obligation to take protective measures is not limited to protection against the activities of man, but it also contains the necessity of prevention against deterioration and interference being the result of predictable events or natural processes.

According to the opinion of the EU Court of Justice, there are not only situations that happen after designation of the Natura 2000 areas that matter, but any activities resulting from the existing ways of using the environment, such as e.g. agriculture and fishery. That protection is continued and covers also the situations when, after the environmental impact assessment for the Natura 2000 area was carried out (Article 6 (3) of the Habitats Directive), the Member State considered that a given project or plan will not affect the Natura 2000 area, nevertheless such influence has taken place. The general obligation of protection is waived if, despite the negative impact assessment of the plan or project, the prerequisites were identified as indicated in Article 6 (4) of the Habitats Directive.<sup>29</sup>

## **V. ASSESSMENT OF THE IMPACT OF PLANS AND PROJECTS ON THE NATURA 2000 AREAS**

The feasibility of conducting the “habitats” assessment for the Natura 2000 areas is limited to activities that are included in a definition of a plan or project. Because the Habitats Directive does not give any definition of the plan or project, the Court of Justice of the European Union states that in such cases

---

<sup>27</sup> Ibidem.

<sup>28</sup> Cases: C-355/90, Commission v. Spain, 1993 [ECR] I- 8445; C-117/00, Commission v. Ireland, 2002 [ECR] 05335.

<sup>29</sup> Case C-117/03, Dragaggi a.o., 2005 [ECR] I-167; Case C-244/05 Bund Naturschutz in Bayern a.o., 2006 [ECR] I-8445.

the definition of project could be used as given in Article 1 (2) of Dir. 85/337 on the assessment of certain public and private projects on the environment.<sup>30</sup> According to its provisions, the project means doing any construction works or installations or systems, as well as other interventions in the natural environment or landscape, including exploitation of natural resources.<sup>31</sup> That definition is just complementary. According to the EU Court of Justice opinion, the term “plan or project” should be subject to widening interpretation and cover any activities that could negatively influence the Natura 2000 areas. Only such widened interpretation of the above-mentioned terms may ensure that any plan or project that could negatively influence the Natura 2000 area will be assessed according to procedure under Article 5 (3, 4) of the Habitats Directive.<sup>32</sup>

As far as the term “plan” is concerned, the European Commission’s standpoint is that the notion of a general plan of the declarative character does not comply with the notion of plan as understood in Article 6 (3,4) of the Habitats Directive. In light of the jurisdictional line of TSUE, it seems that the definition of a plan and project should enjoy the valor of autonomous community definition, that would give those notions the unified and independent interpretation for the whole European Union, and which is produced with taking into account of the context of regulation, and a goal whose accomplishment given regulation is to serve.<sup>33</sup>

There is an obligation to carry out the “habitats” assessment before the certificate is given for the implementation of any plan or project when two prerequisites are met, namely: first, the plan or project is not directly linked or necessary for management of the Natura 2000 project and, secondly, the plan or project can, in a substantive way, create a negative impact on a given area separately, or jointly, in connection with other plans or projects. The EU Court of Justice judgements related to identification of the obligation to carry out “habitats” assessment refers mainly to the second prerequisite.<sup>34</sup> The result becomes that the sole qualifying criterion for a plan or project is the criterion of probability that a significant influence on a given area takes place. That criterion is based on the principle of precaution, which means that it is necessary to carry out the “habitats” assessment in every case when based on unbiased information on a plan or project, it is not possible to exclude the significant impact of those projects on the Natura 2000 network.<sup>35</sup> It is also to be remembered that the necessity to carry out the “habitats” assessment cannot

---

<sup>30</sup> [1985] OJ L 175/40.

<sup>31</sup> Comp. cases: C-127/02, Landelijke Vereniging tot Behoud van de Waddenzee, 2004 [ECR] I-7405; C- 226/08, Stadt Papenburg, 2010 [ECR] 00131.

<sup>32</sup> Managing Natura 2000...op.cit.

<sup>33</sup> Ibidem.

<sup>34</sup> Comp. Case C-290/03, Commission v. Germany, 2006 [ECR] I-3949.

<sup>35</sup> Comp. Case C-127/02, Landelijke Vereniging tot Behoud van de Waddenzee, 2004 [ECR] I-7405.

be replaced with an environmental impact assessment carried out in accordance with the regulations of the Directive 85/337 on the assessment of the effects of certain public and private projects on the environment and the Directive 2001/42<sup>36</sup> on the assessment of the effects of certain plans and programs on the environment because the scope of those assessments is different.<sup>37</sup> The “habitats” assessment can, however, be integrated with the procedure for an environmental impact assessment of private plans and projects.

From the practice of national practice, confirmed by the EU Court of Justice judgments, it appears that the mechanism stage of the approach to the procedure of “habitats” assessment, set in Article 6 (3 and 4) of the Settlement Directive, is considered operational. The use of the whole procedure is subject to the rule of precaution, according to which the goals of protection of the Natura 2000 are to be considered as superior, if there is no certainty as to the impact of a given plan or project for the Natura 2000 area.

The results or outcomes of particular stages of “habitats” assessment should, in the light of relevant proof, indicate – in an objective way – that (a) there will not be any significant impact on the Natura 2000 area, (b) there will not be any negative impact on the integrity of Natura 2000 area, and (c) there are no alternative variants of a given plan or project that could likely have negative impact on the integrity of Natura 2000 area.<sup>38</sup>

The TSUE jurisdiction does not give any particular methods for how to carry out the “habitats” assessment, it only provides a general framework. First, the requirement to secure the required quality of the “habitats” assessment, which cannot just be simple research, but an in-depth analysis at the level assumed for the protection of a given area.<sup>39</sup> Because, in many cases, scientific research does not give certainty of correlations of causes and effects of a given phenomenon, it is necessary to use the prognosis based on the calculation of probability and of estimation.<sup>40</sup>

The “habitats” assessment should be properly documented. Neither the Habitats Directive nor the EU Court of Justice judgements set the format or level of accuracy of such documentation. However, as it appears for the quoted case C-127/02, it should have the format and level of accuracy that

---

<sup>36</sup> [2001] OJ L 197/30.

<sup>37</sup> Moreno, A.M., *Environmental Impact Assessment in EC Law; A critical Appraisal*, in: Macrory, R., (ed.), *Reflections on 30 Years of EU Environmental Law; High Level of Protection?*, Groningen 2005, pp. 43-60.

<sup>38</sup> *Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6 (3) and 4 of the Habitats Directive 92/43/EEC*, Luxemburg 2002; comp. also Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee*, 2004 [ECR] I-7405.

<sup>39</sup> Case C-441/03, *Commission v. Netherlands*, 2005 [ECR] 03043.

<sup>40</sup> Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee*, 2004 [ECR] I-7405.

would enable a national court to evaluate if the given authority complied with the requirements of Article 6 (3) of the Habitats directive.

In light of regulations Article 6 (3 and 4) of Habitats Directive, an analysis of the alternative solutions is the obligatory stage of environmental impact assessment of the habitats that must be carried out when the possibility of a negative impact on the Natura 2000 area is identified. TSUE has spoken out on the issue of alternative solutions in its judgment in the case C-239/04, where it clearly stated that approval for operation of a plan or project that could significantly have a negative effect on the Natura 2000 area, taking into account the superior goals of public interest, is subject to evidence of lack of alternative solutions. Such a case should however be interpreted in a narrow way, meaning that real alternative solutions are also those that cause certain difficulties of a social, economic and ecological nature. Lack of alternative solutions must be very well documented by respected authorities of the Members State.<sup>41</sup> The European Commission emphasized that for the correct assessment of the alternative solutions, it is also necessary to take into account the option of stopping of a given plan or project.<sup>42</sup>

A statement that there are no alternative solutions to accomplish the plan or project results in the necessity to prove that for the accomplishment of the plan or project one needs to take into account the requirements of superior public interest. An assessment of the reasons, resulting from the fact of existence of superior public interest, requires their consideration in the context of an unfavorable impact caused by a given plan or project within a given area of Natura 2000. It is not that any kind of public interest can be taken as superior over the superior importance of interests protected by regulations of the Habitats Directive.

Based on the theory of imperative requirements formulated in the EU Court of Justice's judgements concerning the exceptions from the rule of unconstrained flow of commodities, the Commission took it that the imperative requirements of superior public interest concern the following activities: (a) protection of values of primary meaning for the life of citizens, (b) fundamental rules of national policies and social policy, (c) engaging in economic and social actions that meet the requirements of performing public services.

In the case of settlements and priority species, plans and projects that can have negative impacts on them can be implemented and accomplished solely in the situation when public interest is about peoples' health, public security or superior meaning for the environment, or after an opinion of the European Commission is obtained<sup>43</sup>.

---

<sup>41</sup> Case C-239/04, Commission v. Portugal, 2006 [ECR] I- 10183.

<sup>42</sup> Assessment...op.cit. p.35 and next.

<sup>43</sup> Managing Natura 2000 sites...op.cit. pp.46-48.

In the case of acknowledgement by relevant competent authorities that the requirements of superior public interest speak for the implementation of the plan or project, it is necessary to carry out an assessment of compensation measures. The goal of the compensation measures is to keep the coherence of the Natura 2000 network as an entity. Therefore, the Commission emphasizes, the necessity to secure appropriate and effective compensation measures. As a consequence, it is absolutely crucial to ensure legal and financial resources required for the long-term implementation and monitoring of the effectiveness of compensation action.<sup>44</sup>

In accordance with this, the European Commission recommended such evaluation of compensation measures that will make sure that: (a) they are appropriate for a given area and for a sort of damage caused by a plan or project; (b) they are able to preserve or reinforce the coherence of Natura 2000 areas, and (c) they are available and can be implemented at the time damages occur.<sup>45</sup>

#### **CLOSING REMARKS**

The subject and scope of the aforementioned deliberations were legal issues connected to major aspects of Natura 2000 as for example, mechanisms of designating the SAC and SPA areas that arise from controversies in practice, and the resulting obligations for Member States. The goal of these deliberations was not the exhaustive analysis of those problems resulting from the Member States' practice, and then depicted in the EU Court of Justice's judgements that emerge at both the stage of implementation and compliance with the EU regulations, but to put forth legal questions. It was, therefore, the goal of the Author to look at legal aspects of the protection of the Natura 2000 areas as designated in the Habitats Directive and the Birds Directive from the EU Court of Justice perspective.

According to the Natura 2000 Barometer of 2017, the network is stretching over 18% of the European Union's land area and over almost 6% of its marine territory. It is the largest coordinated network of protected areas in the world offering a haven to Europe's most valuable and threatened species and habitats.<sup>46</sup> As noted several times by the European Commission, the Natura 2000 network is not a system of strict nature reserves. The EU approach to conservation of nature is much broader, directing people to work with nature, not against it. The whole project of Natura 2000 is about a principle that the EU Member States must ensure that the sites are managed according to the requirements of sustainable development.

---

<sup>44</sup> *ibidem*, p. 58.

<sup>45</sup> *Assessment...op.cit.* p. 39

<sup>46</sup> The Natura Barometer is produced by Directorate General Environment of the European Commission with help of the EU Environment Agency. It is based on information officially transmitted by Member States of the EU.

Many factors contribute to both the successes and weaknesses of the Natura 2000 project.<sup>47</sup> Despite critical voices on its mechanisms of compliance with the EU environmental requirements, the network of Natura 2000 is particularly significant because it encompasses two different types of sites. However, it is important to remember the weaknesses of the project, principally that not all requirements arising from both Directives have been implemented.<sup>48</sup> It is also important to remember the problems arising from local authorities' and local people's resistance to Natura 2000 project and, last but not least, lack of funding by the EU as well as by the Member States' to support the capacity building and management costs.<sup>49</sup>

---

<sup>47</sup> See for example critical remarks by Ludwig Kramer in: EU Environmental Law ...op.cit. p. s. 187 and next.

<sup>48</sup> For updated information see: [www.ec.europa.eu/environment/nature/natura2000/index\\_en.htm](http://www.ec.europa.eu/environment/nature/natura2000/index_en.htm)

<sup>49</sup>Coffey, C., Richartz, The Habitats Directive: Generating Strong Responses, Institute for European Environmental Policy, March 2003, Project Deliverable No.D 17; see also; Last, K., Mechanisms for Environmental Protection – A Study for Habitat Conservation, in: Ross, A., (ed.) Environment and Regulation, Edinburgh University Press, 2000.