Dams on Natura Rivers in Estonia: Collision of the Interests of Cultural Heritage and Biodiversity Protection

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Abstract

Combating climate change and biodiversity loss, the European Commission (EC) has come up with the biodiversity strategy for 2030 – a crux of European Green Deal. This strategy sets a target to increase protected areas in the European Union (EU) to 30% both of land and sea and aims to launch a EU's nature restoration plan to restore degraded ecosystems at land and sea.

At the same time and despite the strict interpretation of the Habitats Directive by the EC and the Court of Justice of the European Union (CJEU), Member States still struggle to enforce proper implementation of the Habitats Directive. As a result, the objectives of the Habitats and Birds Directives are not achieved, and biodiversity loss is not stopped while biodiversity protection still faces strong opposition among different interest groups. Also, Estonia seems to be failing in protecting biodiversity as the EC initiated an infringement procedure against Estonia on 9th of June 2021 regarding logging activities in Natura 2000 (N2000) sites and the implementation of the Habitats Directive and the SEA Directive.

Numerous disputes regarding the dams on rivers that are N2000 sites are also emerging in Estonia. As a total of more than 1 000 dams have been counted on Estonian rivers and about 40 percent of them have a significant impact on the state of fish, fauna, and flora, this paper aims to assess whether the case law of Estonia judiciary regarding the dams on the N2000 rivers is in line with the EU's legislation, the EC's guidelines, and the case law of the CJEU.

This paper discusses the fundamentals of Article 6(3) of the Habitats Directive and Natura assessment procedures with the focus on the most recent case-law in Estonia. This study also highlights the essential conflict between biodiversity and cultural heritage protection in light of the recent Estonian case-law and discusses some of the cases where the obligation to carry out appropriate Natura assessment and the use of Article 6(4) of the Habitats Directive are avoided.

1. Introduction

Article 11 of the Treaty on the Functioning of the European Union (TFEU)[1] stipulates that environmental protection requirements must be integrated into the definition and implementation of the EU policies and activities to promote sustainable development. The pillars of the EU's legislation on nature conservation and biodiversity are

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[1] Consolidated version of the Treaty on the Functioning of the European Union – OJ C 326, 26/10/2012, pp. 1–390.

Council Directive 2009/147/EC[2] on the conservation of wild birds (Birds Directive) and Council Directive 92/43/EEC[3] on the conservation of natural habitats and of wild fauna and flora (HD). Under these two directives, the N2000 network that stretches over the EU and covers more than 18% of land and 8% sea is established under the Article 3 of the HD whereby core breeding and resting sites for rare and threatened species and rare natural habitat types are protected. Despite this, the EU has failed to protect biodiversity in the existing N2000 areas. The EC has ascertained in 2016 and in 2020 that the general objectives of the HD and Birds Directive are not met and some of the species and habitat types continue to decline or remain endangered.[4] Considering the focus of this paper, it is important to underline that many species associated with freshwater habitats are declining to a worrying extent[5] and around 30% of fish species received a 'bad status' assessment in 2020[6] while being most affected by the pressures relating to modifications of the water regime.[7]

Combating climate change and biodiversity loss, the EC has come up with the biodiversity strategy for 2030[8] – a crux of European Green Deal.[9] This strategy sets a target to increase protected areas in the EU to 30% both of land and sea but also aims to launch a EU's nature restoration plan to restore degraded ecosystems at land and sea. The EC has issued numerous guidelines on management of N2000 sites.[10] In addition, the EC has issued a notice on managing N2000 sites under the provisions of Article 6 of the HD in 2018[11] and the relevant extensive EU case law[12] is also publicly available. Despite extensive guidance, the EU still struggles to enforce proper implementation of Article 6 of the HD and biodiversity protection still faces strong opposition among different interest groups. Thus far the EC seems to be focusing on clarifying the framework of the enforcement of the HD rather than on the enforcement of the HD itself.

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[2] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds – OJ L 20, 26.1.2010, pp. 7–25.

[3] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora - OJ L 206, 22.7.1992, pp. 7–50.

[4] European Commission 16.12.2016 SWD(2016) 472 final "Fitness Check of the EU Nature Legislation" (Birds and Habitats Directives), pp. 72–73, 87. Accessible: https://ec.europa.eu/environment/nature/legislation/fitness_check/docs/nature_fitness_check.pdf (10.12.2021); European Commission 20.05.2015 COM(2015) 219 final, Report from the Commission to the Council and the European Parliament, The State of Nature in the EU, Report on the status of and trends for habitat types and species covered by the Birds and Habitats Directives for the 2007–2012 period as required under Article 17 of the Habitats Directive and Article 12 of the Birds Directive, p. 19. Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0219&from=EN (10.12.2021); European Commission 15.10.2020 COM(2020) 635 final, Report from the Commission to the European Parliament, the Council and The European Economic and Social Committee, The state of nature in the European Union "Report on the status and trends in 2013–2018 of species and habitat types protected by the Birds and Habitats Directives" pp. 19–20. Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0635&rid=1 (10.12.2021).

[5] European Commission COM(2015), p. 8.

[6] European Commission COM(2020), p. 7.

[7] *Idid*, p. 11.

[8] European Commission. Biodiversity strategy for 2030, 2021. Accessible: https://ec.europa.eu/environment/strategy/biodiversity-strategy-2030_en (10.12.2021).

[9] European Commission. A European Green Deal, 2021. Accessible: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en (10.12.2021).

[10] European Commission, Management of Natura 2000 sites, Article 6 – Sector Specific Guidance. Accessible: https://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm (10.12.2021).

[11] European Commission 21.11.2018 notice C(2018) 7621 "Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC". Accessible: https://ec.europa.eu/transparency/regdoc/rep/3/2018/EN/C-2018-7621-F1-EN-MAIN-PART-1.PDF (10.12.2021).

[12] European Commission' booklet. Article 6 of the Habitats Directive: Rulings of the European Court of Justice, Jun 2014. pp. 1–80. Accessible: https://ec.europa.eu/environment/nature/info/pubs/docs/others/ECJ_rulings%20Art_%206%20-%20Final%20Sept%202014-2.pdf (10.12.2021).

Numerous authors have demonstrated that the formation of the N2000 lead to conflicts all over Europe[13], it reflects the interests of the loudest stakeholders in some of the Member States[14] and of environmental non-governmental organizations in most of the EU countries.[15] Thus, in general, with some exceptions, the N2000 network was to a large extent established following the ecological criteria set forth in the HD[16], the rules and instructions of the EC and the CJEU case law.[17] Therefore, formation of N2000 network did not initially carry the spirit of balancing the economic, social, cultural, and ecological concerns, despite the HD's objective according to Article 2(3) was to establish a network of protected areas which do not exclude human factor.

According to Schoukens and Cliquet, the current opposition stems from the understanding that the HD poses constraints to sustainable development – an increasing number of politicians but also businesspeople argue that the conservation objectives and rules are too rigid which ultimately lead to disproportionate costs.[18] Therefore, it is not a surprise that strict application of the precautionary principle by the CJEU which leaves little room for leverage at the permit level might lead to further impropriate implementation of the HD on national level as Schoukens and Bastmeijer have underlined.[19]

Thus far, around 20 percent of all environmental cases and more than 80 rulings by the CJEU[20] are related to the HD and most of the cases involve infringements of proper implementation of the EU legislation (Article 258 of the TFEU). The major issue seems to be the failure to carry out proper Natura assessment pursuant to Article 6(3) of the HD.

2. Appropriate Natura Assessment

The Environmental Impact Assessment (EIA) Directive[21] sets the standard of the EIA in general and applies to a wide range of public and

[13] Paavola, J. Protected Areas Governance and Justice: Theory and the European Union's Habitats Directive, Environmental Sciences, 1(1), 2004, p. 71. Accessible: https://doi.org/10.1076/evms.1.1.59.23763 (10.12.2021); Alphandéry, P., Fortier, A. Can a Territorial Policy be Based on Science Alone? The System for Creating the Natura 2000 Network in France. Sociologia Ruralis, 41(3), July 2001, pp. 324–326. Blackwell Publishers. Accessible: https://www.researchgate.net/publication/229531699_Can_a_Territorial_Policy_be_Based_on_Science_Alone_The_System_for_Creating_the_Natura_2000_Network_in_France (10.12.2021).

[14] Hiedanpää, J. European-wide conservation versus local well-being: the reception of the Natura 2000 Reserve Network in Karvia, SW-Finland. Landscape and Urban Planning, 61(2–4), Nov 2002, pp. 113, 116–117, 119. Accessible: https://doi.org/10.1016/S0169-2046(02)00106-8 (10.12.2021); Schoukens, H., Cliquet, A. Judical Training on EU Environmental Law. Trier, 27–28 May 2019, p. 31 and there cited national case law. Accessible: https://www.ejtn.eu/PageFiles/17863/Habitat%20Directive_Presentation.pdf (10.12.2021).

[15] Paavola, J. *Op. cit*., p. 71 and there cited authors.

[16] Jakobson, S. Natura 2000 derogation procedure Under the Habitats Directive: Options for Improvement. Master's thesis, pp. 20–21, University of Tartu, School of Law, Department of Public Law, 2021 Tallinn. Accessible: http://hdl.handle.net/10062/72604 (10.12.2021).

[17] CJEU 11.07.1996 C-44/95, *Regina v Secretary of State for the Environment*, judgement, ECLI:EU:C:1996:297; CJEU 13.12.2007 C-418/04, *Commission v Ireland*, para 39 and there cited cases, 141, ECLI:EU:C:2007:780; CJEU 07.11.2000 C-371/98, *First Corporate Shipping*, para 23, 25, ECLI:EU:C:2000:600.

[18] Schoukens, H., Cliquet, A. Biodiversity offsetting and restoration under the European Union Habitats Directive: balancing between no net loss and deathbed conservation? Ecology and Society, 21(4):10, 2016, Conclusions and Outlook. Accessible: http://dx.doi.org/10.5751/ES-08456-210410 (10.12.2021).

[19] Schoukens, H., Bastmeijer, K., Species Protection in the European Union: How Strict is Strict? (February 3, 2014). This chapter has been published in: Born C-H., Cliquet A., Schoukens H., Misonne D. & Van Hoorick G., (eds.), The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?, pp. 8, 12, Routledge, Abingdon, Oxford 2014, Accessible at SSRN: https://ssrn.com/abstract=2390383 (10.12.2021).

[20] Schoukens, H., Cliquet, A. (2019). p. 6.

[21] Consolidated text: Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011

private projects (which are defined in Annexes I and II thereof).[22] The Article 2(1) combined with Annex III note 3 of the EIA Directive and Article 6(3) of the HD have somewhat similar meaning – the aim is to assess the environmental impacts of specific project *ex ante*. Nevertheless, it is pointed out that general regulation regarding EIA and Natura assessment differ significantly due to the obligation to initiate impact assessments, the extent of assessments, the minimum standard of the assessments, the legislative consequences of the assessments, but also due to the relevant case law.[23]

In Estonia, the procedures for assessing environmental impact, including Natura assessment, are governed by the Environmental Impact Assessment and Environmental Management System Act (EIA Act).[24]

As to the extent of assessment, Article 3 of the EIA Directive has broader meaning than Article 6(3) of the HD as the latter sets narrow focus and concentrates on assessing the impacts of project's implications for the N2000 site in view of the site's conservation objectives. The general methodology of a step-by-step Natura assessment under the Article 6(3) of the HD is covered in all sector-specific guidelines issued by the EC with the emphasis that the scope of Natura assessment is much narrower than an assessment under the EIA Directive or under the Strategic Environmental Assessment Directive (SEA) Directive.[25] Regarding the minimum standard, the regulation of the general EIA is much more specific while Natura assessment requirements are minimal.[26] In case C-243/15 *Lesoochranárske zoskupenie VLK*, the CJEU held though that the Article 6(3) of the HD in conjunction with Article 6(1)(b) of the Aarhus Convention[27] sets the standard to competent national authorities not only to obtain the opinion of the general public but also assure the rights of an environmental organization to challenge decisions regarding appropriate assessments.[28]

Regarding the legislative consequences of the assessments, Article 6(4) of the HD sets strict benchmark for derogations. The derogation procedure under the HD is not necessary only if it is certain that project will not adversely affect the integrity of the site – according to the best scientific knowledge in the field[29] – and the opinion of the publicity is obtained.[30] Furthermore, the CJEU has held in many cases that an assessment cannot constitute as appropriate where reliable and updated data is lacking[31]; also, all cumula-

on the assessment of the effects of certain public and private projects on the environment (codification) (Text with EEA relevance) – OJ L 26, 28.1.2012, pp. 1–21.

[22] European Commission. Environmental Impact Assessment – EIA. Overview – legal context. Accessible: https://ec.europa.eu/environment/eia/eia-legalcontext.htm (10.12.2021).

[23] Relve, K., Vahtrus, S. Environmental Impact Assessment is Lost in the Woods – Juridica 2019/V, pp. 325, 327 and there cited case-law and authors. Accessible: https://www.juridica.ee/article.php?uri=2019_5_keskkonnam_jude_hindamine_omadega_metsas&lang=en (10.12.2021).

[24] Environmental Impact Assessment and Environmental Management System Act – RT I, 10.07.2020, 46. Accessible: https://www.riigiteataja.ee/en/eli/502112021007/consolide (10.12.2021).

[25] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment – OJ L 197, 21.7.2001, pp. 30–37.

[26] *Ibid*, sec. 29.

[27] United Nation's Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Aarhus, Denmark, 25 June 1998. Accessible: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en (10.12.2021).

[28] CJEU 08.11.2016 C-243/15, *Lesoochranárske zoskupenie VLK*, para 45–61, ECLI:EU:C:2016:838.

[29] C-127/02, *Waddenzee*, para 61.

[30] Article 6(3) of the Habitats Directive.

[31] E.g., CJEU 11.09.2011 C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others v Ipourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others*, para 115, ECLI:EU:C:2012:560; CJEU 24.11.2011 C-404/09, *Commission v Spain*, para 103–105, ECLI:EU:C:2011:768.

tive effects which result from the combination of a plan or a project with other plans or projects must be considered in view of the site's conservation objectives as the CJEU held in case C-127/02, *Waddenzee*.[32] The EIA Directive nor the EIA Act require to demonstrate best scientific knowledge in an EIA nor specify in which circumstances the acceptance of a project is precluded. The EIA Directive does not lay down the substantive rules either in relation to the balancing of the environmental effects with other factors or prohibit the completion of projects which are liable to have negative effects on the environment.[33]

Regarding the initiation of an EIA, the CJEU has clarified in case C-127/02, *Waddenzee*, that to initiate a Natura assessment, the effects of a plan or a project need not be certain, but that the risk of significant effects has been identified and on basis of objective data, one cannot rule out this risk.[34] The CJEU has also held in case C-418/04, *Commission v Ireland*, that EIA and Natura assessment have different legal consequences, as assessments carried out pursuant to the EIA Directive or the SEA Directive cannot replace the procedure provided for in Articles 6(3) and 6(4) of the HD.[35]

Furthermore, the CJEU has explained in case C-258/11, *Sweetman and Others*, that the provisions of Article 6 of the HD must be construed as a coherent whole in the light of the conservation objectives pursued by the directive and to maintain the integrity of a site as a natural habitat, the site needs to be preserved at a favorable conservation status. It follows that this ensures the lasting preservation of the constitutive characteristics of the site concerned and the competent national authorities cannot authorize interventions where there is a risk of lasting harm to the ecological characteristics of sites that host priority natural habitat types.[36]

It can be drawn that as a rule the appropriate assessment of N2000 site – being much narrower than general EIA – should be carried out according to Article 6(3) of the HD. The appropriate assessment concentrates only on the N2000 site affected and on its conservation objectives in relation to the intended plan or a project. As a rule, appropriate Natura assessment must be carried out within development of a plan or a project. In case C-127/02, *Waddenzee*, the CJEU held that also activities which have been carried out periodically for several years but for which a license is granted annually for a limited period, each license should be considered, at the time of each application, as a distinct plan or project within the meaning of the HD.[37] Therefore, competent authorities have narrow margin of discretion due to precautionary principle in deciding whether to carry out an appropriate assessment.[38]

The improper implementation of Article 6(3) of the HD seems to be symptomatic in the EU. The EC issued an evaluation study[39] in 2013 to investigate how appropriate assessment is used in Member States. The study revealed that there were more than 70 different appropriate assessment approaches in practical use by either

[32] CJEU 07.09.2004 C-127/02, *Waddenzee*, para 53, ECLI:EU:C:2004:482.

[33] CJEU 14.03.2013 C-420/11, *Leth*, para 46, ECLI:EU:C:2013:166.

[34] C-127/02, *Waddenzee*, para 41–45.

[35] CJEU 13.12.2007 C-418/04, *Commission v Ireland*, para 231, ECLI:EU:C:2007:780.

[36] CJEU 11.04.2013 C-258/11, *Sweetman and Others v An Bord Pleanála*, para 32 and there cited cases, para 39 and there cited cases, para 42 and there cited cases, ECLI:EU:C:2013:220.

[37] C-127/02, *Waddenzee*, para 28.

[38] *Ibid*, para 59, 67.

[39] Sundseth, K., Roth, P. Study on Evaluating and Improving the Article 6.3 Permit Procedure for Natura 2000 Sites. European Commission, 2013. Accessible: http://ec.europa.eu/environment/nature/natura2000/management/docs/AA_final_analysis.pdf (10.12.2021).

national or regional legislation across the EU and some countries seem to try to fit everything under Article 6(3) of the HD to avoid having to use Article 6(4)[40] of the HD. In addition, the 2017 report of the European Court of Auditors highlighted that substantial deficit exist in the Member States such as France, Germany, Spain, Poland, and Romania of adequately assessing projects that have impact on N2000 sites.[41]

3. Natura Assessment – Case Law in Estonia

In Estonia, major flaws in protecting biodiversity seem to exist as the EC initiated an infringement procedure against Estonia on 9th of June 2021. The EC is calling on Estonia to bring its national legislation in line with the HD and the SEA Directive regarding logging activities in N2000 sites.[42] The infringement procedure cannot come by no means as a surprise as Relve and Vahtrus concluded already in 2019 that Estonian domestic law contradicts Article 6(3) of the HD regarding Natura assessment and logging in N2000 sites.[43] However, the flaws regarding following Article 6(3) of the HD in Estonian domestic legislation as well as following the EC guidelines and the case law of the CJEU seem to not stop here.

3.1 Hellenurme Dam

As a total of more than 1 000 dams have been counted on Estonian rivers and about 40 percent of them have a significant impact on the state of fish, fauna, and flora[44]; a large proportion of Estonian dams have significant effect on N2000 sites as well. Matters become complicated when a dam that restricts fulfilment of the HD goals has the cultural heritage importance.

The collision between the environmental and heritage interests emerge most often in the process of the water permit application. On one hand, the Estonian Heritage Conservation Act[45] prohibits to endanger, damage or destroy a monument or structure located on a heritage conservation area. On the other, the Estonian Water Act[46] stipulates that the fish passage both up- as well as downstream shall be ensured by the owner or possessor of a dam on the dam built on a water body that has been approved as a spawning area or habitat of salmon, brown trout, salmon trout or grayling or on a stretch thereof based on subsection 51(2) of the Nature Conservation Act.[47] The construction of the fish passages, however, often have the effect on the cultural monument or structure and therefore a solution must be sought through consideration[48] and if necessary, through the Natura derogation process in accordance with the Article 6(4) of the HD. Thus, when the dam is under the heritage protection and is located on the river which is a N2000 site, the impact of the proposed activity must be assessed in view of the cultural herit-

[40] *Ibid*., pp. 17, 63.

[41] European Court of Auditors. Special Report No 1: More efforts needed to implement the Natura 2000 network to its full potential, 2017, pp. 9, 20, 45. Accessible: https://www.eca.europa.eu/Lists/ECADocuments/SR17_1/SR_NATURA_2000_EN.pdf (10.12.2021).

[42] European Commission, June infringements package: key decisions, 9th June 2021, Brussels. Accessible: https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743 (10.12.2021).

[43] Relve, K., Vahtrus, S. *Op. cit*., pp. 332–333.

[44] Varov, K. Finding a Balance Between Environmental and Heritage Interests in the Water Permit Application Process, p. 39, Master's thesis, University of Tartu, School of Law, Department of Public Law, 2021 Tallinn. Accessible: http://hdl.handle.net/10062/72933 (10.12.2021).

[45] Heritage Conservation Act, sec. 33, subsec. 1 – RT I, 10.12.2020, 22. Accessible: https://www.riigiteataja.ee/en/eli/513122020003/consolide (10.12.2021).

[46] Water Act, subsec. 174 (3) – RT I, 21.09.2021, 6. Accessible: https://www.riigiteataja.ee/en/eli/506102021002/consolide (10.12.2021).

[47] Nature Conservation Act – RT I, 16.06.2021, 3. Accessible: https://www.riigiteataja.ee/en/eli/530062021001/consolide (10.12.2021).

[48] Varov, K. *Op. cit*., pp. 60–61.

age[49] but also in view of the environmental aspects, including the Natura assessment[50] according to the Article 6(3) of the HD.

In case 3-17-1739/80[51], *Hellenurme dam*, the dispute over the special use of water permit of the powerplant and a watermill on the Hellenurme dam was held. The owner of a watermill, that operates since 2002 as a museum and is under the heritage protection[52], requested a special use of water permit from the Estonian Environmental Board (EEB). The dam is on Elva River which is a N2000 site since 08.01.2006[53] for the protection of the habitat type listed in Annex I to the HD: rivers and streams (3260) and for the protection of the habitats *Cobitis taenia* and *Unio crassus* whose conservation status is poor in Boreal region.[54] The Elva River should be, once included in the list of sites of Community importance, be managed under the provisions set out in Article 6 of the HD. In addition, *Hellenurme dam* also falls under the protection of spawning area.[55] The EEB requested the project promoter to carry out full EIA, including Natura assessment, but the owner of the powerplant and a watermill filed a claim to court contesting the scope and the extent of the EIA arguing that the dam is under heritage protection and the National Heritage Board has repeatedly found that fish passage cannot be built. The owner of a watermill argued that the obligation to carry out EIA and Natura assessment should be lifted as the former Water Act[56] which was in force until 30.09.2019 enabled an exception – according to subsection 17(4^1). The former Water Act stipulated that the EEB may, considering a good reason, exempt the owner of the dam from performance an obligation to ensure fish passage. The Supreme Court of Estonia held in this case that the promoter of a project must be released from the obligation of carrying out a full EIA and Natura assessment. The Court explained that the EEB cannot include the requirement of assessing the impact of water impoundment to N2000 site as the water has been already impounded prior to the formation of the N2000 site.

The Supreme Court of Estonia argued that as the power plant's turbine dates back to the 1950s and was put back into operation in 2005; the working mill equipment dates back to 1932–1933 and the dam together with the dam lake already existed in 19th century and the whole complex is under heritage protection together with the manor ensemble, this activity – water impoundment – on the Elva River constitutes as continuing activity in which case Article 6 of the HD does not apply. The Court did not consider it to be necessary to ask a preliminary ruling from the CJEU. The ruling was based of the existing CJEU case law[57] and concluded that carrying out and financing an EIA (and Natura assessment)

[49] EIA Act subsec. 3^1 (2).

[50] EIA Act sec. 29.

[51] Judgement No 3-17-1739/80 of the Supreme Court Administrative Law Chamber, ECLI:EE:RK: 2021:3.17.1739.354. Accessible: https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=284174319 (10.12.2021).

[52] 12.08.1999 Directive No 16 of the Minister of Culture "Kultuurimälestiseks tunnistamine", para 79 – RTL 1999, 122, 1665. Accessible: https://www.riigiteataja.ee/akt/91744 (10.12.2021).

[53] 15.12.2005 Regulation No 311 of the Government of the Republic of Estonia "Hoiualade kaitse alla võtmine Valga maakonnas" – RT I 2006, 2, 4. Accessible: https://www.riigiteataja.ee/akt/108122016003 (10.12.2021).

[54] Accessible: https://eunis.eea.europa.eu/species/361 (10.12.2021).

[55] The Nature Protection Act subsec. 51(2).

[56] Water Act – RT I, 22.02.2019, 32. Accessible: https://www.riigiteataja.ee/en/eli/526022019001/consolide (10.12.2021).

[57] Incl. CJEU 29.07.2019 C-411/17, *Inter-Environnement Wallonie ASBL ja Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres*, para 127–128, ECLI:EU:C:2019:622; CJEU 14.01.2010 C-226/08, *Stadt Papenburg v Bundesrepublik Deutschland*, para 47–51, ECLI:EU:C:2010:10; C-209/04, *Commission v Austria*, para 56 and there cited cases; C-418/04, *Commission v Ireland*, para 154, 245.

should be the responsibility of the administrative body (the EEB). In addition, the Court explained that heritage protection interests can, in principle, overpower environmental protection objectives and a competent authority may allow exception according to Article 6(4) of the HD.[58]

By this ruling, the Supreme Court of Estonia seems to have departed from the strict interpretation of the Natura assessment, whereas it should always be observed separately from EIA. In 2014, the EIA Directive was amended due to the very purpose of elaborating on the relations of the EIA Directive, the HD, and the Birds Directive and to specify and scrutinize the screening and appropriate assessment procedures.[59]

The ruling in case *Hellenurme dam* contradicts with the principle of obligation to compensate, i.e., incurring the costs related to environmental use and environmental disturbances must be borne by the environmental user. The Environmental Liability Act of Estonia clearly stipulates those costs related to the prevention or remedying of environmental damage will be borne by the person who caused damage and these costs include the costs of identifying, preventing, and remedying environmental damage and a threat of damage, including the costs of assessing alternative measures.[60] It also seems peculiar that when it is ultimately established that a project falls within the concept of "plan" or "project" within the meaning of Article 6(3) of the HD, the question of who is obliged to incur costs of the appropriate assessment could be raised at all. Furthermore, the ruling in case of *Hellenurme dam* seems to be quite an opposite of what the CJEU held in case C-258/11, *Sweetman and Others*, where the CJEU explained that Article 6 of the HD must be construed as a coherent whole in the light of the conservation objectives pursued by the directive and in order to maintain the integrity of a N2000 site, the competent national authorities cannot authorize interventions where there is a risk of lasting harm to the ecological characteristics of sites that host priority natural habitat types.

Möckel explains that the term "project" in Article 1(2) a) of the EIA Directive and the term in Article 6(3) of the HD includes all human interventions in nature and the landscape regardless of whether interventions are subject to an authorization procedure based on national law.[61] It follows that as the term "project" is based on the impact-related understanding and the CJEU places high demands on general exemptions for specific project types and plans, no statutory national exemptions can be construed.[62]

The main argument of the Supreme Court of Estonia seems to rely on the 2010 case C-226/08, *Stadt Papenburg*, where the CJEU held that ongoing maintenance works in respect of the navigable channels of estuaries can be regarded as constituting a single operation which were already authorized under national law before the expiry of the time-limit for transposing the HD.[63] The Court also referred to the 2006 case C-209/04, *Commission v Austria*, where the CJEU had previously held that a construction of a carriageway for which building permit was given prior to the

[58] Judgement No 3-17-1739/80, para 14, 17, 25, 32–34.

[59] European Commission. Informal consolidated version of the EIA Directive. Accessible: https://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf (10.12.2021).

[60] Environmental Liability Act, sec. 25, sec. 26 subsec. 1. – RT I, 30.10.2020, 8. Accessible: https://www.riigiteataja.ee/en/eli/507122020002/consolide (10.12.2021).

[61] Möckel, S. (2017) The terms "project" and "plan" in the Natura 2000 appropriate assessment. In: Möckel S (Ed.) Natura 2000 appropriate assessment and derogation procedure – legal requirements in the light of European and German case-law. Nature Conservation 23: 31–56, p. 53. https://doi.org/10.3897/natureconservation.23.13601 (10.12.2021).

[62] *Ibid*, pp. 47–48, 53.

[63] C-226/08, *Stadt Papenburg*, para 47–51, the judgement.

expiry of the time-limit for transposition of the HD is not subject to appropriate assessment.

The CJEU explained in case C-209/04, *Commission v Austria*, that the expiry of the time-limit for transposition of the HD as a formal criterion is the only one which accords with the principle of legal certainty and preserves a directive's effectiveness. The Court argued however that the HD was primarily designed to cover large-scale projects which often require a long time to complete as the relevant procedures were already complex at national level, and it would have been too cumbersome and time-consuming to meet the new criteria of the appropriate assessment under the HD.[64]

It is doubtful thought, that maintenance works of channels and construction of carriageway can hardly be compared to a dam on a N2000 river in view of the public importance. The analogy of the case *Hellenurme dam* with the case C-209/04 seems artificial as the planning of a road project of national importance, including conducting an EIA and obtaining a building permit and acceptances of numerous municipalities, is with no doubt much more cumbersome and time-consuming than carrying out EIA and Natura assessment of a dam on a small river. Nevertheless, the cases C-226/08, *Stadt Papenburg* and C-209/04, *Commission v Austria* seem to undermine the logic of Article 6(3) of the HD and the approach taken by the EC in the latest guidelines regarding Natura assessment.

As to the ongoing activity, in the case C-127/02, *Waddenzee* the CJEU held that periodically given permits fall under the requirements of the HD in regard to Natura assessment. The CJEU has also ruled in case C-72/95, *Aannemersbedrijf P.K*, that the projects that include modifications to activities such as relocation, reinforcement or widening of the dyke, replacement of a dyke by constructing a new dyke in situ, whether or not the new dyke is stronger or wider than the old one, or a combination of such works, these works constitute a project whereby the EIA must be carried out in order to assess projects' impact on the environment and should therefore be made subject to an assessment with regard to its effects.[65] In the same case, the CJEU held than when the Member State establishes the criteria or thresholds that particular projects are exempted in advance from the requirement of an EIA, exceeds the limits of discretion of a Member State, unless projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

In a case C-538/09, *Commission v Kingdom of Belgium*, the CJEU held that Article 6(3) of the HD does not authorize a Member State to enact national legislation in a way that it allows the EIA obligation for a development plan to benefit from a general waiver, i.e., because of the low costs or the particular type of work. The Court added that systematically exempting works and development programs and projects, which are subject to a declaratory scheme from the procedure for assessing their implications for a site, a Member State fails to fulfil its obligations under Article 6(3) of the HD.[66]

Nevertheless, the Supreme Court of Estonia concluded in case *Hellenurme dam* that by analogy with the CJEU cases, the EEB should consider a dam on the Elva River as a single operation for which the building permit was given prior to the expiry of the time-limit for transposition of the HD and if the purpose and nature of water use

[64] C-209/04, *Commission v Austria*, para 57, 62.

[65] CJEU 24.10.1996 C-72/95, *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland*, para 42, 54, 55 and there cited cases and the judgement, ECLI:EU:C:1996:404.

[66] CJEU 26.05.2011 C-538/09, *Commission v Kingdom of Belgium*, para 43 and there cited cases, ECLI:EU:C:2011:349.

remains the same (no extra impact to N2000 site is imposed compared to the time N2000 site was established) an appropriate assessment is not necessary to assess the implication of a dam to river water regime.[67] Despite the Court emphasized that the position taken in this case may not be transferable to other temporary permits and activities permitted by them[68], the ruling nevertheless seems to pave the way for unsound Natura assessment on Estonian rivers.

The EU legislation and case law of the CJEU demonstrates that only in very rare circumstances it is possible to make an exemption of carrying out appropriate environmental impact (and Natura) assessment. Article 2(4) of the EIA Directive excludes projects from the requirement to conduct an EIA if a Member State can demonstrate that the alleged risk to security of the electricity supply is reasonably probable and that that project is sufficiently urgent.[69]

In a case C-256/98, *Commission v France*, the CJEU held that in the context of the HD, no project could be excluded of proper environmental assessment by the argument of its low cost (by implying its irrelevant impact) or its purpose, as this would exceed the discretion of a Member State. In addition, the CJEU pointed out that the EIA must be carried out with consideration of the site's conservation objectives according to Article 6(3) of the HD, which requires the assessment to determine the environmental impact of development plan in the light of the site's particular conservation objectives.[70]

Peculiar is that the Supreme Court of Estonia specially emphasizes that the position taken in case of *Hellenurme dam* where a project was deemed to be an ongoing operation as regards to special circumstances may not be transferable to other permits and activities and in general, periodic permits should be considered as permits for new activities.[71] This emphasis seems to refer to the *Linnamäe Dam* case (observed in the next chapter). In addition, if the case *Hellenurme Dam* was so special, a preliminary ruling from the CJEU according to Article 267 of the TFEU should have been asked to confirm the approach taken in interpretating EU legislation.

It seems evident that in case of *Hellenurme dam* the Supreme Court of Estonia considered the interests of private enterprise and cultural considerations to outweigh the objectives of the HD. However, this exceeds the competence of the Supreme Court of Estonia as the preliminary ruling of the CJEU was not requested, and the approach taken seems to contradict not only the principle according to which a promoter of a plan or a project must always incur the costs of using the public resource – the environment – but also the EU legislation, the case-law of the CJEU and the most recent guidance materials issued by the EC. The obligation under the Article 6(3) of the HD clearly directs Member States to scrutinize environmental use to minimize adverse impacts on it and to promote sustainable development and this objective is most effectively achieved in case the costs of meeting the requirements of the preserving obligation, including of those that are related to environmental use and environmental disturbances, are put on the user of the environment. To add, a subsidy granted by a public authority for measures taken to compensate for damage to a N2000 site can be considered also as

[67] Judgement No 3-17-1739/80 of the Supreme Court Administrative Law Chamber, para 18, 19.; C-226/08, *Stadt Papenburg*, para 47–51 and the judgement; C-209/04, *Commission v Austria*, para 56.

[68] Judgement No 3-17-1739/80 of the Supreme Court Administrative Law Chamber, para 19.3.

[69] C-411/17, *Inter-Environnement Wallonie ASBL et al*, para 102.

[70] CJEU 06.04.2000 C-256/98, *Commission v France*, para 39 and 40, ECLI:EU:C:2000:192.

[71] Judgement No 3-17-1739/80 of the Supreme Court Administrative Law Chamber, para 19.3.

a state aid, should it be granted to an undertaking established in N2000 site, designated before or after the establishment of the undertaking.[72] Referring to the aforementioned 2013 study by the EC, the case of *Hellenurme dam* seems to be another example of a project with adverse impact on N2000 site that escapes through a "loophole" as it is not considered to be necessary to be included in the EIA.[73]

To conclude, the ruling of the Supreme Court of Estonia in case *Hellenurme dam* paves the way for improper Natura assessment and derogation procedure in Estonia and undermines the principle according to which the promoter of a project should always incur the costs of developing and executing a plan or a project.

3.2 Linnamäe Dam

In Northern Estonia, another historical dam restricts fulfilling of objectives of the HD. In this case, a private enterprise applied a new special use of water permit for electricity production on the Jägala River and the EEB has been struggling for years to process a special use of water permit as the dam itself (built in 1922–1924, renovated in 2002) was taken under heritage protection as an immovable monument[74] by 21.12.2016 directive[75] of the Minister of Culture. The Jägala River is also a N2000 site since 10.07.2005 for the protection of the habitat type listed in Annex I to the HD: rivers and streams (3260) and common species listed in Annex II: *Cottus gobio*, *Lampetra fluviatilis* and *Salmo salar*.[76] Therefore, the Jägala River should, once included in the list of sites of Community importance, be managed under the provisions set out in Article 6 of the HD. Nevertheless, the entrepreneur claims that the conditions regarding water regime have not changed compared to the time N2000 site was established referring to an ongoing activity and the analogy of the case *Hellenurme Dam*.

The Harju County Court as the first instance court ruled on 27.07.2020 in a case 3-19-1697/78, *Linnamäe dam*, that the EEB must issue a proper administrative act regarding special use of water permit.[77] However, this case took an interesting turn as most of the dam lake which is located upstream the Jägala River was taken under protection as the protective zone of the heritage by 18.12.2020 directive[78] of the Minister of Culture. As a result, the EEB cannot oblige the owner of the dam to demolish this immovable monument nor lower the water level of dam lake, on one hand, but on the other, the Ministry of Culture has not initiated a proper derogation procedure under Article 6(4) of the HD in which the opinion of the EC should be obtained but seems to be consent with the *status quo*. The non-profit environment association "Jägala Kalateed" has challenged the 2020 directive of the Minister of Culture in court because the heritage protection of the dam lake restricts building fish passage. The protection of the lake dam lake to as large

[72] Van Hoorick, G. Compensatory Measures in European Nature Conservation Law. Utrecht Law Review, 10(2), May 2014, p. 169. Accessible: http://doi.org/10.18352/ulr.276 (10.12.2021).

[73] Sundseth, K., Roth, P. *Op. cit*., pp. 55–56.

[74] National Registry of Cultural Monument. Registry no 30418 "Linnamäe hüdroelektrijaama pais". https://register.muinas.ee/public.php?menuID=monument&action=view&id=30418&lang=en (10.12.2021).

[75] 21.12.2016 Directive No 180 of the Minister of Culture "Linnamäe hüdroelektrijaama paisu kultuurimälestiseks tunnistamine" – RT III, 23.12.2016, 1. Accessible: https://www.riigiteataja.ee/akt/323122016001 (10.12.2021).

[76] 16.06.2005 Regulation No 144 of the Government of the Republic of Estonia "Hoiualade kaitse alla võtmine Harju maakonnas" – RT I 2005, 38, 300. Accessible: https://www.riigiteataja.ee/akt/103092019007?leiaKehtiv (10.12.2021).

[77] Judgement No 3-19-1697/78 of the Harju County Court, the judgement, ECLI:EE:TLHK:2020:3.19.1697.14357.

[78] 18.12.2020 Directive No 190 of the Minister of Culture "Asulakohtade ja muistsete põllujäänuste kultuurimälestiseks tunnistamine ning ühise kaitsevööndi kehtestamine" – RT III, 22.12.2020, 1. Accessible: https://www.riigiteataja.ee/akt/322122020001 (10.12.2021).

extent as this (over 24 hectares)[79] does not carry a good faith regarding balancing the environmental and cultural interest as it exempts the option of building a fish passage with reasonable costs.

3.3 Kunda Dam

The Tartu Administrative Court, on the other hand, held on 20.01.2015 in a case 3-14-51675 that the EEB had every right to require the EIA, including Natura assessment, while processing special use of water permit involving a hydroelectric power station dam on the Kunda River, which is not under heritage protection. The ruling has remained in force as it was not appealed.

The Kunda River is a N2000 site since 01.10.2004[80] for the protection of the habitat type listed in Annex I to the HD: rivers and streams (3260) and common species listed in Annex II (*Cottus gobio*), the protection of the habitats *Cobitis taenia*, *Salmo salar* and *Unio crassus*. Therefore, the Kunda River is, once included in the list of sites of Community importance, managed under the provisions set out in Article 6 of the HD.

The Court held that if the proposed activity may jeopardize the conservation objectives of the Natura site and an EIA, including Natura assessment, must be initiated. The Court held that in preliminary EIA, *inter alia*, the following considerations should be considered: reduction of the habitat area of the habitat type or species targeted by the site; increasing fragmentation; impact on the integrity of a site; increased disturbance; reduction in the number or population density of species; changes in water regime or water quality; duration of the effect; habitat resilience; cumulative effects, other existing or planned projects in the region. Furthermore, the Court held that the need for an EIA must be considered in each application for a permit for the special use of water, not only when altering the activity.[81]

In the light of the cases *Hellenurme dam*, *Linnamäe dam* and *Kunda dam* in the Estonian case-law, the courts seem to be of the opinion that when the purpose of the special use of water permit is to generate hydroelectricity, an EIA and if relevant, also an appropriate assessment must be carried out by the promoter of the project, but when the dam is operating for heritage purposes (e.g. museum) only, an EIA and if relevant, also an appropriate assessment should be carried out by the State (despite the operator of the dam being a private enterprise). However, Article 6(3) of the HD does not distinguish projects as the term "project" is based on the impact-related understanding and should include all human interventions in nature. As to the consideration, domestic heritage protection interests seem to overpower EU's biodiversity protection goals in Estonia. Furthermore, Estonian domestic legislation, as well as general principles applied both in EU and Estonian legislation and the EC guidance materials place the obligation of incurring the costs of meeting the requirements of the preserving obligation, including those that are related to environmental use and environmental disturbances, on the environmental user.[82]

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[79] Annex III of the 18.12.2020 Directive No 190 of the Minister of Culture of the common protection zone Accessible: https://www.riigiteataja.ee/aktilisa/3221/2202/0001/KuM_kk190_Lisa3.pdf# (10.12.2021).

[80] 15.09.2005 Regulation No 237 of the Government of the Republic of Estonia "Hoiualade kaitse alla võtmine Lääne-Viru maakonnas" – RT I 2005, 51, 404. Accessible: https://www.riigiteataja.ee/akt/112032019031 (10.12.2021).

[81] Judgement No 3-14-51675/16 of the Tartu Administrative Court, para 12, 22, ECLI:EE:TRHK:2015:3.14.51675.2479. Accessible: https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=151730856 (10.12.2021).

[82] EC notice (2018), p. 70.; The Constitution of the Republic of Estonia, sec. 53 – RT I, 15.05.2015, 2. Accessible: https://www.riigiteataja.ee/en/eli/530122020003/consolide (10.12.2021); Kask, O., Triipan, M. The Executive Issue: The Constitution of the Republic of Estonia, sec. 53 comment. para 14 – Ü. Madise, *et al*. Tar-

In addition, the CJEU case law clearly indicates that Natura assessment according to Article 6(3) of the HD should always consider the site's particular conservation objectives. The author of this paper fully agrees with the approach taken in a case *Kunda dam* by the Tartu Administrative Court. Nevertheless, the Supreme Court of Estonia has different approach on Natura assessment. Therefore, the question remains whether biodiversity protection goals on Estonian rivers can be achieved.

4. Natura Derogation

On paper, the derogation procedure under Article 6(4) of the HD should balance the public interests and allow execution of a plan or a project for imperative reasons of overriding public interest if despite a negative assessment of the implications for the N2000 site no other alternative solution exists. Article 6(4) of the HD stipulates that the compensatory measures should be submitted to the EC before they are implemented and before the realization of the plan or project concerned, but after its authorization. Even in cases where the prior opinion of the EC is not mandatory, the planned compensatory measures must always be communicated to the EC who analyses the balance between ecological values and imperative reasons and the appropriateness of compensatory measures.

In 2017 study Möckel highlighted that the EC and the CJEU have little opportunity to enter the individual requirements for a derogating authorization in Germany and the German case law has been favoring developments, especially governmental infrastructural projects, and has therefore weakened the concepts of N2000 and appropriate assessment by allowing derogating authorizations too easily.[83] The same study underlined that, developing governmental infrastructural projects that ignore conservation objectives of the HD, the EC guidelines and the CJEU case law has become a norm in Germany.[84] In the light of the cases of *Hellenurme dam* and *Linnamäe dam*, the same risk is already realizing also in Estonia.

Inconsistency and rare application of derogation procedures are confirmed both in academic literature but also by the EC on basis of its own statistics.[85] According to the EC practice up until now, there have been officially only 25 cases where the EC has allowed exceptions under Article 6(4)[86] of the HD. It should be noted that it takes long time for the EC to issue its opinion: the average duration of obtaining the opinion of the EC is approximately one year; in the *River Danube* case, the opinion was issued almost 2 years after the request. During the time Article 6(4) is being processed, the intended project is put on hold. It becomes obvious why the Member States have incentives to search for alternative and faster ways of processing EIA and Natura assessment, including ones that try to fit everything under Article 6(3) of the HD to avoid having to use Article 6(4). To add, it is also possible that the infringement of the HD takes place during derogation procedure. Therefore, the derogation procedure as it is, could hardly

tu: Iuridicum 2020. Accessible: https://pohiseadus.ee/ (10.12.2021); Environmental Liability Act, sec. 25, sec. 26 subsec. 1, 9. Accessible: https://www.riigiteataja.ee/en/eli/507122020002/consolide (10.12.2021).

[83] Möckel, S. The European ecological network "Natura 2000" and its derogation procedure to ensure compatibility with competing public interests. Nature Conservation, 23, 2017, p. 113. Accessible: https://doi.org/10.3897/natureconservation.23.13603 (10.12.2021).

[84] Möckel, S. The European ecological network "Natura 2000", p. 113.

[85] *Ibid*, p. 89; Sundseth, K., Roth, P. *Op. cit*., p. 63.

[86] European Commission Opinions relevant to Article 6 (4) of the Habitats Directive. Accessible: https://ec.europa.eu/environment/nature/natura2000/management/opinion_en.htm (10.12.2021).

fulfil its initial purpose and remains utmost inefficient.[87]

5. Conclusion

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

Estonian case law seems to leave more room for the discretionary right of competent authorities and steers them to take other public interests such as cultural heritage into account when managing the N2000 sites. In the case of *Hellenurme dam*, the Supreme Court of Estonia seem to have valued cultural heritage interests higher than the EU's biodiversity protection interests and went too far when excluding "an ongoing activity" (historical dam on river that is a N2000 site) from the obligation of the Natura assessment – the proponent of a project could not be released of such obligation according to the EU and domestic legislation in force and according to extensive CJEU case law which has been very strict in that matter. In addition, in the case of *Hellenurme dam*, the Supreme Court of Estonia lifted the obligation to compensate, i.e., incurring the costs related to environmental use and environmental disturbances, of the enterprise which owned the dam on the river in N2000 site.

In conclusion, improper national case-law might be one of the root causes, why the general objectives of the HD are not met and some of the species and habitat types continue to decline or remain endangered. Even one improper interpretation of Article 6 of the HD, especially if it is confirmed by the Supreme Court of a Member State, could have immense impact. In conclusion, it is not premature to argue, that unless EC finds a way how to enforce and scrutinize proper implementation of the HD, the new initiatives of the EC in combating biodiversity loss, such as biodiversity strategy for 2030 and European Green Deal, are at great risk of failing.

[87] Jakobson, S., *Op. cit*., p. 72.