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Content

Introduction

David Langlet

Welcome to the thirty-second issue of the Nordic Environmental Law Journal (NELJ), which comprises four articles, dealing with a broad and timely range of topics.

In "The Attractiveness of Contracts: Community Benefit Agreements and Environmental Law's Contractualisation", Sonja Vilenius analyses the potential of so-called Community Benefit Agreements (CBAs) in tackling social acceptance issues. She looks specifically at the role such agreements can play in relation to extractive industries in Europe as a way in which communities can be given benefits or concessions beyond what is legally required and in exchange grant their consent for planned projects. Vilenius identifies the flexibility and law-like character of CBAs as positive features that can make them suitable for promoting democratization and strengthening the agency of concerned parties.

In the second article, "Allocation Procedure and its Applicability to the Allocation of the National Total Maximum Emission Amount of Pollutant" Mirjam Vili carries out an analysis of the granting of permits under the Estonian Atmospheric Air Protection Act and discusses to what extent and how such permits allocate a limited benefit. She specifically asks what requirements should be met by such a procedure and, more specifically, whether the granting of such permits qualify as an allocation procedure. In this, she draws on German legal literature where the concept of allocation procedure as a special form of administrative procedure has been extensively discussed.

In "Getting to the Bottom of Rules on the Strict Protection of Species and By-catches from Fisheries (in the Exclusive Economic Zone) Through the Lens of the Baltic Proper Harbour Porpoise" Rebecka Thurfjell uses the Harbour Porpoise of the Baltic Sea as the case study to analyse to what extent EU Member States are

obliged to take measures against fisheries to eliminate bycatches of strictly protected species in their marine waters. The discussion centers on the extent to which and how the obligations of Article 12 of the Habitats Directive apply to fisheries. Rather than deficiencies in the legal framework, lack of political ambition by Member States is identified as a significant problem.

As the title indicates (in Swedish), the article "Äldre kvinnor, klimat och juridik", is dedicated to the recent decision by the European Court of Human Rights in the case *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, where the court for the first time addresses what obligations follow from the European Convention on Human Rights specifically with respect to climate change. Christina Olsen Lundh summarises and reflects on the main points of the case, with a particular focus on the issue of legal standing.

The Attractiveness of Contracts: Community Benefit Agreements and Environmental Law's Contractualisation

Sonja Vilenius

Abstract

In Europe, local opposition to mining projects is growing, which has driven scholars in the mineral-rich Nordics to study the governance environment of the extractive industry. This article examines a proposed solution, namely Community Benefit Agreement (CBA), a contract through which a community grants its consent for a planned mining project. The broad aim of this article is to contextualise CBA with respect to the regulatory developments that are emerging in Europe, especially in the field of environmental law. The more specific aim is to lay out why CBA appears to represent an attractive regulatory solution in tackling social acceptance issues.

Based on the observations made through two interconnected developments, contractualisation and proceduralisation, this article concludes that in many respects CBA reflects the developments that are already occurring in Europe. With regard to the attractiveness of contracts, the contractualisation approach highlights that two qualities give rise to their attractiveness, namely their flexibility and their law-like character. The analysis based on the theories of proceduralisation lays out why these qualities are considered beneficial. The reasons can be summarised as follows: the enablement of democratisation, between-system coordination and the development of the contract parties' agency in regulating.

Key words: Community Benefit Agreements, Contractualisation, Proceduralisation, Regulatory Theory

1. Introduction

In Europe, local opposition to mining projects is growing, which has driven scholars in the mineral-rich Nordics to study the governance environment of the extractive industry.[1] A recent empirical study conducted in Finland proposes Community Benefit Agreement (CBA) as a potential complementary instrument to state regulation and companies' own Corporate Social Responsibility (CSR) measures in tackling problems with social acceptance of mining activities.[2] The basic idea of CBA is that an impacted community negotiates a binding agreement with a mining company. In the agreement the community grants its consent for the planned mining project in exchange for certain benefits and the minimisation of adverse cultural and environmental impacts. However, there is a lack of European legal research about CBA.

Perhaps the most beneficial way to begin the European legal discussion of the foreign instrument is to observe it against wider regulatory developments emerging in environmental law.

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[1] Juha M. Kotilainen, Lasse Peltonen, and Kalle Reinikainen, "Community Benefit Agreements in the Nordic Mining Context: Local Opportunities for Collaboration in Sodankyla, Finland," *Resources Policy* 79 (2022): 1–10; Sonja Kivinen, Juha Kotilainen, and Timo Kumpula, "Mining Conflicts in the European Union: Environmental and Political Perspectives," *Fennia – International Journal of Geography* 198, no. 1–2 (August 23, 2020): 163–79.

[2] Kotilainen, et al. (n 1), p. 8.

In other words, we should start the discussion by asking why we would use a *contract* to answer social acceptance problems. The question is essential since comprehensive state regulation, as well as companies' own self-regulation measures, is already in force. Therefore, the question could be rephrased as follows: why would we introduce a novel regulatory instrument, a *contract*, and not simply improve the existing measures? The interest towards contracts can be understood when observing it against the wider regulatory developments emerging in environmental law.

The use of contracts is expanding in environmental law in such a way that there seems to emerge an overlooked regulatory development called 'contractualisation'. Today contracts are becoming a central regulatory tool for environmental policies at domestic, international, and European levels, and their use has spread to new dimensions of environment-related matters.[3] This trend in which the use of contracts has increased in a certain context, or where contracts have been used for new purposes, has been labelled contractualisation[4], but environmental law scholars have rarely paid attention to the phenomenon. The studies have instead focused on individual contract models. However, contractualisation is a useful perspective when investigating why we would introduce CBA in Europe, since it enables us to highlight the qualities that make contracts attractive regulatory tools. Thus, by analysing CBA through contractualisation, we are also able to contextualise CBA with respect to wider developments in environmental law in Europe.

Although contractualisation is a good starting point, the approach does not provide explanations on a wider legal and societal level as to why we would use contracts to answer social acceptance problems. Therefore, we need to look at the phenomenon that explains why we are interested in complementing laws with other regulatory instruments. This phenomenon, or rather a theoretically anchored framework, is called 'proceduralisation'. The term is often used to refer to the shift towards procedures and participation. It can be also understood as an analytical framework that highlights the tension between traditional democratic rule-making and the need for flexibility. The latter understanding of proceduralisation builds on the idea that the goals of the law must be articulated directly by those who are subject to legal procedures.[5] Therefore, proceduralisation is seen to cover the strategies of inducement that aim to develop procedures, e.g. contract negotiations, and institutional structures, e.g. contracts, that will enable the regulatees to become the regulators.[6]

In legal and regulatory literature these types of strategies are most clearly seen in the theories of reflexive law and responsive regulation, which can therefore be called theories of proceduralisation.[7] Reflexive law aims for a certain form of democratisation by emphasising the need for law to focus on the regulation of self-regulation.[8]

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[3] Mathilde Hautereau-Boutonnet, "The Effectiveness of Environmental Law through Contracts," in *The Effectiveness of Environmental Law*, ed. Sandrine Maljean-Dubois, 1st ed., 2017, 67–80, p. 68.

[4] Eckard Rehbinder, "Environmental Agreements a New Instrument of Environmental Policy," *Environmental Policy and Law* 27, no. 4 (1997): 258–69; Cristina Poncibò, "The Contractualisation of Environmental Sustainability," *European Review of Contract Law* 12, no. 4 (2016): 335–55.

[5] See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996), p. 408–410.

[6] Julia Black, "Proceduralizing Regulation: Part I," *Oxford Journal of Legal Studies* 20, no. 4 (2000): 597–614, p. 597–598.

[7] Ibid., p. 598 and 602.

[8] Ralf Rogowski, *Reflexive Labour Law in the World Society* (Edward Elgar Publishing, 2013), p. 38–39. Sanford E. Gaines, "Reflexive Law as a Legal Paradigm for Sustain-

Thus, it provides one explanation for the question of why we are interested in complementing laws with other regulatory instruments. Another explanation for this question is provided by responsive regulation. It emphasises the role of non-governmental actors in governance.[9] In other words, a responsive regulation approach complements reflexive law by focusing on the regulators and the regulatees.

The aims of this article can be summarised as follows. The broader aim is to contextualise CBA with respect to the regulatory developments that are emerging in Europe, especially in the field of environmental law. Proceduralisation and contractualisation developments highlight that CBA does not represent as unorthodox a regulatory solution as it seems at first glance, rather in many respects it can be seen to reflect the developments that are already occurring in Europe. The more specific aim is to lay out why CBA seems to represent an attractive regulatory solution in tackling social acceptance issues. While contractualisation analysis highlights the qualities that make contracts attractive regulatory tools, proceduralisation analysis shows why these qualities are seen to be beneficial.

The article is divided into two parts. The first part considers contractualisation. It starts by outlining the emergence of contractualisation development in environmental law and then moves on to consider the reasons why contractualisation emerges in the given context. The third subchapter covers contractualisation in the mining sector, and this development is compared against the wider contractualisation phenomenon in environmental law. The second part concerns proceduralisation. It starts by outlining my understanding of proceduralisation. The next two subchapters analyse CBA through proceduralisation theories, reflexive law, and responsive regulation, the aim of which is to elaborate on the understanding of CBA's attractiveness. The article ends with concluding observations.

Before moving on to contractualisation, it should be emphasised that the terms 'agreement' and 'contract' are used interchangeably, since both notions have been used in environmental contractualisation. Moreover, governance and regulation are used interchangeably unless stated otherwise.[10] Additionally, the concepts of 'procedure', 'procedural', and consequently proceduralisation are understood extensively, hence they include a variety of structured participation models, not just court proceedings. With relation to the method of this research, it is based on qualitative analysis of the texts of legal and social sciences and their interpretations.

2. Contractualisation

2.1 Interest in environmental contracts (re)awakens

In the first part of the article, I investigate contractualisation. I start this investigation by outlining the emergence of contractualisation in environmental law and what position contracts appear to have in today's environmental regulation. Thus, the analysis in this chapter shows that there emerges a development in the field of environmental law that can be referred to as contractualisation.

Contracts are not so much an innovative or a new initiative. From an overall historical perspective, the contract is probably the oldest con-

able Development," *Buffalo Environmental Law Journal* 10, no. 1–2 (2002): 1–24, p. 8–9.

[9] See Cameron Holley and Clifford Shearing, "A Nodal Perspective of Governance: Advances in Nodal Governance Thinking," in *Regulatory Therory: Foundations and Applications*, ed. Peter Drahos, 1st ed. (ANU Press, 2017), 163–80, p. 166.

[10] F.ex. Kotzé has stated that governance is just a more modern name for regulation. See Louis J. Kotzé, *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar, 2012).

struction defined by the law and certainly the most used one.[11] Even in the context of environmental regulation, contracts, often referred to as environmental agreements or covenants, have been in use for decades. They were first introduced in France and Germany in the early 1970s, where contracts were made between the business sector and the government to achieve certain environmental objectives that went beyond legal requirements.[12] Later on, in the 1980's environmental agreements emerged in the Dutch-speaking part of Europe where they became relatively popular.[13] Also, other European countries such as Austria, Denmark, Italy, Sweden and Portugal started to experiment with environmental agreements.[14] These developments occurred at the EU level as well. However, environmental contracting has not been limited to Europe; environmental agreements have been experimented with in the United States since the 1980s, and their use has been highly popular in Japan.[15]

The highest point of academic and political interest in environmental agreements was reached at the turn of the millennium.[16] In 1996 the EU formally embraced the use of this regulatory approach when the Commission provided a Communication on Environmental Agreements, in which it stated that agreements can be used as a supplement to legislation or as an implementation tool.[17] Shortly thereafter the Commission issued a Recommendation on environmental agreements for implementing directives of the Community.[18] The Communication and the Recommendation were based on a large-scale empirical investigation of environmental contracts that occurred in the Community.[19] In 2002 the Commission made a new recommendation that concerned environmental agreements at the Community level.[20] Wider-scale research on the topic took place at the end of the 1990s and the beginning of the 2000s.[21]

Since that time the interest surrounding environmental agreements as a whole seems to have faded, but this does not mean that the use of environmental agreements has decreased or stopped altogether. Today, contracts are used to replace, anticipate, supplement or implement the law, and they are becoming an essential regulation tool for environmental policies at the domestic, international, and European levels.[22] Moreover, they are used in various sectors of environmental regulation such as waste regulation, nature conservation regulation, energy regulation, environmental damage regulation, ecologi-

[11] Simona-Maya Teodoroiu, "The Administrative Contract Regulated by the Environmental Law," *Perspectives of Law and Public Administration* 8, no. 1 (2019): 128–35, p. 128.

[12] Eric W. Orts and Kurt Deketelaere, "Introduction: Environmental Contracts and Regulatory Innovation," in *Environmental Contracts: Comparative Approach to Regulatory Innovation in the United States and Europe* (Kluwer Law International Ltd., 2001), 1–35, p. 5–6.

[13] Ibid.

[14] Rehbinder (n 4), p. 260.

[15] Orts and Deketelaere (n 12), p. 11; Rehbinder, "Ecological Contracts: Agreements between Polluters and Local Communities," in *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization*, ed. Gunther Teubner, Lindsay Farmer, and Declan Murphy (Wiley, 1994), 147–65, p. 151.

[16] Eric W. Orts and Kurt Deketelaere, *Environmental Contracts: Comparative Approaches to Regulatory Innovations in the United States and Europe*, 1st ed. (Kluwer Law International Ltd., 2001).

[17] COM(96)561 final: Communication from the Commission to the Council and the European Parliament: On Environmental Agreements, p. 3.

[18] Recommendation 96/733/EC, 1996 O.J. No. L 333/59.

[19] Rehbinder (n 4), p. 260.

[20] COM(2002) 412 final: Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment.

[21] Teubner, Farmer, and Murphy (n 15); Orts and Deketelaere (n 15).

[22] Hautereau-Boutonnet (n 3), p. 68.

cal compensation, etc.[23] In Finland, for example, the use of environmental agreements was fairly marginal at the end of the 1990s.[24] Nowadays, however, the approach seems to have changed. Fixed-period 'green deals' between the business sector and different levels of government are becoming more common[25] and the popularity of voluntary environmental forestry subsidy agreements made between private forest owners and the Finnish Forest Centre has increased[26]. Also, voluntary ecological compensation incorporated into the new Nature Conservation Act (9/2023) is meant to be applied partly through agreements made between a polluter and the entity that produces nature values.[27]

Scholarly interest is, however, mainly directed towards the environmental contracts occupying a specific sector of environmental law, which leaves the wider development of contractualisation off the radar.[28] Moreover, legal research regarding contracts seems to be marginalised in comparison to other disciplines, such as economics, business administration and social sciences. This might be due to legal scholars' reluctance to embrace transactional documents as a component of legal scholarship.[29] Therefore, the work of these scholars paints a rather fragmented and technical picture of environmental contracts. Nevertheless, academic interest in more broadly framed environmental contracts seems to be reawakening in Europe.[30] Whereas political interest, at least at the EU level, is yet to be reawakened.[31]

2.2 The attractiveness of environmental contracts – reasons for their introduction

As the former chapter demonstrates, contracts are in use in diverse areas of environmental law. Their details and explicit objectives may differ significantly, as do their names, parties and legal form. However, the reasons why they have been introduced are in many ways analogous. Thus, in this chapter, I will outline the reasons

[23] Ibid.

[24] See Geert Van Calster and Kurt Deketelaere, "The Use of Voluntary Agreements in the European Community's Environmental Policy," in *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (Kluwer Law International Ltd., 2001), 199–246, p. 245; Panagiotis Karamanos, "Voluntary Environmental Agreements: Evolution and Definition of a New Environmental Policy Approach," *Journal of Environmental Planning and Management* 44, no. 1 (2001): 67–84, p. 72.

[25] Ministry of Environment in Finland, "Green Deals". https://ym.fi/en/green-deals (29.4.2023).

[26] The Finnish Government, "Voluntary forest protection popular among forest owners – record funding for fixed-term environmental forestry subsidy agreements". https://valtioneuvosto.fi/-/1410837/vapaaehtoinen-metsien-suojelu-metsanomistajien-suosiossa-maaraaikaisiin-ymparistotukisopimuksiin-ennatysrahoitus?languageId=en_US (29.4.2023).

[27] The Government Bill on Nature Conservation Act (HE 76/2022 vp) p. 230–232.

[28] See f.ex. Hans Bressers et al., "Negotiation-Based Policy Instruments and Performance: Dutch Covenants and Environmental Policy Outcomes," *Journal of Public Policy* 31, no. 2 (2011): 187–208; Steven Van Garsse, Kit Van Gestel, and Nicolas Carette, "Energy Performance Contracts for Governments: The Two Faces of Europe," *European Procurement & Public Private Partnership Law Review* 12, no. 2 (2017): 87–96; Malin Aldenius, Panagiota Tsaxiri, and Helene Lidestam, "The Role of Environmental Requirements in Swedish Public Procurement of Bus Transports," *International Journal of Sustainable Transportation* 16, no. 5 (2022): 391–405; Claudia Sattler et al., "Institutional Analysis of Actors Involved in the Governance of Innovative Contracts for Agri-Environmental and Climate Schemes," *Global Environmental Change* 80 (2023): 1–14.

[29] Natasha A Affolder, "Rethinking Environmental Contracting," *Journal of Environmental Law and Practice* 21 (2010): 155–80, p. 159.

[30] Kateřina Peterková Mitkidis, "Using Private Contracts for Climate Change Mitigation," *Groningen Journal of International Law* 2, no. 1 (2014): 54; Hautereau-Boutonnet (n 3).

[31] However, there are sector-specific recommendations on the use of contracts, for example concerning energy performance contracting. See Van Garsse, Van Gestel, and Carette, "Energy performance contracts for governments: the Two Faces of Europe, European Procurement & Public Private Partnership Law Review, Vol. 12, No. 2 (2017), pp. 87–96.

why contractualisation is emerging in environmental law. The question is deeply connected to the qualities of contracts, and therefore the overarching qualities of different types of environmental agreements are highlighted.

Environmental contracts comprise a category that is highly variable, or some would say flexible. Firstly, it is important to notice that just as the names of environmental contracts differ, there are also different categorisations. Perhaps the most widely used is 'Voluntary Environmental Agreements'(VEAs), but 'negotiated agreements' and 'private agreements' are also typical classifications for environmental contracts.[32] Secondly, parties to the agreements may include any of the three sectors: public, business, and non-profit. However, the extent of the involvement of either party varies across different contracts.[33] Thirdly, the legal character of environmental contacts differs from one contract to the next. Some of them are legally binding and others are more accurately characterised as 'self-commitments' that are not legally enforceable, even though they have a real effect on the practice of environmental law.[34] Similarly, the contracts may be interpreted as private law or public law instruments depending on their content and parties.

The fourth area of variability relates to the declared objectives of environmental contracts. Broadly speaking, their aim is the achievement of *environmental* objectives.[35] Usually, however, environmental contracts seek to answer specific environmental issues or opportunities such as climate change, loss of biodiversity, overconsumption of natural resources, or promotion of a circular economy.[36] Moreover, the relative significance of environmental objectives might differ since the purpose of the contract is not in all cases solely environmental. For example, supply chain contracts may include clauses that concern carbon emissions, but their primary purpose is not to improve the environment; rather the environmental improvements are a by-product of the contract.[37] Thus, a contract can be classified as an environmental contract (as has been done in this article) even though it may only indirectly be environmental in nature.[38]

There are developments that explain why flexibility is a quality that is considered attractive. The interest in environmental contracts stems from the critique directed to command-and-control regulation, i.e. the implementation and enforcement deficit of environmental law.[39] Contracts were one of several regulatory options offered as a solution for the perceived efficiency and effectiveness issues of traditional regulation. This development in environmental policy-making has been related to deregulation tendencies and, especially at the EU level, to the approach called 'political modernisation' which was born from the recognition of ecological crisis.[40] In essence, political modernisation was an efficiency-oriented approach that sought to fix

[32] See f.ex. Rory Sullivan, *Rethinking Voluntary Approaches in Environmental Policy* (Edward Elgar Publishing, 2006); Stephanie Hayes Richards and Kenneth R Richards, "VIII.24 Voluntary Environmental Agreements," in *Elgar Encyclopedia of Environmental Law*, ed. Michael Faure, vol. 8 (Edward Elgar Publishing, 2023), 363–76.

[33] Hayes Richards and Richards (n 32), p. 366.

[34] Orts and Deketelaere (n 12), p. 6.

[35] COM(96) 561 final, p. 5.

[36] See f.ex. Ministry of Environment in Finland, "Green Deals". https://ym.fi/en/green-deals (3.10.2023).

[37] See Mitkidis (n 30).

[38] Hautereau-Boutonnet (n 3), p. 70.

[39] Rehbinder (n 15), p. 148; Affolder (n 29), p. 156; Cameron Holley, Neil Gunningham, and Clifford Shearing, *The New Environmental Governance*, vol. 1 (Taylor & Francis Group, 2013), p. 1–4.

[40] Anne Kumpula, "Ympäristösopimukset – itsesääntelyä vai yhteisohjausta," in *Juhlajulkaisu Leena Kartio 1938-30/8-2008*, Suomalaisen Lakimiesyhdistyksen julkaisuja 39 (Suomalainen Lakimiesyhdistys, 2008), 147–62, p. 150.

degradation through techno-scientific development and technocratic practices.[41]

Therefore, it is not surprising that one of the justifications for environmental contracting is its effectiveness and efficiency, especially in relation to hierarchical command-and-control regulation. Traditionally, contracting is thought to relieve the public sector's regulatory burden by distributing the burden more equally.[42] Moreover, it has been suggested that contracts' inherent flexibility and voluntarism allow the industry or company in question to find the most cost-effective and adaptive solution to a specific situation.[43] Also from a goal achievement perspective, contracts are suggested to represent an effective regulatory tool. This perspective is usually connected to the implementation of the public goals laid in law, i.e. the vertical effectiveness of contracts.[44] The urgent need for rapid and effective solutions can be most clearly seen in relation to climate change. However, there is scepticism among scholars as to whether environmental contracts or other voluntary approaches do lead in reality to overall improvements in the environmental wellbeing.[45]

Even though political modernisation narrowed the range of terms in which the ecological crisis could credibly be discussed by accepting the parameters of the capitalist system, it paved the way for novel kinds of thinking by raising the role of non-state actors in governance.[46] Continuing ecological degradation and the increasing complexity of social and environmental problems shifted governance/regulation thinking towards 'new environmental governance' (NEG) that is believed to improve the effectiveness, efficiency and legitimacy of responses to environmental problems.[47] NEG differs from partnership and "light-handed" approaches in that it demands higher levels of collaboration, participation, integration, flexibility and adaptability.[48] The approach can be described as polycentric governance, since it involves collaboration between a diversity of private, public and non-governmental stakeholders, who act collectively towards commonly agreed (or mutually negotiated) goals.[49] It relies heavily, inter alia, on participatory dialogue, deliberation, and institutionalised consensus-building practices.[50]

NEG thinking raises another perspective from which the attractiveness of environmental contracts can be understood. As reflected earlier, environmental contracts constitute a broad category in which contracts between local communities and the polluters represent one segment. Broadly speaking, the aim of all environmental contracts is environmental improvements. However, one main purpose of community-polluter environmental contracts is to find agreement despite conflicting motivations between a state agency, the originator of the polluting project and local communities.[51] In this context, contracts can be seen to provide a technology for collaboration and participation since they em-

[41] Maarten A. Hajer, "'Verinnerlijking': The Limits of a Positive Managements Approach," in *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization* (Wiley, 1994), 167–84, p. 172.
[42] Rehbinder (n 4), p. 266.
[43] COM(96) 562 final, p. 6.
[44] Hautereau-Boutonnet has separated vertical and horizontal effectiveness of environmental contracts. See more: Hautereau-Boutonnet (n 3).
[45] Hayes Richards and Richards (n 32), p. 375.
[46] Kumpula (n 40), p. 150; Hajer (n 41), p. 172. Cameron Holley, "Environmental Regulation and Governance," in *Regulatory Theory*, ed. Peter Drahos, 1st ed. (ANU Press, 2017), 741–58, p. 746.
[47] Peter P. J. Driessen et al., "Towards a Conceptual Framework for The Study of Shifts in Modes of Environmental Governance – Experiences From The Netherlands: Shifts in Environmental Governance," *Environmental Policy and Governance* 22, no. 3 (2012): 143–60, p. 144–145.
[48] Holley (n 46), p. 744–747.
[49] Holley, Gunningham, and Shearing (n 39), p. 4.
[50] Holley (n 46), p. 747.
[51] Rehbinder (n 4), p. 159.

body a product of institutionalised negotiation between the parties. Thus, they are a reflection of, and a response to, the crisis of traditional participation, such as EIA and environmental licence procedures, that does not sufficiently secure the acceptance of potentially adversely affected parties.[52] From this perspective, contracts are a means of social self-help in situations where a state is (relatively) inactive, i.e. contracts are believed to enable effective public participation to occur.[53]

The discussion above highlights the important aspects of the attractiveness of environmental contracts, but the question of what distinguishes contracts from other 'voluntary' approaches is still ambiguous, even though the notion that contracts are a product of *institutionalised* negotiation might offer some ideas on that front. However, what differentiates contracts is that they can be used to create individual (or, as some would say, situation-specific) norms that are at least partially legally binding.[54] It should be noted that not all environmental contracts are legally enforceable, but if they are, the contractual form horizontally strengthens the legal pressure on compliance.[55] Thus contracts embody law-like rules and they are subject to – and interpreted through – law and legal institutions. Based on this notion, some have even proposed that differences between command-and-control regulation and contracts are differences largely of degree rather than kind.[56]

This type of argumentation, where contracts' ability to create legally binding norms is invoked, is typical when contracts are compared to companies' self-committed, softer obligations. For example, it has been suggested that if CSR-related obligations are incorporated into companies' supply chain contracts, the obligations might obtain a hard law edge and might, therefore, be more successful in fostering ethical behaviour among suppliers.[57] Some have characterised this as 'certainty', although in the context of contracts the level of certainty is always relative.[58] However, it should be kept in mind that large-scale contracts, which environmental contracts usually are, generally include both hard and soft contractual clauses and both types of clauses may direct parties' behaviour. For example, climate change litigations against corporations have shown that corporate social responsibility is evolving into corporate social liability, and thus companies' soft obligations may have real legal effects.[59] Moreover, the value of soft obligations is not restricted to their legal character. Clauses that, for example, provide tolerance zones for unexpected events or outline the decision-making processes direct parties' behaviour into certain direction. These clauses direct parties' behaviour even though their *legal* enforcement might be pointless or even impossible.[60]

All in all, it appears that the attractiveness of environmental contracts is based on their cha-

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[52] Ibid.

[53] Ibid., p. 148.

[54] See Hautereau-Boutonnet (n 3).

[55] Mitkidis (n 30), p. 75.

[56] See f.ex. Geoffrey C. Hazard, Jr. and Eric W. Orts, "Environmental Contracts in the United States," in *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (Kluwer Law International, 2001): 71–91, p. 77. Dadush has also suggested that contracts are a hybrid in that they operate at the junction of soft and hard law. Sarah Dadush, "Prosocial Contracts: Making Relational Contracts More Relational," *Law and Contemporary Problems* 85, no. 2 (2022): 153–75, p. 158.

[57] Kateřina Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (Eleven International Publishing, 2015), p. 6.

[58] Affolder (n 29), p. 175–76.

[59] The most famous case is perhaps a Dutch case called Milieudefensie et al. v. Royal Dutch Shell.

[60] See more about contracts' multifold functions: Donald J. Schepker et al., "The Many Futures of Contracts: Moving Beyond Structure and Safeguarding to Coordination and Adaptation," *Journal of Management* 40, no. 1 (2014): 193–225.

meleon-like character. We can list the different qualities that are invoked when endorsing the use of environmental contracts, as I have done here, but all these qualities are dependent on their context and framing. Approaches such as political modernisation and NEG have proved the statement to be correct, since they paint a fairly different picture of the same instrument by emphasising different characteristics. In a similar manner, there always appear to be a counter argument for the positive qualities of contracts. For example, some may state that contracts are legally enforceable while others can object to such a statement by arguing that in reality the disputes are rarely taken to court. Moreover, critical scholars might perceive contracts as reinforcing the triumph of neoliberalism, while others might see them as enabling the emergence of collectivism, of which collective labour contracts are a good example.

Although versatility can be seen as the overarching quality of contracts that contributes to the instrument's attractiveness, there is also another appealing characteristic that appears in the discussion above; contracts provide the comfort of familiar dullness in a similar manner like law. They are easy to endorse since they are (probably) the oldest tool defined by the law, and certainly the most used. They also follow the same logic as law by providing norms which are protected by the judicial system. Moreover, even their physical appearance and language resemble law. Thus, contracts could be defined as 'the second-best option'. This conclusion concerns above all a 'market failure' of the regulation in force, i.e. situations where legislation and self-commitments have inflicted disappointments.

The next chapter covers Community Benefit Agreement (CBA), which represents one segment of environmental contracts. They can be categorised as community-polluter environmental contracts, but state agencies may also be involved in, or even a party to, such agreements. Next, I will outline what kind of instrument CBA is understood to represent, and why this type of contractualisation emerges in a specific and topical area of environmental law, i.e. in natural resource exploitation. This chapter's general discussion of environmental contracts' attractiveness is mirrored against CBA's development, which is meant to provide context for the instrument within the wider developments emerging in environmental law. Since CBA has not been, to my knowledge, implemented here in Europe, we need to look at developments elsewhere. The focus is on Canadian and Australian CBAs because, firstly, utilisation of CBAs has been the most popular in these countries, and secondly, their societal and legal systems are more comparable to European counterparts.

2.3 Contractualisation in the Mining sector: what and why?

Mining is one of the expanding issue areas where contracts have been used. This is not surprising, since voluntary approaches have been a characteristic practice of the mining industry for a long time.[61] There is no broad consensus about the role of CBAs or their ability to deliver the improvements they promise.[62] Many writings have in fact provided fairly critical reflections on the topic, and empirical findings show that in some cases the agreements have created significant disadvantages for communities.[63] However, scholars seem to be more inclined to see

[61] Karamanos (n 24), p. 71 Sullivan, *Rethinking Voluntary Approaches in Environmental Policy*, p. 132–135.
[62] Cameron Gunton and Sean Markey, "The Role of Community Benefit Agreements in Natural Resource Governance and Community Development: Issues and Prospects," *Resources Policy* 73 (2021): 1–11.
[63] Ibid., p. 3; Ciaran O'Faircheallaigh, "Explaining Outcomes from Negotiated Agreements in Australia and Canada," *Resources Policy* 70 (2021): 1–7, p. 1.

CBA use as a beneficial rather than disadvantageous practice, since even negatively-framed CBA literature focuses on identifying how the instrument can be improved, rather than simply rejecting it as an unsuitable instrument for extractive governance.[64]

During the same period as VEAs emerged on a larger scale in Europe in the early 1990s, mining-related contracts started to generate serious interest in the Canadian North.[65] CBA, also commonly known as Community Development Agreement (CDA) and, especially in Canada, as Impact Benefit Agreement (IBA), is an instrument that has been used in various jurisdictions for various purposes, and its application is expanding.[66] In Australia and Canada CBAs are negotiated in relation to nearly all major mining projects, and their application is increasing in the United States, New Zealand, and developing countries.[67] Although their use has been the most popular in the mining sector, CBAs have also been used in other major natural resource exploitation projects.[68]

CBAs are typically over hundred pages long documents[69] but they do not have a widely accepted definition. This is mostly explicable by the instrument's goal of being situation-specific. *O'Faircheallaigh*'s Canadian-based description, however, succeeds in capturing most of the essential ideas of CBA. According to him, IBAs are "negotiated agreements which seek to shape the occurrence and distribution of costs and benefits arising from major projects – and which embody the support of Indigenous entities (landowners, communities, governments) for the project concerned" and they "[seek] to reduce negative impacts that would otherwise occur, particularly by providing protection beyond that already available under legislation for Indigenous values and cultural heritage and for the bio-physical environment".[70]

As this description shows, CBA is not merely a benefit-sharing mechanism, as its name suggests, although the compensation dimension is an important part of the instrument. CBA embodies the support of the entities that are somehow tied to the land in the vicinity of the planned resource extraction project. From this perspective, CBA does not differ from commu-

[64] Gunton and Markey (n 62), p. 7.
[65] Emilie Cameron and Tyler Levitan, "Impact and Benefit Agreements and the Neoliberalization of Resource Governance and Indigenous-State," *Studies in Political Economy* 93, no. 1 (2014): 25–52, p. 25.
[66] Andy Hira and James Busumtwi-Sam, "Improving Mining Community Benefits through Better Monitoring and Evaluation," *Resources Policy* 73 (2021): 1–11, p. 3.
[67] Ciaran O'Faircheallaigh, "Aboriginal-Mining Company Contractual Agreements in Australia and Canada: Implications for Political Autonomy and Community Development," *Canadian Journal of Development Studies* 30, no. 1–2 (2010): 69–86, p. 69.
[68] Ciaran O'Faircheallaigh, "Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements," *Journal of Business Ethics* 132, no. 1 (2015): 91–103. p. 97; Jennifer Loutit, Jacqueline Mandelbaum, and Sam Szoke-Burke, "Emerging Practices in Community Development Agreements," *Journal of Sustainable Development Law and Policy* 7, no. 1 (2016): 64–96, p. 65.
[69] There are articles that *inter alia* business contracts commonly include, such as definitions, interpretations, principles, objectives, project description, implementation, term, termination, mediation and arbitration. However, they may also involve more exceptional articles concerning financial participation, employment, workplace conditions, education and training, wildlife compensation, inuit engagement in project stewardship etc. See. Kivalliq Inuit Association and Agnico Eagle Mines Limited, Whale Tail Project Impact and Benefit Agreement, 2017. http://kivalliqinuit.ca/wp-content/uploads/2019/02/Whale-Tail-IIBA-2017-06-15.pdf (10.5.2024); Qikiqtani Inuit Association and Baffinland Iron Mine Corporation, "The Mary River Project Inuit Impact and Benefit Agreement", 2018. https://www.qia.ca/wp-content/uploads/2018/10/Mary-River-IIBA-Signed.-October-22-2018.pdf (10.5.2024).
[70] Ciaran O'Fairchellaigh, "Impact and Benefit Agreements as Monitoring Instruments in the Minerals and Energy Industries," *The Extractive Industries and Society* 7 (2020): 1338–46, p. 1339.

nity-polluter environmental contracts that have been used in Europe. In other words, their aim is to gain the local community's acceptance for the planned project, i.e. build legitimacy for it. However, unlike its European 'counterparts', CBA is strongly tied to indigenous rights. It has mainly been used in regions that suffer from structural challenges originating from a colonial past, but any "affected community", even non-indigenous ones, can be a party to CBA.[71]

Additionally, *O'Faircheallaigh*'s description highlights that CBA is an instrument that enables the reduction of a project's negative impacts on culture and environment. There can be clauses that provide, for example, higher quality standards for wildlife and aquatic ecosystems.[72] Since CBA may include clauses that aim to limit a mining project's negative impacts on its bio-physical environment, the agreement can be seen to represent an indirect environmental contract, similar to supply chain contracts. However, because CBA's regulatory object is a big natural resource project that is directly connected to its environment, CBA can also be seen as a contract that is directly environmental. It should be noted, however, that CBA's economic (or benefit-sharing) dimension is still given strong emphasis because economic concerns are of significance for all the regulators involved, i.e. public sector, the mining company, and the community.[73]

As is the case for environmental contracts, CBA can be either legally binding, which seems to be more common, or more like 'self-commitment' in its nature. Similarly, it may be interpreted as a private law or public law instrument, but this depends on the CBA's content and parties to it. It has often been perceived as a legal or quasi legal document that could be enforced.[74] In Canada and Australia, CBAs are often categorised as private contracts that rely on private law and can be enforced through courts.[75] Moreover, CBA utilisation can occur either on a voluntary basis, or national or subnational laws may require it, which has affected the legal characterisation of the instrument.[76] However, perceiving CBA merely as a subject of private law is misleading. It can in fact provide for an increased role of the state in environmental management.[77] Moreover, the instrument can be used to implement the law, and a public agency may be heavily involved in agreement-making process, or even be a party to the agreement.[78]

Typically, the incentives for the use of CBA relate to concerns about the inadequacy of existing statutory frameworks and the mistrust that Aboriginal and non-governmental participants feel towards the government.[79] These incentives have the same roots as environmental contracting in the case of community-polluter environmental contracts: issues with acceptance, traditional participation and state's inactiveness.

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[71] The World Bank, "Mining Community Development Agreements Source Book" (The World Bank, 2012), p. 19–20. Kotilainen, Peltonen, and Reinikainen (n 1), p. 1.

[72] Affolder (n 29), p. 156.; see also Chris Hummel, "Impact Benefit Agreement Transparency in Nunavut," *Cahiers de Droit* 60, no. 1 (2019): 367–94.

[73] Juha M Kotilainen et al., "Kaivossopimukset – sisällöt, funktiot ja riskit," *Ympäristöpolitiikan ja -oikeuden vuosikirja* XII (2019): 7–41. p. 20–25. Kristi D. Bruckner, "Community Development Agreements in Mining Projects," *Denver Journal of International Law and Policy* 44, no. 3 (2016): 413–28, p. 426.

[74] Hummel (n 72), "Impact Benefit Agreement Transparency in Nunavut," p. 380; Hira and Busumtwi-Sam (n 66), "Improving Mining Community Benefits through Better Monitoring and Evaluation," p. 3.

[75] O'Fairchellaigh (n 70), p. 1338–1339.

[76] Bruckner (n 73), p. 422.

[77] Affolder (n 29), p. 175.

[78] Loutit, Mandelbaum, and Szoke-Burke (n 68), "Emerging Practices in Community Development Agreements," p. 65.

[79] Affolder (n 29), p. 162; Neil Craik, Holly Gardner, and Daniel McCarthy, "Indigenous – Corporate Private Governance and Legitimacy: Lessons Learned from Impact and Benefit Agreements," *Resources Policy* 52 (2017): 379–88, p. 387.

In other words, minority groups are seeking greater autonomy. However, it seems that in Europe distrust is directed in equal measure towards mining companies and the government and administrative authorities.[80] In the context of CBA, inadequate statutory frameworks and consequent mistrust are usually the result of the differing interests between governmental/public entities and the affected community. For example, a municipality or government might be more interested in positive economic impacts, while stakeholder groups may focus on the mitigation of the negative impacts of mining, commitment to compensation and the improvement of dialogue.[81]

These incentives have affected the development of CBA in a way that can be described as a NEG-like approach, in which higher levels of collaboration, participation, integration, and adaptability are demanded. For example, in Finnish research, CBA is framed as collaborative governance.[82] Collaborative governance is one of NEG's applications that prescribes how NEG operates.[83] It emphasises negotiation-based problem-solving and the objective of finding consensus.[84] These viewpoints underline the importance of public participation simultaneously as they show that there are gaps in participation possibilities and public participation's perceived effectivity. CBA ideally provides a platform for continuous collaboration, from negotiations to monitoring and feedback mechanisms.[85] Moreover, participation of the parties should be effective, since agreement-making requires consensus between all the signatories to be built.

This kind of governance framing is understandable in the societal context of a Nordic welfare state, but the governance categorisation always depends on how CBA is implemented. Some researchers have suggested that while CBA embodies an example of complex interactions between public regulation and private arrangements, it is useful to examine CBAs workings through the lens of private governance.[86] However, this notion concerns mainly those CBAs in which governments play no role.[87] Either way, both governance perspectives highlight that CBA implementation might help in building legitimacy for a planned project because it enables a local community's procedural and substantive expectations to be fulfilled.[88]

Another incentive for contracting in the mining sector is CBA's legally binding and situation-specific nature. This situates CBA at the junction of discretionary industry initiatives and public regulation by providing flexibility and certainty. Again, the attractiveness of CBAs mirrors that of (community-polluter) environmental contracts. Communities' and public interest groups' disappointment with discretionary industry initiatives, such as CSR and different performance standards, stems from the lack of effective enforcement mechanisms, since it has been proven that there exists a substantial gap between companies' rhetoric and delivery.[89] Public regulation, on the other hand, is seen to be inflexible and unresponsive, especially to the specific circumstances of communities, and it can be exposed to industry capture.[90]

[80] Kivinen, Kotilainen, and Kumpula (n 1), p. 175.
[81] Kotilainen, Peltonen, and Reinikainen (n 1), p. 7. Kotilainen (n 73), p. 25.
[82] Kotilainen, Peltonen, and Reinikainen (n 1), p. 8.
[83] Holley (n 46), p. 747–748.
[84] Juha M Kotilainen, Lasse Peltonen, and Rauno Sairinen, "Yhteistoiminnallinen ympäristöhallinta erityispiirteineen ja sovelluksineen," *Ympäristöpolitiikan ja -oikeuden vuosikirja* XIV (2021): 7–47. p. 36.
[85] The World Bank (n 71).
[86] Craik, Gardner, and McCarthy (n 79).
[87] Ibid., p. 386.
[88] Ibid., p. 387; Kotilainen, Peltonen, and Reinikainen (n 1), p. 8.
[89] O'Faircheallaigh (n 68), p. 93–95.
[90] Ibid., p. 92.

As a conclusion to the first part of this article, it can be said that CBA's attractiveness mirrors that of environmental contracts in many respects, even though the societal and legal contexts in which CBA emerges differ. In CBA discussion, situation-specific, collaborative and binding characteristics are emphasised, which has focused the conversation on their acceptability (or legitimacy). These reflections, however, in many ways follow the same argumentation model as community-polluter environmental contracts, which is one segment in the broad category of environmental contracts. Thus, this part of the article has shown that contractualisation that occurs in the mining sector is not an isolated phenomenon occurring in only one area of environmental law. Contracts are rather spreading to new areas of environmental law as the views on what constitutes good governance are developing into more multifold directions.

Another conclusion that can be made in the light of the analysis above is that there are two main reasons for contracts' attractiveness. Firstly, contracts are flexible in many ways. They enable the traditional regulatees to become regulators in addition to being able to adapt to different contexts, whether the context is public or private, conflicted or cooperative, implementation of defined goals or creation of new objectives. The second main reason is that contracts enable the creation of law-like norms. This is perceived to help in integrating the agreed goals and policies into parties' practice. On the other hand, it enables legal enforcement in cases where the agreed rules are not followed.

The next part of this article takes a step back by examining a phenomenon, or rather a theoretically anchored framework, called 'proceduralisation'. Contractualisation can be seen as one of the many forms of proceduralisation. Thus, proceduralisation provides explanations on a broader legal and societal level as to why a contract, or more specifically CBA, is an attractive regulatory instrument. The next part begins with the introductory chapter outlining my understanding of proceduralisation. The two subsequent chapters cover two well-known theories (or strategies), namely reflexive law and responsive regulation, that fall under proceduralisation.

3. Proceduralisation

3.1 Understanding proceduralisation

Here I will develop my understanding of proceduralisation. In some legal texts, where the term proceduralisation is referred to, the scope has been limited to court proceedings.[91] It has been used in a similar manner as contractualisation; it encapsulates the observation that proceedings are increasing in number and assuming a greater part of social and legal life. However, proceduralisation can also be seen as a more diverse, theoretically anchored approach, and this is the understanding this article assumes.

The term proceduralisation or 'procedural approach' has been used to create a bridge to the procedural theories that take the difficulties of regulating pluralistic and complex modern societies as their starting points.[92] Thus, these accounts usually begin with the reference to Habermas who advocated a procedural turn. He argues that due to the increased complexity of the modern welfare state the form and the goals of the law should be retrieved from practices and

[91] See f.ex. Karl-Heinz Ladeur, "Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law," in *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organisation* (Wiley, 1994), 299–336.; Christian Pigache, *Les Évolutions Du Droit : Contractualisation et Procéduralisation* (Université de Rouen, 2004).

[92] Black (n 6); Mark Dawson, *New Governance and the Transformation of European Law : Coordinating EU Social Law and Policy*, Cambridge Studies in European Law and Policy (Cambridge University Press, 2011), p. 103–163.

preferences of citizens.[93] Hence, the goals must be articulated *directly* by those who are subject to legal procedures, i.e. the addressees of the law must be the ones who define the scope and boundaries of the programs being advanced in their name.[94] These views highlight the tension which is occurring between general legal norms and the complex reality of social circumstances. Environmental issues are perhaps the most obvious context in which the tension occurs.

The exact meaning of proceduralisation is ambiguous. Dawson has used proceduralisation as an analytical framework to conceptualise new governance methods in the context of EU social law. In his work proceduralisation highlights a common challenge or tension to which European law has had to respond, namely the functional and territorial complexity of the European polity, and the regulatory environment within which new governance methods must live.[95] Howarth has, in a similar but narrower manner, used the term to encapsulate the development of EU environmental legislation in which mandatory environmental standards are supplemented by regulatory mechanisms that allow greater national and local flexibility and discretion in determining what particular substantive outcomes need to be realised.[96] Black has referred to proceduralisation when observing the shift to procedures and participation. She uses proceduralisation as an umbrella term to indicate the strategies of 'decentring' and inducement which include Habermas's discursive democracy and Teubner's reflexive law.[97]

Based on the earlier applications of proceduralisation I understand the term as an analytical starting point that highlights the tension between traditional democratic rule-making and the need for flexibility while simultaneously underlining the shift to procedures, participation, and inducement. Thus, proceduralisation is a broad umbrella under which exist different theories that provide more detailed diagnosis of the regulatory dilemma and recommendations for how to solve it. One of these theories is reflexive law, which is perhaps the most frequently connected to proceduralisation.[98] Reflexive law aims for a certain form of democratisation by emphasising the need for law to focus on the regulation of self-regulation.[99] Another theory that reflects proceduralisation is responsive regulation that provides a different but complementary viewpoint regarding CBA's attractiveness.[100] It highlights CBA's ability to enable the development of a local community's regulatory agency. The next two chapters will analyse CBA first through reflexive law and thereafter through responsive law.

3.2 CBA as a reflexive law mechanism

The emergence of reflexive law dates back to the time when scholars saw the law as one among several other modes of political regulation.[101] German legal scholar *Gunther Teubner* analysed the evolution of modern law in the 1980's and he called the emerging kind of legal structure 'reflexive law' which is one perspective on the process of social and legal change.[102] In other

[93] Habermas (n 5), p. 408.
[94] Ibid., p. 408–410.
[95] Dawson (n 92).
[96] William Howarth, "Aspirations and Realities under the Water Framework Directive: Proceduralisation, Participation and Practicalities," *Journal of Environmental Law* 21, no. 3 (2009): 391–418, p. 396–398.
[97] Black (n 6).
[98] Black (n 6); Dawson (n 92).
[99] Rogowski (n 8), p. 38–39. Gaines (n 8), p. 8–9.
[100] See Black (n 6), 598.
[101] Peer Zumbansen, "Law after the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law," *The American Journal of Comparative Law* 56, no. 3 (2008): 769–808, p. 787.
[102] Gunther Teubner, "Substantive and Reflexive Elements in Modern Law," *Law & Society Review* 17, no. 2 (1983): 239–85.

words, reflexive law is built on the observation that the complexity of society is increasing in terms of differentiation (social change) at the same time as the scope of governmental regulation of the different areas of society is dramatically expanding (legal change[103]). Reflexive law is an attempt to *conceptualise* a new model of law which could be adequate in addressing the challenges of these changes.[104] Moreover, reflexive law emphasises the need for law to focus on regulation of self-regulation.[105] Therefore, *Teubner's* analysis highlights that the perception of law's rationality needed to be diversified and reflexive law was one way of achieving that.

Even though reflexive law has earned plenty of criticism over the years, it has been used in various areas of law. Especially in environmental law, reflexive law has been used to analyse different self-regulatory models, such as reporting and certification systems and CSR, but also to observe environmental law more broadly.[106] Additionally, in other fields of law, such as labour law and human rights, reflexive law has received scholarly attention.[107]

Central for *Teubner's* reflexive law is the attempt to separate the procedural rationality of law from the purposive or 'substantive' rationality that was characteristic for the social welfare state. Thus, reflexive law does not impose the substantive ends to be achieved, but rather induces social subsystems (such as economics, politics, the marketplace and the law itself) towards those ends by using indirect strategies.[108] Since social processes happen in and between semi-autonomous social subsystems[109], law becomes a system for the coordination of these actions.[110] Therefore, in reflexive law *Teubner* melds *Luhmann*'s system theoretical ideas, which emphasise the aspect of coordination between social subsystems, and *Habermas*' arguments about the need for democratisation of social subsystems to institutionalise procedural legitimation.[111] He summarised his theses by stating that:

"(I) Reflexion within social subsystems is possible only insofar as processes of democratization create discursive structures within these subsystems. (2) The primary function of the democratization of subsystems lies neither in increasing individual participation nor in neutral-

[103] Teubner describes this 'welfare-regulatory intervention'. Ibid., p. 240.
[104] Zumbansen (n 101), p. 793.
[105] Rogowski (n 8), p. 38–39.
[106] Eric W. Orts, "Reflexive Environmental Law," *Northwestern University Law Review* 89, no. 4 (1995 1994): 1227–1340; Gaines (n 8); Karin Buhmann, "The Danish CSR Reporting Requirement as Reflexive Law: Employing CSR as a Modality to Promote Public Policy Objectives through Law," *European Business Law Review* 24, no. 2 (2013): 187–216; Ronan Kennedy, "Rethinking Reflexive Law for the Information Age: Hybrid and Flexible Regulation by Disclosure," *George Washington Journal of Energy and Environmental Law* 7, no. 2 (2016): 124–39; Ngaya Munuo and Jan Glazewski, "The Implementation of REDD+: Self-Governance through the Lens of Reflexive Law," *Carbon & Climate Law Review* 2018, no. 2 (2018); Adaeze Okoye, "Reflexive Law and Section 172 Reporting: Evolution of Social Responsibility within Company Law Limits?," *European Business Law Review* 32, no. 3 (2021): 501–20.
[107] Rogowski (n 8),; Karin Buhmann, "Neglecting the Proactive Aspect of Human Rights Due Diligence: A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action," *Business and Human Rights Journal* 3, no. 1 (2018): 23–46; Eliah English, "Section 54 of the Modern Slavery Act 2015 and the Corporation," *SOAS Law Journal* 6, no. 1 (2019): 87–142; Hazel Conley, "Gender Equality in the UK Public Sector: Is Reflexive Legislation the Way Forward?," in *Gender and Diversity Studies: European Perspectives*, ed. Ingrid Jungwirth and Carola Bauschke-Urban (Verlag Barbara Budrich, 2019), 71–87.
[108] Teubner (n 102), p. 254–255.
[109] Teubner's semi-autonomous social subsystems seem to build on the concept of semi-autonomous social fields that was originally developed by Moore. See Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law & Society Review* 7, no. 4 (1973): 719.
[110] Teubner (n 102), p. 242.
[111] Gaines (n 106), p. 4–5.

izing power structures but in the internal reflexion of social identity".[112]

Unfortunately, in later writings, *Teubner* gives more emphasis on systems theories which has, according to *Gaines*, led to reflexive law missing essential social elements it previously included.[113] In systems theories the concept of autopoiesis, which is a biological concept referring to self-production, is essential.[114] In the autopoietic line of thinking, systems are separated from their environment, and the environment consists of other systems; in other words, the autopoietic concept includes a system-environment dichotomy.[115]

Teubner talks about the law's radical closure and openness which both occur simultaneously because information and interference (or 'coupling') combine operative closure of the law with cognitive openness to the environment. This means that law produces an 'autonomous legal reality' by generating knowledge within the system itself. It orients its operations according to this autonomous reality, without any real contact with the outside world. However, the law is still connected with its social environment, but this is possible through mechanisms of interference which operate between systems. Thus, in autopoiesis the emphasis shifts from design and control to autonomy and sensitivity to the environment; in other words, a shift happens from planning to evolution. However, he notes that the proceduralisation focus does not mean the abandonment of substantive legal norms.[116] Moreover, reflexive law itself has a purposive orientation.[117]

However, to return to *Gaines*'s critique, these developments of reflexive law led to its missing the two essential social elements: within-system democratisation and between-system coordination. These elements must be restored if reflexive law strategies are to work properly in the field of environmental law, especially with regard to sustainable development.[118] He explains this conclusion by saying:

> "So long as system coordination is properly understood to include exchange of information and interaction between and among different social systems, specifically including all levels of government and affected nongovernmental individuals and organizations, reflexive law reinforces democratic participation and the opportunity for environmental policy to incorporate important non-scientific values into the environmental protection side of sustainable development and important noneconomic values into its human development side."[119]

In other words, the multiple initiatives of sustainable development can neither operate reliably nor with legitimacy in the absence of shared information and mechanisms of social response to that information.[120] *Gaines's* attempt to restore reflexive law to its original form is in my opinion well justified, since modern environmental law

[112] Teubner (n 102), p. 273.
[113] Gaines (n 106), p. 9.
[114] Gunther Teubner, *Law as an Autopoietic System*, European University Institute Series (Oxford/Cambridge: Blackwell Publishers, 1993).
[115] See more about the paradoxical nature of the system-environment dichotomy: Andreas Philippopoulos-Mihalopoulos, "Towards a Critical Environmental Law," in *Law and Ecology: New Environmental Foundations*, ed. Andreas Philippopoulos-Mihalopoulos, 2011, 18–38.
[116] Teubner, (n 114), p. 64–67.
[117] Black (n 6), p. 603.
[118] Gaines (n 106).
[119] Ibid., p. 24.
[120] Ibid., p. 9. Black also seems to criticise reflexive law partly on this same basis as Gaines, since she seems to categorise reflexive law as thin rather than thick proceduralisation, the thick proceduralisation reflecting Habermas's ideas of discursive democracy. Black (n 6).

grapples constantly with information and interaction challenges.

So, what does all this have to do with environmental contractualisation and more specifically with CBA? As I have argued before, contractualisation can be seen as a result of proceduralisation, i.e. contractualisation is one form in which proceduralisation appears. Reflexive law as described above, on the other hand, is a certain type of proceduralisation strategy that aims to explain how society has changed and how we should address these changes. Thus, reflexive law can help to understand and conceptualise why CBA is an attractive instrument for the mining sector, which is currently facing major acceptance issues. As the legitimacy of the mining project is the purposive orientation incorporated into CBA, i.e. its aim seems to be to create a structure that *enables* legitimacy to be built, the 'original' reflexive law and *Gaines*' elaborated version of it seem to be the most fruitful analytical bases.

Many writings related to mining regulation highlight the tension between general regulation and local regulatory needs, which is seen to be one of the root causes of the legitimacy issues being faced by mining projects. CBA's 'tailor-made', flexible character emphasises this notion. The local circumstances differ significantly, as do the reasons for the opposition. Moreover, the extractive projects and their effects vary greatly. In reflexive law language, the local communities and their needs are differentiating, which results in increased complexity (societal change). This has been taken into account by legislators, since nowadays local people have an increasing number of participatory possibilities available to them (legal change).

However, the participation possibilities have not resulted in legitimacy since they are not felt to be effective, and the multiplicity of different participation procedures has resulted in confusion among local people about what information is relevant in each procedure.[121] Thus, the relationships between mining companies and local communities are hard to regulate with direct strategies. This conclusion is in line with Teubner's belief that direct regulation may actually present problems of motivation because it engenders resistance by the regulated system.[122] Therefore, it seems more suitable to focus on procedure and communication, as reflexive law does, because they are the essential ingredients of legitimate decisions in democratic societies.[123]

If CBA is approached as a reflexive law mechanism, its democratising and coordinative elements can be traced.[124] By following this approach it can be perceived that CBA formulates a knowledge and norm-generating social subsystem, i.e. it allows societal actors, in this case the mining company and the local community, to interact and formulate norms based on learning.[125] Technically speaking, this means that CBA includes negotiations, monitoring and feedback mechanisms.[126] In more abstract terms, these 'processes of democratisation' ideally enable 'the creation of discursive structures within the subsystem'.

The between-system coordination is a slightly more ambiguous and speculative part of this approach. At the same time as CBA formulates a knowledge and norm-generating social subsystem, it can be seen to constitute a mechanism of social response that responds to the information a local community provides. As has been noted in many cases related to sustainable develop-

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[121] Sonja Vilenius, "Kaivossopimus – vaikuttavampaa osallistumista ja lisää legitimiteettiä?," *Ympäristöjuridiikka* 3–4 (2022): 34–58, p. 42.
[122] Teubner (n 114), p. 91.
[123] See Gaines (n 106), p. 23.
[124] Okoye has regarded CRS semi-autonomous subsystems as a result of the law's limitation. Okoye (n 106).
[125] See Buhmann (n 106), p. 202.
[126] See The World Bank (n 71).

ment, noneconomic values are hard to incorporate into corporations. CBA provides a platform and a mechanism that enables a mining company's representatives to acquire knowledge about local needs, and this information can be responded to by making contractual clauses that result in changes in the company's behaviour. Thus, the 'local' information could be incorporated into the mining company's 'coding' since the main focus of CBA is the company's actions, i.e. what the company can do to satisfy local people so that they sign the agreement. However, it should be kept in mind that "reflexive law will always need to be supplemented with substantive law determined through legislation and regulation by public authorities"[127]

3.3 CBA and agency building

The deregulation debate was not only a starting point for the theory of reflexive law, but also for the theory of responsive regulation that was developed by *Ian Ayers* and *John Braithwaite* in the 1990s in Australia. Responsive regulation, as well as reflexive law, aims at providing a solution to the challenge of how to regulate modern society. However, the scholars approach the issue from different viewpoints. Both theories emphasise the role of self-regulation, but while *Teubner's* main focus is on law and its general development in society, *Ayers* and *Braithwaite* are more interested in the interplay and the mix of public and private regulation concerning corporations and industries.[128] Consequently responsive law builds on the polycentric understanding of governance where important roles in governance are played by non-governmental actors, in this case corporations/industry.[129] In other words, the viewpoint in responsive regulation is the regulators and the regulatees, while in reflexive law it is the systems, not the intra-system actors per se.

Responsive regulation builds on *Braithwaite's* conclusion that companies may sometimes be motivated by making money, and at other times by being socially responsible; responsive regulation argues that this goodwill of actors should not be undermined by the strategy of punishment.[130] Thus, responsive regulation theorises how a plurality of motivations for compliance interact by establishing an escalating enforcement pyramid which generates a synergy between punishment and persuasion.[131] In *Ayer's* and *Braithwaite's* model enforcement pyramid self-regulation is categorised as persuasion and it constitutes the lowest and first part of the pyramid, and enforced self-regulation is the second part of the pyramid.[132] This mirrors responsive regulation's idea that the company has the opportunity to create tailored self-regulation and, in case of enforced regulation, to create self-regulation that holds institutionally-recognised position. If this opportunity is ignored or wasted, however, the government provides harsher standards.[133]

Since different motivations and self-regulation's primacy sit at the core of the theory, the approach highlights how self-regulation *enables* companies to build regulatory agency. Self-regulation's enabling role means that if a company or industry does not make their private regulation work, this very behaviour channels the regulatory strategy to greater degrees of government in-

[127] Gaines (n 106), p. 24.
[128] Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregualtion Debate*, Oxford Socio-Legal Studies (Oxford University Press, 1992), p. 3.
[129] See Holley and Shearing (n 9), p. 166.
[130] Ayers and Braithwaite (n 128), p. 24.
[131] Buhmann (n 107), p. 26–27; Ayers and Braithwaite (n 128).
[132] Ayers and Braithwaite (n 128), p. 35–39. CBA can be categorised as either self-regulation or enforced self-regulation depending on the legal context.
[133] Ibid., p. 101.

tervention.[134] Thus, not all companies/industries have the same degree of regulatory agency. As responsive regulation argues, regulation should be responsive to those companies/industries that are willing to go through the agency building process, i.e. to create credible and effective self-regulation that should also be responsive to the context in which private regulators are less-motivated.

Before proceeding to the analysis of how CBA enables regulatory agency building, I will add a heuristic framework[135] called 'smart regulation' to the puzzle, since it strengthens responsive regulation by invoking the strategy of surrogate regulator harnessing.[136] *Gunningham's*, *Grabosky's*, and *Sinclair's* smart regulation builds on responsive regulation, but it considers a broader range of regulatory actors, namely quasi-regulators/third parties such as public interest groups and professional bodies.[137] Smart regulation suggests, according to *Gunningham*, that "markets, civil society and other institutions can sometimes act as surrogate regulators and accomplish public policy goals more effectively, with greater social acceptance and at less cost to the state."[138] Thus, smart regulation holds that third parties have an important and potentially beneficial role in rule-making and the 'tripartism' should not be just a strategy for implementing laws and regulations.[139]

The reason for this kind of elaboration was the substantial body of empirical research revealing that there is a plurality of regulatory forms, with numerous actors influencing the behaviour of regulated groups in a variety of ways.[140] Moreover, smart regulation was developed to address in particular the increasingly complex environmental problems during the period in which the dominance of neoliberalism had resulted in the relative weakening of formerly powerful environmental regulators, i.e. the state.[141] Hence, essential for smart regulation is the construction of multi-instrument mixes in which different regulatory instruments complement each other's weaknesses, and the engagement of a variety of first- (government), second- (business), and third-party (commercial and noncommercial) participants in the regulatory process.[142]

However, there are preconditions for the use of a smart regulation approach. Firstly, the circumstances in which second and third parties should be mobilised, and which members of these parties should be involved, should be carefully considered.[143] Additionally, smart regulation's empowerment principle suggests that the government has an important role in creating the necessary preconditions for second or third par-

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134 See Ayers and Braithwaite (n 128), p. 4.

135 Van Gossum et al. have suggested that smart regulation should be understood rather as a heuristic framework than a coherent theory. Peter Van Gossum, Bas Arts, and Kris Verheyen, "'Smart Regulation': Can Policy Instrument Design Solve Forest Policy Aims of Expansion and Sustainability in Flanders and the Netherlands?," *Forest Policy and Economics* 16 (2012): 23–34, p. 24.

136 Neil Gunningham, "Enforcing Environmental Regulation," *Journal of Environmental Law* 23, no. 2 (2011): 169–201, p. 197.

137 Neil Gunningham, Peter Grabosky, and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998); Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice*, 2nd ed. (Oxford University Press, 2012), p. 265–266.

138 Gunningham (n 136), p. 174.

139 Although, responsive regulation notes the importance of third-party involvement in regulation, the role of tripartism is limited mainly to preventing corruption and capture of authorities by punishing regulatory agencies who fail to punish guilty firms. Ayers and Braithwaite (n 128), p. 54–57.

140 Neil Gunningham and Darren Sinclair, "Smart Regulation," in *Regulatory Theory: Foundations and Applications*, ed. Peter Drahos (ANU Press, 2017), 133–48, p. 133–134.

141 Ibid., p. 134.

142 Neil Gunningham and Darren Sinclair, "Integrative Regulation: A Principle-Based Approach to Environmental Policy," *Law & Social Inquiry* 24, no. 4 (1999a): 853–96, p. 853.

143 Ibid., p. 878.

ties to assume a greater share of the regulatory burden, because their participation in regulatory processes is unlikely to arise spontaneously. In other words, government should act principally as a catalyst or a facilitator.[144]

When reading CBA through the brief review of responsive and smart regulation provided above, another aspect of the instrument appears. While reflexive law highlighted the democratising and coordinating elements of CBA, responsive and smart regulation raises how this type of regulation enables the development of the second party (mining company) and the third party (local community) agency in regulating. The mining company and local community become 'surrogate' regulators who have the power to make decisions when they take part in the agreement-making processes. Their positions differ significantly from those they have in the licensing and EIA processes due to this decision-making power, even if this decision-making happens within the frameworks that the government has provided.

The frameworks and preconditions, however, are essential in order to empower the parties. For example, in Australia the government has 'catalysed' agreement-making between indigenous people and mining companies by enacting the Native Title Amendment Act 1998, which introduces legally binding Indigenous Land Use Agreements (ILUAs), and nowadays they have become frequently used instruments.[145] Meanwhile in Finland, Kotilainen et al. have argued that the key reason why CBA has not been established here yet is the lack of the institutionalised form.[146] CBA's institutionalised position would most likely facilitate the coercion of the company by the local community in the desired direction. Additionally, it should be noted that CBA should not be seen as a disconnected part of the regulatory mix concerning mining projects; rather it should be noted that there occurs a dependence between CBA and other regulatory tools.

4. Conclusions

This article sought to contextualise CBA with respect to the regulatory developments that are emerging in Europe, especially in the field of environmental law. As the discussion above shows, the development of contractualisation is emerging in different European countries. Contracts have been used in various ways in diverse issue areas. However, this development seems to be overlooked as contracts are increasingly used today as one narrowly focused part of the regulatory frameworks that exist in different sectors of environmental law. CBA can be seen as one embodiment of such development. It represents one segment of environmental contracts, namely community-polluter contracts, that have already been used in some European countries.

Contractualisation can be seen as a result of the more widely recognised shift towards procedures. Proceduralisation covers the strategies that aim to develop procedures that enable the regulatees to become the regulators. Contracts can be seen as such, since ideally they include negotiations in which the parties to the contract become the regulators who decide what they can agree on. Therefore, CBA does not represent as unorthodox a regulatory solution as it seems at first glance, rather in many respects it can be seen to reflect the developments that are already occurring in Europe. In other words, the disuse of CBA does not seem to be a result of CBA's unsuitability for European contexts. A more credible conclusion is that this disuse results from the

144 Ibid., p. 876–877.
145 Catherine Howlett and Rebecca Lawrence, "Accumulating Minerals and Dispossessing Indigenous Australians: Native Title Recognition as Settler-Colonialism," *Antipode* 51, no. 3 (2019): 818–37, p. 825–826.
146 Kotilainen, Peltonen, and Reinikainen (n 1), p. 8.

fact that the continent's mining activities have been decreasing over the years.

The second aim of this article was to lay out why CBA appears to represent an attractive regulatory solution in tackling social acceptance issues. Contractualisation analysis outlined the reasons referred to when endorsing the application of environmental contracts. Consequently, it highlighted the two overarching qualities that make environmental contracts, including CBA, promising regulatory tools.

The first quality is flexibility. It illustrates contracts' adaptability in different contexts and for different purposes. The context may be public or private, conflicted or cooperative. The purpose may be to implement defined goals or create new objectives. Flexibility also explains the difficulty of deciding whether the contract is a preferable regulatory instrument, since this aspect of contracts allows them to be used and framed in multiple ways. The second quality is their law-like character. Contracts follow the same logic as law, i.e. providing norms which are protected and recognised by the judicial system. This appears to help in integrating the agreed goals and policies into the parties' practices. When the two qualities are combined, we begin to understand why environmental contracting has expanded in use. Contracts provide a familiar solution for the diverse 'market failures' of the regulation in force. Ideally, they combine the advantages of legislation and self-commitments.

The discussion of proceduralisation deepened the analysis. It provided a more in-depth examination of why the above-mentioned qualities are seen to be beneficial by analysing CBA through the theories of reflexive law and responsive regulation. The reflexive law approach highlights CBA's democratising and coordinating elements. The former can be traced to CBA's ability to formulate a knowledge and norm-generating social subsystem, i.e. it allows societal actors, in this case the mining company and the local community, to interact and formulate norms based on learning. Negotiations, monitoring and feedback mechanisms enable interaction and learning by creating discursive structures within CBA. The coordinating element of CBA enables local information to be incorporated into a mining company's 'coding' since the company has agreed on the norms and is (legally) bound by them. Therefore, CBA's flexibility allows (but does not guarantee) democratisation in a similar way as its law-like character allows (but does not guarantee) coordination.

Responsive and smart regulation, on the other hand, raised CBA's ability to strengthen the development of a mining company's and a local community's agency in regulating. The mining company and local community become surrogate regulators who have the power to make decisions when they take part in the agreement-making processes. This position differs significantly from licensing processes where especially the local community is a participator rather than a regulator. CBA's flexibility and law-like character emphasise the parties' agency in regulating since they allow the parties to create binding norms.

This article has portrayed CBA as a possibility and therefore it does not provide critical reflections on the instrument. The purpose is not to deny the risks that this type of instrument presents. Rather the purpose is to provide a general contextualisation that also allows for critical and more detailed accounts in Europe-based legal writings in the future.

Allocation procedure and its applicability to the allocation of the national total maximum emission amount of pollutant

*Mirjam Vili**

Abstract

The Estonian Atmospheric Air Protection Act (AAPA) states, that the granting of an air pollution permit and an integrated environmental permit should be refused, if the emission of a pollutant discharged from the emission source causes the total maximum emission limit set for specific pollutants to be exceeded in the territory and economic zone of Estonia. Thus, the total quantitative limit for the permit applicants regarding the discharge of specific pollutants has been set with this provision. Any quantitative limit to a certain benefit can lead to a situation where there is not enough of it for all interested parties. This, in turn, means that the state has to make a decision on who to prioritize as benefit recipients. When granting the permit, the state may be in a situation where, due to the total emission limit, it has to select operators who are allowed to use the ambient air as a public good to discharge the pollutant. Therefore, the question arises as to which requirements should be met by such a selection procedure. This article dwells upon the question whether, in the form of the regulation of the AAPA, it is an allocation procedure as one of the special types of administrative procedure. In doing so, the requirements of the allocation procedure developed in German legal literature have been taken as a benchmark in the absence of an appropriate approach in Estonia.

Key words: ambient air protection, (national) emission ceilings, NEC-Directive, environmental permits, principle of prevention, allocation procedure

Introduction**

Regardless of the time perspective in which the finite nature of environmental benefits is discussed, there seems to be a consensus today that environmental resources are not infinite, so economic growth cannot be infinite either. The world's base of natural wealth and resources is finite and is constantly being depleted because of exploitation and pollution. At the same time, the demand for resources is increasing due to population growth and related socioeconomic developments. Ambient air – as well as water – although, according to the prevailing opinion, a renewable natural resource is still not replaceable for humanity according to current knowledge. It is not possible to obtain or produce ambient air of a quality suitable for living on planet Earth, therefore it is not possible to draw an equal sign between the self-sustainability of renewable natural resources and the limitlessness of resources.[1]

The German philosopher C. F. Gethmann concludes that the environment as a whole is

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** Section 1 of this article is based on an article by the same author published in Juridica 2022/3, p. 195–204 (in Estonian).

[1] P. Reszat, "Gemeinsame Naturgüter im Völkerrecht. Eine Studie zur Knappheit natürlicher Ressourcen und den völkerrechtlichen Regeln zur Lösung von Nutzungskonflikten" München: C.H.Beck, 2004, p. 56.

therefore a good that is not infinitely available.[2] Koenig is also in the opinion that environmental protection in its essence is simply the sharing of rights to use the limited environmental resources.[3] Murswiek believes that all environmental problems are also problems of sharing, as these originate from the scarcity of man-made environmental benefits.[4] If one social group gains the right to emit a pollutant, another social group loses out in air quality at its expense.[5] Thus, today all natural resources can be treated as an absolutely finite resource and all environmental use can be reduced to resource sharing.

However, the allocation of the right to use a natural resource as a finite resource between the specific persons participating in the administrative procedure should be distinguished from the general public-law use of environmental resources created by the state in the public interest. In the field of atmospheric air protection, the activities of operators of stationary emission sources may be restricted by refusing to authorise the activities that would result in exceeding the total emission limit set for the pollutant. In principle such a total limit can be set for all stationary pollution sources, for sources in specific sectors or for sources at regional or national level. The latter solution is used in Estonian law. More specifically, according to Section 97 of the Atmospheric Air Protection Act[6] (hereinafter **AAPA**), an air pollution permit and an integrated environmental permit (hereinafter together referred to as **environmental permit**) should be refused if the emissions of pollutants released from the emission source cause an exceedance of the total maximum emission amounts of pollutants (hereinafter also as **total emission**) in the territory and economic zone of Estonia.

The allocation of the total emission within a specified limit is an allocation of the emissions as a limited resource by the state. The article examines, based on the regulation in force in Estonia, the question of whether limiting the granting of environmental permits with total emissions means that the administrative procedure in which the emissions are granted belongs systematically to the allocation procedure as a special type of administrative procedure. The comparative benchmark here is – in the absence of relevant approaches in Estonia – German legal literature about allocation procedure in the German administrative law. The adoption of German law as one of the benchmarks in this article is justified by the general tendency of Estonian law to use several solutions originating from the Germanic legal system in the creation of its legal system after the restoration of the independence of the Republic of Estonia. Estonian administrative law and environmental law also have very strong similarities with German law. This fact makes legal solutions easily comparable.

This regulatory measure stands out as unique within the context of Estonian law. When a permit is refused, it affects the fundamental rights of applicants. It is crucial to define the nature of the regulation, not only for the sake of systematising it in the theory of law, but also for ensuring its constitutional validity. For this purpose, a broad overview of the allocation procedure, its nature, function, and important features is provided. Then, the presence of important features of the allocation procedure in allocating the total emission is comparatively examined. Thereafter,

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[2] C.F. Gethmann, "Ethische Probleme der Verteilungsgerechtigkeit im Umweltstaat". in C.F. Gethman, M. Kloepfer, S. Reinert "Verteilungsgerechtigkeit im Umweltstaat", Bonn: Economica Verlag GmbH, 1995, p. 28.

[3] C. Koenig, "Die öffentlich-rechtliche Verteilungslenkung". Berlin: Duncker & Humblot, 1995, p. 944.

[4] D. Murswiek, "Privater Nutzen und Gemeinwohl im Umeltrecht". Deutsches Verwaltungsblatt, 1994, p. 77 ff.

[5] C. Calliess, "Rechtsstaat und Umweltstaat". Tübingen: Mohr Siebeck, 2001, p. 363.

[6] Atmospheric Air Protection Act. Available at https://www.riigiteataja.ee/en/eli/529092023001/consolide (most recently accessed on 01.04.2024).

the main constitutional prerequisites for the procedure due to the important features of the allocation procedure are examined and the general important structural elements characteristic of the allocation procedure resulting from these assumptions are pointed out. Finally, it is analysed whether the important structural elements characteristic of the allocation procedure have been provided for in the current regulation of Estonia and the conclusions are made on the basis of this about the nature of the total emission allocation procedure. Prior to the above discussions, the author provides an overview of the context in which the regulation under consideration in the article is located, taking into account the European Union and national air quality regulations.

In order to delimit the scope of the article, it should be pointed out that it does not deal with the case when the state has separately set a limit for the total pollutant emissions of stationary emission sources and the emissions are allocated within this quantity. Here, one of the main ways of allocating emissions is the emissions trading system. It is generally confirmed in case of emissions trading that it is a procedure that is part of the allocation procedure.[7] In addition, although this is also a topical issue in Estonia and considering the ongoing preparation of the draft climate law, the article does not discuss the question of how to allocate the total national emissions by the economic sectors covered by the emissions.

1. Total emission and its distinction from environmental quality and emission limit values

1.1 Three-pillar approach to ensure air quality in the European Union

The total emissions referred to in Section 97 of AAPA derive from Directive (EU) 2016/2284 of the European Parliament and of the Council (hereinafter **NEC Directive**), which deals with the reduction of national emissions of certain air pollutants.[8] Sulphur dioxide (SO_2), nitrogen oxides (NOx), ammonia (NH_3), non-methane volatile organic compounds (VOCs) and fine particulate matter ($PM_{2.5}$) are covered by the NEC Directive.[9] It is one of the pieces of legislation that supports the goal of the European Green Deal to achieve a toxic-free environment[10] and it also supports the achievement of the zero pollution goals set in the zero pollution action plan by 2030.[11]

The NEC Directive entered into force on 31 December 2016 and replaced the previously valid Directive 2001/81/EC.[12] The pollutant emission ceilings established by Directive 2001/81/EC

[7] A. Voßkuhle, "Strukturen und Bauformen neuer Verwaltungsverfahren" in: Hoffmann-Riem/Schmidt-Aßmann, Verwaltungsverfahren. Baden-Baden: Nomos, 2015, DOI: doi.org/10.5771/9783845258669, p. 308.

[8] Directive (EU) 2016/2284 of the European Parliament and of the Council on the reduction of national emissions of certain air pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC, OJ L 344 17.12.2016, p. 1.

[9] The NEC Directive also regulates other pollutants (listed in Annex I of the Directive). There is no obligation to reduce emissions for these pollutants. Member States have an obligation to monitor and report on the impact of pollutant emissions specified in Annex I.

[10] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 final.

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Pathway to a Healthy Planet for All EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil', COM(2021) 400 final.

[12] Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission

were valid until 2020, when the national emission reduction obligations set out in the NEC Directive started to be applied. In their essence the directives are similar. The more important difference is that while Directive 2001/81/EC set annual emission ceilings for each pollutant in units of mass (tonnes) for member states, the NEC Directive sets emission reduction obligations expressed as a percentage of the emissions of each pollutant in the reference year 2005. In addition, the NEC Directive sets stricter obligations to reduce pollutant emissions. Compared to Directive 2001/81/EC, the list of pollutants has been supplemented with obligations to reduce fine particulate matter ($PM_{2.5}$). Although according to the NEC Directive, the country has a pollutant emission reduction target in percentage terms, it is possible to express it as an absolute number, i.e. as a total emission, based on the actual emissions of the base year (2005).

The NEC Directive forms part of the European Union's legal framework for ambient air protection, which also includes directives on ambient air quality and European Union legislation regulating the reduction of air pollution at source.[13] Thus, in a broader sense the modern air quality regulation of the European Union is based on three pillars.[14] First, the ambient air quality standards, which derive from Directive 2008/50/EC of the European Parliament and Council on ambient air quality and cleaner European air[15] (hereinafter **AAQD**) and Directive 2004/107/EC of the European Parliament and the Council relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air.[16] AAQD regulates environmental quality including sulphur dioxide, nitrogen oxides and fine particulate matter. The second pillar concerns emissions related to specific sources of pollution as well as (newly)[17] eco-design requirements for boilers and stoves. Two directives are important for stationary emission sources: Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated prevention and control of pollution)[18] (hereinafter **IED**) and Directive (EU) 2015/2193 of the European Parliament and of the Council on the limitation of emissions of certain pollutants into the air from medium combustion plants.[19] IED regulation covers sulphur dioxide, nitrogen oxides, volatile organic compounds and fine particulate matter, among others. The objective of the Directive on Medium Combustion Plants is to limit emissions of sulphur dioxide, nitrogen oxides and dust from medium capacity combustion plants.

The air quality regulation of the European Union has traditionally relied on these two pillars. With the predecessor of the NEC Directive – Directive 2001/81/EC – the so-called third pillar

ceilings for certain atmospheric pollutants, OJ L 309, 27.11.2001, p. 22–30.

[13] Such systematization is guided, for example, by the Commission's report to the European Parliament and the Council on the progress made in the implementation of Directive (EU) 2016/2284, which deals with the reduction of national emissions of certain air pollutants. COM (2020) 266.

[14] Commission report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The Third Clean Air Outlook. COM/2022/673 final.

[15] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008, p. 1–44.

[16] Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air, OJ L 23, 26.1.2005, p. 3–16.

[17] Stated in the Third Clean Air Outlook (Note 14).

[18] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, p. 17–119.

[19] Directive (EU) 2015/2193 of the European Parliament and of the Council of 25 November 2015 on the limitation of emissions of certain pollutants into the air from medium combustion plants, OJ L 313, 28.11.2015, p. 1–19.

was created at the level of the European Union, which regulates pollutant emissions, but does not do so based on the emission source. With Directive 2001/81, the European Union's emissions regulation moved for the first time beyond regulation based only on the emission source.[20] Setting a total limit for pollutant emissions at the level of a member state can therefore be considered as a separate regulatory mechanism in the field of ambient air protection in the European Union.

However, all three pillars are aimed at reducing the amount of pollutants in the ambient air. The purpose of setting the ambient air quality limit values of the European Union is to directly ensure a certain air quality in a certain area.[21] These are quality requirements for a specific environmental element. A reliable air quality should be ensured regardless of the sources that may affect the quality. Also, the total emission of a pollutant does not regulate emissions from specific emission sources but includes all possible sources in the territory of the member state and the economic zone. The result of the reduction of the total emission is, similarly to compliance with air quality limit values, a reduction of the concentration of pollutants in the ambient air, which in turn leads to improved air quality. However, the NEC Directive does not regulate ambient air quality in a specific area, but stipulates a general obligation to reduce emissions of specific pollutants.[22] Advocate General Juliane Kokott finds that although national emission ceilings are related to the discharge of emissions, these can be considered a special form of limit values, "limit values for the whole economy".[23] The NEC Directive makes references both to directives on ambient air quality and to European Union legislation regulating the reduction of air pollution at the point of source. According to Article 1(2)(a) of the NEC Directive, one of the objectives of the directive is to help achieve air quality levels consistent with the World Health Organization's air quality guidelines. According to Recital 18 of the NEC Directive, the provisions of the Directive should effectively contribute to the achievement of air quality objectives. Related to the source-based emission rules, the NEC Directive implies that Union legislation on source-based air pollution control should effectively ensure expected emission reductions.[24] In turn, Recital 29 of the IED indicates that the fulfilment of the goals for achieving national emissions of pollutants should be ensured through the requirements set for the source-based emission limit value. Thus, by determining the emission limit values resulting from the IED, the objectives of the NEC Directive are also fulfilled. However, the IED does not contain a specific obligation to follow the NEC Directive, similar to Article 18, which obliges to comply with environmental quality limit values when granting a permit.[25]

[20] A. Epiney, Umweltrecht der Europäischen Union. Baden-Baden: Nomos, 2019, p. 488.

[21] H. D. Jarass, Luftqualitätsrichtlinien der EU und die novellierung des Immissionsschutzrechts. – Neue Zeitschrift für Verwaltungsrecht, 2003/3, p. 258.

[22] A. Epiney (Note 20), p. 490.

[23] The proposal of 16 December 2010 of Advocate General J. Kokott in ECJ joined cases C-165/09–C-167/09, p. 59.

[24] Recital 12 of the NEC Directive.

[25] According to IED art 18, if the environmental quality standard stipulates stricter conditions than those that can be met by using the best available techniques, the permit should contain additional measures, without limiting the taking of other possible measures to meet the environmental quality standards.

1.2 Differentiation in Estonian law in the procedure for granting an air pollution permit and integrated environmental permit for stationary emission sources

The requirements of the integrated environmental permit, which result from the Industrial Emissions Act, record the obligations regarding emissions stipulated in the IED. In addition, all environmental permits regulating air pollutants should consider the environmental quality requirements arising from the AAQD. These regulations are interrelated, as air quality limit values cannot be applied directly to emission sources, but only by setting requirements for emissions from a specific source. In order to regulate the ambient air quality in a way that does not exceed the limit value of the environmental quality, it is necessary to have the concept of emission limit values.[26] If we compare air quality values and source-based emission regulation, in the absence of special regulation limiting emissions, we can basically conclude that emissions can be added to the region as long as the limit value of environmental quality is not exceeded.

In Estonian law, this conclusion is also supported by the General Part of the Environmental Code Act[27] (hereinafter **GPECA**), which applies to both the air pollution permit and an integrated environmental permit. According to GPECA Section 52 (1) 8), the issuer of the environmental permit refuses to grant an environmental permit if upon addition of emissions arising from the activity proposed based on the environmental permit, the limit value of the quality of the environment would be exceeded. Ambient air protection with only source-based pollutant emission limits without air quality values does not ensure that ambient air is safe for human health and the environment, even if all installations use best available techniques. The purpose of regulation based on emission and air quality limit values is to ensure air quality in a specific area that meets the established requirements. This purpose is also carried out by the grounds for refusal to grant a permit provided for in Section 52 (1) 8) of GPECA.

However, by setting the total emission, it is ensured that the emission of the pollutant remains within certain limits throughout the country. Refusal of a permit due to total emission exceedances is not related to the air quality of a particular stationary source area or to the best available techniques used at the facility. Based on Section 97 of AAPA the permit issuer should refuse to grant a permit even if the introduction of a stationary emission source would not lead to the emission limit values and air quality limit values being exceeded. The legislator would be able to direct the ambient air quality of a specific region by setting the total limit of pollutant emissions. This is, for example, in the case that within the framework of the total limit quantity, the total limit quantities of pollutant emissions have been established regionally, as was pursued to be done with the first Ambient Air Protection Act established immediately after the restoration of Estonia's independence.[28] In Principle, it

[26] I. Appel, Staatliche Zukunfts- und Entwicklungsvorsorge. Tübingen: Mohr Siebeck, 2005, lk 193.

[27] General Part of the Environmental Code Act. Available at https://www.riigiteataja.ee/en/eli/529122023002/consolide (most recently accessed on 01.04.2024).

[28] Pursuant to Section 6 (1) of Ambient Air Protection Act, in force 1998–2004, if the release of pollutants into the ambient air is regulated by international agreements, the total emissions permitted for these pollutants from stationary emission sources of the county shall be established by the regulation of the Government of the Republic. Although Estonia was not yet a member of the European Union at the time of the entry into force of this Act, the explanatory memorandum explains that the need for regulation arises from the Europe Council Decisions 81/462/ EEC on the conclusion of the Convention on Long-Range Transboundary Air Pollution and 94/69/ EC concerning the conclusion of the United Nations Framework Convention on Climate Change.

is also possible to contribute to the reduction of emissions in a specific sector based on the total limit quantity – by setting the total emission limit for the stationary emission sources of a specific sector. However, in Estonian law, the basis for refusing to grant a permit due to exceeding the total limit quantity of pollutant emissions is limited to the fact that the total emissions of the pollutant should be considered when issuing air pollution permits and integrated environmental permits.

The NEC Directive itself does not directly contain an obligation directed at the member states to create a regulation that would allow them to refuse to grant an environmental permit if the total emission is exceeded. At the same time, it is of course important to emphasize that the member states are still obliged to implement the directive in a way that effectively contributes to the achievement of the Union's long-term air quality goal.[29] Therefore, in case of the restriction on the granting of environmental permits in question (AAPA Section 97), it is fully a national regulation. Given the limited accessibility of the resource in terms of specific pollutants, and the divergence from the approach in the NEC Directive and national regulation, which is traditionally based on emission limit values and air quality limit values, it is crucial, particularly for those with an interest in the resource, to ascertain what it fundamentally is.

2. Characteristics of the allocation procedure

2.1 Nature and function of the allocation procedure

A scarcity that occurs in a market economy usually regulates itself, as the scarcity is reflected in the market price of the good. The allocation procedure deals with the situations of scarcity of goods, when the state has not left the satisfaction of the demand for some limited good to market forces alone.[30] Public authorities manage such scarce goods through many of their decisions by distributing these among individuals. Traditional situations in which the state makes decisions on the distribution of scarce goods in the administrative procedure are, for example, the filling of student places at the university, granting of subsidies, granting of the right to use radio frequencies and the appointment of public servants. Although the decisions on the allocation of scarce resources are not unknown to the state, the allocation procedure as a general type of procedure is not regulated in Estonian law. There are also no systematic concepts to the allocation procedure as a separate type of procedure in Estonia. The problems of the allocation procedure and the legal organization of their resolution have been analyzed in more detail in German legal theoretical literature already since the 1970s.[31] The decisions on the distribution of benefits made in different areas allow to treat the allocation procedure as a cross-sectoral phenomenon and today, in Germany, the allocation procedure is considered as a separate type of administrative procedure.[32] According to the

[29] Recital 9 of the NEC Directive.

[30] D. Kupfer, "Die Verteilung knapper Ressourcen im Wirtschaftsverwaltungsrecht." Baden-Baden: Nomos, 2005, p. 102.

[31] C. Tomuschat, "Güterverteilung als rechtliches Problem", Der Staat, 1973, Vol. 12, No. 4 p. 433 ff. Available at: https://www.jstor.org/stable/43640522 (most recently accessed on 01.04.2024); W. Berg "Die Verwaltung des Mangels: Verfassungsrechtliche Determinanten für Zuteilungskriterien bei knappen Ressourcen", Der Staat, 1976, Vol. 15, No. 1 p. 1 ff. Available at: https://www.jstor.org/stable/43640778 (most recently accessed on 01.04.2024).

[32] See for example N. Malaviya, "Verteilungsentscheidungen und Verteilungsverfahren." Tübingen: Mohr Siebeck 2009, p. 250 ff; Voßkuhle (Note 7) p. 290; H.C.Röhl "Ausgewählte Verwaltungsverfahren" in: W. Hoffmann-Riem, E. Schmidt-Aßmann, A. Voßkuhle (Eds), Grundlagen des Verwaltungsrechts, Band II, München: C.H.Beck, 2012, 2. Aufl. § 30 Rn. 10 ff.; F. Wollenschläger,

prevailing opinion in Germany it is an allocation procedure both when a good administered by the state is shared, but also when the state acts as a purchaser on the market in a public procurement procedure.[33]

The executive authority selects the beneficiaries from a large number of applicants based on specific criteria through the allocation procedure. The allocation decision is adopted as a result of the allocation procedure. The decisions that are made in a competitive situation due to the scarcity of benefits can therefore be considered allocation decisions.[34] The necessity of the allocation procedure is thus determined by two mutually dependent situations – the scarcity of benefits and the multitude of those who require these. As a result of the above, the function of the allocation procedure is to allocate scarce resources – the allocation procedure becomes necessary when there are not enough goods offered by the state for all those who want it. Voßkuhle emphasizes that the function of the allocation procedure is the legally appropriate allocation of scarce goods in a competitive situation.[35] Even more precisely, it could be said that the allocation of scarce goods in a competitive situation should be ensured in accordance with fundamental rights. The constitutional framework also indicates how the allocation procedure can be structured.

2.2 Scarcity of goods

The need to carry out the allocation procedure and decide on allocation is because the specific good is not available in the required quantity. The scarcity of goods can be due to natural causes or created intentionally by the state for a specific purpose. Based on this fact, it is possible to distinguish two kinds of scarcity – natural scarcity and deliberate scarcity.[36]

In case of natural scarcity, the reason for the scarcity of a good is independent of the legal system. The scarcity of good here is due to factual circumstances.[37] It may be related to the physical characteristic of the resource, or it may be technically impossible to increase the amount of the available resource or possible only with excessive expenditure.[38] The cases of natural scarcity are not created by the state and therefore cannot be influenced by the state.

The deliberate scarcity is politically desired and created by the legal system.[39] The occurrence of a scarcity situation is therefore preceded by the decision that creates such a situation. Here, a distinction is made between artificially created scarcity and the situation where the goods to be allocated are made available by the public authority only to a limited extent.[40] In case of artificially created scarcity, the state sets limits in the public interest on the use of a good that would be freely available under normal market conditions.[41] By making a good available to a limited

"Verteilungsverfahren. Die staatliche Verteilung knapper Güter: verfassungs- und unionsrechtlicher Rahmen, Verfahren in Fachrecht, bereichsspezifische verwaltungsrechtliche Typen- und Systembildung", Tübingen: Mohr Siebeck, 2010, p. 531 ff; Kupfer (Note 30) p. 529 ff.

[33] E. Meiers, "Das kommunale Marktwesen." Peter Lang GmbH, Internationaler Verlag der Wissenschaften, 2015, p. 93, DOI: 10.3726/978-3-653-05698-3; Voßkuhle (Note 7) p. 295; Schoch "Einleitung" in Schoch/Schneider, Verwaltungsrecht Werkstand: 4. EL November 2023, Rn 690 Available at: https://beck-online.beck.de/Dokument?vpath=bibdata%2Fkomm%2Fschochkovwgo_4_bandvwvfg%2Fvwvfg%2Fcont%2Fschochkovwgo.vwvfg.vor1.gle.gli.gl2.glb.glcc.htm&pos=10&hlwords=on (most recently accessed on 01.04.2024); Röhl (Note 32) § 30 Rn 12 ff; The opposite view is held by Malaviya (see Note 32, p. 126 ff).

[34] Malaviya (Note 32) p. 4; Wollenschläger (Note 32) p. 2.

[35] Voßkuhle (Note 7) p. 290.

[36] For more information on the different categories of the scarcity of goods, see e.g. Berg (Note 31).

[37] Meiers (Note 33), p. 94; Kupfer (Note 30) p. 103.

[38] Kupfer (Note 30) p. 105 ff.

[39] Kupfer (Note 30) p. 105 ff.

[40] Meiers (Note 33) p. 95.

[41] Kupfer (Note 30) p. 108.

extent, the state participates in the commodity market as a provider of a good that is in demand, making it available only to a limited extent.[42]

2.3 The competitive situation and the resulting structure of multipolar procedure

In addition to the fact that the resource is available to a limited extent, the allocation decision also assumes that a situation has arisen that requires the good to be allocated – the good is not sufficiently available for all persons who want to have a share in it.[43] Due to the competitive situation one person can receive a benefit only at the expense of other persons who requested the same benefit in the procedure. The competitive situation leads to the fact that the allocation procedure does not involve the bilateral relationship between the administrative authority and the addressee of the administrative act, which is characteristic of the usual administrative procedure. This creates a multilateral relationship between the administrative authority and the benefit applicants.[44] The executive authority has to make a selection decision in the allocation procedure.

There may be several parties involved in the proceedings even in the traditional administrative procedure and the state should deal with the issues of allocation of scarce goods. For example, in case of legal relations arising in environmental law, it is often not possible to talk only about two parties. If one person requests a permit from the state for an activity that pollutes the environment, often a person (for example, a person living on a neighbouring property) who wants the state not to grant a permit for the activity also participates in this procedure. In these situations, which are typical of environmental law, as well as planning law, the public authority has to decide between conflicting interests. In the allocation procedure the administrative authority is required to decide between parallel interests, i.e. between competitors.[45] At the same time, it should be pointed out here that the administrative authority should also decide between the interests that are parallel in nature when granting traditional environmental permits to operators, as when an environmental permit is granted to one person, the possibilities of future similar operators to carry out polluting activities are reduced. Compared to the allocation procedure the difference though lies in the fact that in the allocation procedure the bilateral relationship in the granting of advantages by the state has been replaced by a procedure in which persons who wish to receive a benefit participate and among whom the recipients of the separately defined benefit are selected.[46] The selection of the recipients of the concrete advantage among the participants of the procedure is what differentiates allocation decisions from other administrative decisions, which may ultimately have an effect similar to allocation, but which do not involve the selection procedure between the persons with parallel interests.

[42] Kupfer (Note 30) p. 114.

[43] Meiers (Note 33), p. 93.

[44] Meiers (Note 33), p. 77; Schoch (Note 33) Rn 690; Röhl (Note 32) § 30, Rn. 22; Voßkuhle (Note 7), p. 294; Wollenschläger, on the other hand, believes that the procedure can be carried out both in a multipolar manner, where all applicants are involved, as well as in bipolar procedures running side-by-side in parallel, although he himself admits that due to the divisional conflict, a multipolar procedure structure is more appropriate (Wollenschläger (Note 32) p. 598).

[45] M. Hamdorf, "Die Verteilungsentscheidung: Transparenz und Diskriminierungsfreiheit bei der Zuteilung knapper Güter." Peter Lang GmbH, Internationaler Verlag der Wissenschaften: 2012, DOI: 10.3726/978-3-653-01539-3, p. 14; Malaviya (Note 31), p. 254.

[46] Voßkuhle (Note 7), p. 291.

3. Scarcity and competitive situation in case of total emissions

3.1 Total emission as artificially created scarcity

Atmospheric air, the mixture of gases making up the earth's atmosphere, is the earth's largest natural resource used by all mankind. In principle, the use of atmospheric air for the discharge of pollutants is possible on an unlimited scale. The fact that only air of a certain quality is suitable for human living makes the ambient air a natural scarcity. Air oxygen, which comes from the process of photosynthesis in the atmosphere, is necessary for both humans and animals to breathe.[47] Therefore, atmospheric air of appropriate quality is vital for the survival of mankind, as well as for the existence of any life on earth. However, within such an absolute limit, the state can in turn set a limit on the use of atmospheric air. In this case, the limit set by the state is the emission of certain pollutants emitted into the ambient air. With the total emissions, the state has set a limit on the total emissions of the pollutant in the country. Thus, an artificial scarcity has been created. Without this limit, it would be possible to release the pollutant into the ambient air to an unlimited extent, taking into account the possible valid local environmental quality and emission limit values.

As the NEC Directive indicates, the limit covers all anthropogenic emissions of pollutants into the atmosphere within the territory and economic zone of Estonia and the emissions of pollutants from practically all sources, i.e. both point and diffuse sources are covered. Such a general quantitative environmental limit established at the national level does not directly affect the fundamental rights of individuals. In order to stay within the set emission limit, the state should develop its own regulation and corresponding measures should be planned with the national air pollution control program stipulated in article 6 of the NEC Directive. Recital 19 of the directive emphasizes that national air pollution control programs should include measures applicable to all sectors concerned.

However, in case of operators of stationary sources, the Estonian legislator has given a different meaning to the total emissions, as the granting of an environmental permit should be refused, if the emission of a pollutant discharged from the emission source causes the total emission to be exceeded. Since the compliance with the limit is made mandatory when granting an environmental permit, it directly affects the rights of those interested in obtaining the permit. The total emission should be taken into account in the administrative procedure for granting an environmental permit and therefore this is an artificially created scarcity characteristic of the allocation procedure as a special type of administrative procedure.

3.2 Competitive situation in the allocation of total emissions

In addition to the scarcity of goods, the allocation procedure is also characterized by the resulting competitive situation. The total emission is not divided by legal act among the sectors. Emissions of pollutants listed in the NEC can originate from energy, transport, industrial processes, solvents, agriculture and waste, which may also include activities for which an environmental permit is not required.[48] Thus,

[47] K. Juurikas et al, Keskkonnaökonoomika. Tallinn: OÜ Infotrükk 2004, p. 21.

[48] Minister of Climate Order No. 1-2/23/144 of 30.03.2023 Approval of the updated "National Programme for the Reduction of Emissions of Certain Atmospheric Pollutants for the Period 2020–2030". Available at (only in Estonian): https://kliimaministeerium.ee/energeetika-maavarad/valisohk/ohusaasteainete-vahendamise-programm (most recently accessed on 01.04.2024).

competition first arises between the owners of stationary emission sources and other persons engaged in the activities emitting the same pollutant. Although all sectors are included by total emissions and therefore compete with the operators of stationary sources, this is not a competition characteristic of the allocation procedure, as other sources do not need to have an environmental permit and therefore do not participate in the administrative procedure. Therefore, if, in addition to those persons who can participate in the administrative procedure, other persons also compete for the finite resource, these other persons are still not parties to the procedure in the allocation procedure.

Since the total emission is the basis for refusing permission to stationary sources, permit applicants also compete for the benefit. The situation is not problematic if the pollutant emissions covered by the applications are below the total emissions. In such a case, each applicant has the right to request the granting of an environmental permit if other conditions for the granting of the permit are met. In this case, it is important to note that the grounds for refusal to grant an environmental permit have not been applied yet in Estonia. The total emissions for certain pollutants have been established in Estonia since 2004, but such a situation that would cause the total emissions to be exceeded has not occurred. Thus, there is no competition for this good. However, as a quantitative limit on emissions has been set, it is not in principle excluded that competition for the benefit will arise. Given, inter alia, the fact that the total emissions resulting from the NEC directive will decrease over time. Therefore, the competition between applicants may arise due to the set emission limit – operators are the persons with parallel interests who all want to use the same benefit of emitting the same pollutant into the ambient air. According to the AAPA the total emission should be considered in the normal environmental permit procedure. The authorising authority should refuse to grant an environmental permit, if the emissions of a pollutant discharged from the emission source cause the total emission to be exceeded. Although competition may arise, it is therefore not a multipolar selection procedure (which is a characteristic feature of the allocation procedure) between the persons who would also like to benefit from the use of the allowance.

4. Constitutional frameworks in the allocation procedure and the general structural elements of the allocation procedure relying on them

The public authority should make a choice among the participants in the benefit allocation procedure to whom to distribute the benefit. Competitive situations therefore bring the question of equal treatment to the fore. By distributing a limited good, the state creates a basis for different treatment of persons, the legality of which should be assessed according to the fundamental right of equality.[49] The issue of equal treatment arises in all allocation procedures, including when environmental benefits are distributed. Wherever, due to limited resources, it is not possible to satisfy the requests of all persons interested in the benefit, equal treatment of the persons interested in the benefit should be ensured. However, the content of equal treatment may differ depending on the specific procedure for allocating environmental benefits.

Equality rights protect the individual against unjustified unequal treatment by the state compared to other individuals. Section 12 (1) of the

[49] Wollenschläger (Note 32) p. 36; Kahl/Ludwigs (Eds), "Handbuch des Verwaltungsrechts." Band IV, Köln: C.F. Müller Verlag: 2022, p. 1175.

Constitution of the Republic of Estonia[50] guarantees legal equality, which is guaranteed when the law treats people in similar situations equally.[51] The differentiation of participants in the procedure is possible, but it should be based on relevant criteria. In the allocation procedure this means that everyone who wants to receive a share of the benefit should have the opportunity to participate on an equal basis.[52] This requires the development of a specific procedure that ensures the neutrality of the administrative authority and equal treatment of the participants. It serves the interests of the parties interested in the proceedings as well as the public. On the one hand, it is important to ensure clarity about the procedure for individuals, but a solid concept also reduces the arbitrariness of the public authority and helps to ensure the plurality of suitable participants in the procedure.[53]

The requirement arising from the general principle of equal treatment to ensure an equal procedure includes the development of both procedural rules and substantive legal bases.[54] However, the state first needs to decide that it is necessary to manage the benefit by the state through allocation and establish the purpose of the allocation. The goal also dictates the appropriate way of allocating the benefit.[55] This includes the need to decide to what extent the benefit will be distributed, what the selection procedure will be and what the criteria for the procedure will be.[56]

At the start of the procedure, it is important to inform interested parties about the procedure to ensure equal treatment.[57] If a person does not find out about the allocation procedure, it cannot participate in it on a fair and equal basis. If the allocation procedure and criteria have not been provided for in the legislative act, these should be made public already at the time of notification.[58] The Estonian Supreme Court has also emphasized that the assessment criteria should be known to the participants in advance, because as a result, all participants will be put on an equal footing.[59]

In addition to procedural rules, an allocation procedure in line with the principle of equal treatment requires the existence of allocation criteria. The criteria for allocation can be formal and material.[60] Here, the material selection criteria have a separate and important place alongside the procedure, as these are the basis for the selection. The formal allocation criteria are neutral to the participants. This includes, in addition to the randomness achieved by drawing lots, e.g. priority-based allocation, which provides for allocation in chronological order.[61] The allocation procedure can also take place through a combination of formal and material criteria. Which specific criterion is appropriate for deciding on the allocation of a certain benefit is measured by the constitution – what matters is how the

[50] The Constitution of the Republic of Estonia, Available at: https://www.riigiteataja.ee/en/eli/530122020003/consolide (most recently accessed on 06.04.2024).
[51] A. Kivioja, K. Muller, L. Oja, in Constitution of the Republic of Estonia. Annotated edition, 2020. Avaliable at (only in Estonian): https://pohiseadus.ee/sisu/3483, § 12, para 14 (most recently accessed on: 06.04.2024).
[52] Malaviya (Note 32), p. 247; Kupfer (Note 30) p. 537.
[53] Wollenschläger (Note 32), p. 539.
[54] Schoch/Schneider (Note 33); Voßkuhle (Note 7), p. 306; Malaviya (Note 32), p. 132; Wollenschläger (Note 32), p. 534.
[55] Kahl/Ludwigs (Eds) (Note 49), p. 1168.
[56] Malaviya (Note 32), p. 252.
[57] Voßkuhle (Note 7), p. 306.
[58] Malaviya (Note 32), p. 252; Voßkuhle (Note 7), p. 306.
[59] Judgement of the Administrative Law Chamber of Estonian Supreme Court 3-3-1-87-04, of 28 February 2005, p. 14.
[60] Kahl/Ludwigs (Eds) (Note 49), p. 1167; Malaviya (Note 32), p. 252; Hamdorf (Note 454), p. 15. Berg further distinguishes between formal and overwhelmingly formal criteria (Berg (Note 31), p. 17).
[61] Berg (Note 31), p. 17.

constitutional objectives of the allocation are achieved.[62]

While the need to ensure equal treatment is at the forefront of the allocation procedure, in addition to the fundamental right of equality, rights of freedom may play a role in the development of the rules of the allocation procedure, depending on the type of benefit to be distributed. The rights of freedom primarily protect individuals from the creation of unjustified scarcity of goods.[63] In order to implement the freedom of choice in the field of activity, profession and workplace provided for in Section 29 of the Constitution of the Republic of Estonia, the legislator is obliged to take measures that eliminate unjustified unequal treatment of people in their choice.[64] The right enshrined in Section 29 of the Constitution is a fundamental right with a simple statutory reservation. The legislator can limit a person's right to choose in justified cases. The first sentence of Section 31 of the Constitution of the Republic of Estonia stipulates the right to conduct a business and considers any interference by the state in activities considered as entrepreneurship an infringement. The core of the freedom to conduct a business is the state's obligation not to make unreasonable obstacles to entrepreneurship, which should be dealt with broadly.[65] According to a broad approach, essentially every regulation established by a country is an interference with the freedom to conduct a business, for example, already when the previously valid legal framework is made stricter.[66] A restriction of the freedom to conduct a business is, for example, when a limit is set for the use of a benefit that previously could be used without restriction. When setting a limit, it is not possible to carry out economic activities in previously permitted way. However, according to the opinion of the Supreme Court, the freedom to conduct a business does not give a person the right to demand the use of national wealth or state property for the benefit of her or his own business.[67] According to Section 5 of the Constitution of the Republic of Estonia, the natural wealth and resources of Estonia are national riches (which must be used sustainably). In the same decision the Supreme Court also emphasized that, despite this, the freedom to conduct a business is affected by the situation where the public authority makes the conditions for doing business less favourable compared to the legal framework that has been in force until now.

5. Compliance of the total emission allocation procedure with the general structural elements of the allocation procedure

5.1 Overview of the procedure for allocating total emissions in the environmental permit procedure

According to Section 97 of the AAPA the distribution of pollutant emission is decided in the environmental permit granting procedure. The main purpose of granting an environmental permit is to ensure the legality of the activity and the permissibility of the activity based on environmental protection aspects, as well as to resolve possible conflicts of interests related to environmental use, especially regional ones. The

[62] Berg (Note 31), p. 17; Malaviya (Note 32), p. 136.
[63] Hamdorf (Note 454), p. 87.
[64] A. Henberg, K. Muller in Constitution of the Republic of Estonia. Annotated edition, 2020. Available at (only in Estonian): https://pohiseadus.ee/sisu/3500/paragrahv_29, § 29, para 8 (most recently accessed on: 06.04.2024).
[65] O. Kask, S. A. Ehrlich, A. Henberg in Constitution of the Republic of Estonia. Annotated edition, 2020. Available at (only in Estonian): https://pohiseadus.ee/sisu/3502,§ 31 para 7 (most recently accessed on 06.04.2024).
[66] Ibid, para 23.
[67] Judgement of the Constitutional Review Chamber of Estonian Supreme Court 3-4-1-27-13, of 16 December 2013, para 44.

environmental permit is not designed to resolve conflicts of interests of persons with parallel interests interested in the benefit.

At the same time, when creating the provision, the legislator has not redistributed all already allocated emissions, as is done when creating an emissions trading system.[68] Section 97 of AAPA applies only to new entrants or to changes in the activities of existing facilities. Here, the benefit is not distributed once, but every time when the request for granting a permit is satisfied, the administrative authority should consider whether it is possible to allocate the desired amount of pollutant emission. In case of a positive decision the chances of other participants to get a share of the benefit become smaller. This regulation is similar to the regulation of refusing to grant an environmental permit due to exceeding the limit value of environmental quality, where also those operating in the area on the basis of a permit take away the opportunity for new entrants. This is also a problem of allocation, which does not, however, require the application of allocation procedure.

Therefore, there is no separate division of the procedure when dividing the emission amount. At the same time, emissions are allocated without restrictions to all applicants until the total emissions limit is reached. Since there are no more precise allocation criteria, applications are granted according to the priority principle in the administrative procedure. The applicant, whose application reaches the limit of the total emissions, will not be able to receive the benefit to the desired extent and the permit will be refused.

[68] It is not possible to create an emissions trading system in such a way that so-called free emissions not yet covered by installations are distributed. To create a system, all emissions must be covered, including emissions issued to specific installations.

5.2 Determining the benefit to be allocated

Under chapter four it was explained that the benefit to be distributed between the participants by the legislator or the executive authority, the object of the allocation procedure, should first be determined in the allocation procedure. The allocation that guarantees fundamental rights means the full distribution of the scarce good determined for the sake of the allocation procedure among the participants. As can be seen from chapter two, the total maximum amount creates an artificial scarcity, which is one of the characteristic features of the allocation procedure. The same clause indicates, however, that the total emission is not limited to the operators of stationary emission sources, but the limit is the total emission in the territory and the economic zone of Estonia, regardless of the emission source. This limit should be considered when allocating emissions to stationary emission sources according to Section 97 AAPA. Therefore, it is not possible to determine the good to be allocated. To the extent that it is not possible to determine the benefit that is distributed among operators of stationary emission sources, the shareable benefit necessary for the application of the allocation procedure has not been determined. Also, the fact that the benefit to be allocated is an unused maximum amount that can be determined does not make this benefit the object of the allocation procedure, as this amount is also used by all other emission sources emitting the same pollutant in addition to stationary emission sources. In addition, to the extent that the nationally valid total emission limit should be considered when granting a permit, the state would treat other polluters included in the total emission unequally when distributing emissions only between the operators of stationary emission sources. This is because their ability to emit pollutants is reduced at the expense of stationary emission sources.

5.3 The purpose of the norm

Wollenschläger points out that the legislature or the executive authority, when creating the allocation procedure, first needs to understand that it is an allocation problem, which as a solution requires the allocation procedure to be carried out.[69] Therefore, one could ask whether the legislator has not understood that the situation created requires the allocation procedure. For this purpose, the goal of the legislator in creating the regulation should first be looked at. According to article 1 of the NEC Directive the aim of setting total emissions is to move towards achieving the level of air quality that does not cause significant adverse effects or risks to human health or the environment. This shows that exceeding the total emission can cause an environmental threat according to Section 5 of the GPECA. According to the provision an environmental threat means the sufficient likelihood of emergence of a significant environmental nuisance. Section 10 of the same act states that an environmental threat should be prevented. An environmental threat or a significant environmental nuisance should be tolerated where the activity is required due to overriding public reasons, there is no reasonable alternative and required measures have been taken to reduce the environmental threat or the significant environmental nuisance.

In its decision 3-20-771[70] dealing with the obligation to reduce greenhouse gas emissions, the Supreme Court finds that the general climate goals for controlling emissions do not set restrictions on facilities as a rigid numerical norm, as the achievement of such goals does not depend only on the planned facility, but on the combined effect of many activities. The determination of specific numerical norms by sector or facility is a matter of policy choices. However, the courts panel considers that if the planned activity would lead to consequences, due to which it is not possible to achieve the goals of reducing greenhouse gas emissions, this activity would have a significant environmental impact, and it should be determined whether such an impact can be sufficiently avoided or mitigated. If, as a result of the consideration, it turns out that the emission of greenhouse gases accompanying the planned activity cannot be tolerated according to the Section 10 of the GPECA, then it is an unacceptable environmental impact and the granting of the permit should be refused.

Based on decision 3-20-771 of the Supreme Court and the relevant regulation of the GPECA, it can be considered that according to Estonian law exceeding the total emission represents an environmental threat, which should be generally avoided in accordance with the principle of prevention provided for in Section 10 of the GPECA. Thus, it can be concluded that the purpose of the regulation of Section 97 of AAPA is to prevent environmental threat to ensure compliance with the NEC Directive, not to allocate benefits.

5.4 The necessity of applying the rules of the allocation procedure

However, due to the limit set by Section 97 of the AAPA, situations may arise where several environmental permit applications are pending simultaneously, and it is not possible to satisfy all of them due to exceeding the total emissions. In the absence of allocation criteria, the principle of priority applicable in the general administrative procedure must be applied. This means that the environmental permit is granted to whoever submitted the application first.

Nevertheless, the principle of priority does not necessarily guarantee that the best solution

[69] Wollenschläger (Note 32), p. 38.

[70] Judgement of the Administrative Law Chamber of Estonian Supreme Court 3-20-771, of 11 October 2023, para 22.

in the public interest is achieved, as the most efficient implementation of the purpose of the provision would require distribution to the person whose emissions are lower or whose field of activity meets the public interest to a greater extent. Such a conflict of interest has been taken into account in Estonian law in the event of the possibility of an environmental quality limit value being exceeded because of the additional emissions resulting from the proposed activity. According to Section 52 (1) p. 9 of GPECA the issuer of an environmental permit refuses to grant the environmental permit where the environmental nuisance emerging from emissions generated by the activity proposed on the basis of the environmental permit would bring about a situation where, for the purpose of adhering to the limit values of the quality of the environment, an environmental permit could not be granted to another person henceforth and the public interest in not granting the requested permit for the purpose of preventing the environmental nuisance overrides the interest in granting the requested environmental permit. However, this provision cannot be applied in cases where total emissions are exceeded.

Hence, the AAPA also contains a regulation in case the total emission does not allow to satisfy all pending environmental permit applications. According to Section 96 (1) of the AAPA, in such a case, the persons who generate energy for domestic or community use shall have a preferential right to obtain an environmental permit. However, if all the persons applying for an environmental permit generate energy for domestic or community use or if none of them does that, the persons with the lowest emissions of pollutants per unit of similar production shall have a preferential right to obtain an environmental permit (Section 96 (2) of AAPA). Proceeding from the regulation and pursuant to the explanations provided in chapter 4 it is about the material criteria for allocating the benefits. These criteria allow the public interest to be taken into account when granting a permit to discharge emissions.

The decision to grant a preferential right is made by a directive of the Minister of Climate upon the proposal of the Environmental Board (Section 96 (3) of AAPA). The provision thus provides for a separate selection procedure with a multipolar relationship, which is characteristic of the allocation procedure, involving the persons, who have applied for an environmental permit, on equal bases. Therefore, not all persons who might have an interest in emissions participate in the selection procedure, but only those who have applied for an environmental permit. The AAPA does not provide for the obligation to inform other persons that might also be interested in using the pollutant. What is questionable here is the principle of equal treatment, where the comparable groups are the persons who submitted the application and other persons who are interested in the emissions. The persons who submitted the application are included in the procedure, but the others are not. In case of the allocation procedure the obligation to notify interested parties should be affirmed. However, since the purpose of setting the limit provided for in Section 97 of AAPA is not to distribute the limited benefit but to prevent an environmental threat, the purpose of selection criteria provided in the law in this case is not to distribute a limited benefit but also to grant the preferential right to pollute. Therefore, the provisions of Section 96 of AAPA have correctly considered only those persons who apply for a permit.

6. Conclusions

The approach above indicates that the determination of the total emission is an artificially created scarcity, and due to the provisions of Section 97 of AAPA, according to which the granting of a permit should be refused if the emission of a pol-

lutant released from the emission source causes an exceedance of the total maximum emission in the territory and economic zone of Estonia, it may also be a competitive situation. However, it is not a procedure that can be systematically considered as part of the allocation procedure, which is an independent type of administrative procedure which theoretical foundations are clearly designed in German legal theoretical literature. The regulation in the AAPA is not structured considering the requirements of the allocation procedure. The allocation of a pollutant emission is decided in the normal administrative procedure for granting a permit. In essence, this is also not a situation that would require the use of structural elements specific to the allocation procedure. The scarcity of the good is intrinsically related to the procedure in the allocation procedure – the scarce good defined for the allocation procedure is distributed. However, in case of total emissions, the persons to whom Section 97 of AAPA does not apply also participate in the use of the limited benefit. The aim of the regulation is to prevent an environmental threat – to ensure that the total emissions are not exceeded by granting the permit. Nevertheless, due to the existence of the emission limit, there may be situations where several applications are pending which cannot be satisfied simultaneously due to the need to prevent exceeding the limit. The AAPA takes this into account and the criteria have been established based on public interests. However, since the purpose of setting the total emission limit is to prevent environmental threat, the selection procedure is also carried out for the purpose of preventing environmental threat, not with the main goal of distributing benefits.

Getting to the bottom of rules on the strict protection of species and bycatches from fisheries (in the Exclusive Economic Zone) through the lens of the Baltic Proper Harbour Porpoise

*Rebecka Thurfjell**

Abstract

This article examines the intersection between fishery and environmental policy in the European Union, with particular focus on bycatch of marine species that are subject to rules under Article 12 of the Habitats Directive. More precisely, the article aims to analyze to what extent Member States are *obliged* to take measures against fisheries to eliminate bycatches of strictly protected species in their marine waters, according to Article 12 of the Habitats Directive, and thus to analyze to what extent the obligations under the Article applies to fisheries. Thereafter, the article will assess to what extent Member States have the *power* to take measures against fisheries to protect Annex IV species from bycatch outside marine protected areas in the EEZ. An aim is also to contribute with new knowledge on the legal preconditions to implement an ecosystem approach to fisheries management, an approach that should be applied according to the CFP Regulation. The EU has adopted the Technical Regulation as a tool for implementing Article 12, with general rules to mitigate and monitor bycatch and a regionalization process under which Member States can initiate additional measures for the same purpose. Conclusions show that if applied fully in accordance with the requirements of Article 12, the Technical Regulation has potential as a tool for contributing to the objectives of the Habitats Directive. However, lack of political ambition by Member States risk leading to weak measures and non-compliance.

Key words: Common fisheries policy, Habitats Directive, integration principle, ecosystem approach, exclusive competence

1. Introduction

The threat to marine biodiversity is, quite literally, a problem not visible on the surface. Still, the loss of species in the marine environment is a fact, and it is increasing at an unprecedented rate. Research shows that a worrying number of species are threatened by anthropogenic impact, and in the Baltic Sea, the condition of several species is critical, where fishing is considered a significant threat.[1] One of these species is the

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[1] HELCOM 2013, HELCOM Red List of Baltic Sea Species in Danger of Becoming Extinct (Baltic Sea Environment Proceedings No. 140) (hereafter HELCOM 2013).

Baltic Proper harbour porpoise (*Phocoena phocoena*)[2], a species listed in Annex IV of the Habitats Directive.[3] The Directive is, together with the Birds Directive, the main instrument for implementing the Bern Convention and the Convention on Biological Diversity (CBD) in the European Union (EU).[4] Since listed in Annex IV, the species has been identified by the EU legislator as a species of community interest. It is thus subject to the rules under the Habitats Directive laying down obligations on Member States of the EU to adopt a *system of strict protection*, to restore and maintain species at a *favourable conservation status*.[5] The most severe threat to the species in the waters of the Baltic Sea is bycatch, where the animals get caught as non-target species in fishing nets and die from drowning.[6]

In the policy area relating to the conservation of marine biological resources under the common fisheries policy (CFP), the EU has *exclusive competence*.[7] This means that the power to adopt legally binding acts in that area remains with the EU, and Member States are able to take actions to conserve marine biological resources through measures against fisheries only after a delegation of competence from the EU. When competence is exercised, the integration principle requires integration of environmental requirements into the definition and implementation of the Union's policies and activities.[8] During the reform of the CFP Regulation[9] in 2013, the integration of environmental concerns into the fisheries policy was an important question.[10] The new regulation therefore gave Member States extended powers in regard to implementing obligations under the Habitats Directive.[11] However, this power only encompasses requirements following from certain provisions relating to habitat protection in the Habitats and Birds Directives and the Marine Strategy Framework Directive (MSFD)[12] in waters under a Member States sovereignty or jurisdiction, i.e. the territorial sea and the exclusive economic zone (EEZ).[13] Regarding the territori-

[2] It is estimated that there are around 500 individuals in Baltic waters, but only just under 100 of them are considered as reproductive. The Swedish Agency for Marine and Water Management, *Action Plan for Porpoise: Phocoena phocoena* (Report 2021:11) and Amundin et al., 2022. *Estimating the abundance of the critically endangered Baltic Proper harbour porpoise (Phocoena phocoena) population using passive acoustic monitoring*, Ecology and Evolution 12, e8554. https://doi.org/10.1002/ece3.8554 (hereafter Amundin et al. 2022).

[3] Council Directive 92/43/EEC of May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L206/7 (hereafter Habitats Directive).

[4] Convention on the Conservation of European Wildlife and Natural Habitats of Sept 19, 1979, C.E.T.S. No. 104; Convention on Biological Diversity of 5 June 1992, 1760 U.N.T.S. 69.

[5] Habitats Directive, Articles 2(2) and 12.

[6] Carlén et al., *Basin-scale distribution of harbour porpoises in the Baltic Sea provides basis for effective conservation actions* (2018), p. 44, in Biological Conservation 226, p. 42–53.

[7] Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012 OJ L 326/47-326/390 (TFEU), Article 3(d).

[8] TFEU, Article 11.

[9] Regulation (EU) No 1380/2013 of the European parliament and of the council of 11 December 2013 on the Common Fisheries Policy, […] OJ L 354/22 (hereafter CFP Regulation).

[10] European Commission, *Reform of the Common Fisheries Policy*, Green Paper, COM (2009) 163 final, 22 April 2009. See, e.g. section 2, 4.2, 5.5 and 5.8.

[11] CFP Regulation, Article 11 regulates what measures Member States can take against fisheries in the exclusive economic zone. For further reading on the topic, see Christiernsson, Michanek and Nilsson, *Marine Natura 2000 and Fishery – The Case of Sweden*, Journal for European Environmental & Planning Law 12 (2015) 22–49 (hereafter Christiernsson et al. 2015).

[12] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy OJ L 164/19.

[13] CFP Regulation, Article 11 states that Member States are empowered to adopt conservation measures for the purpose of complying with the requirements under Article 13(4) MSFD, Article 4 of the Birds Directive and Article 6 of the Habitats Directive. See also case C-683/16, *Deutscher Naturschutzring*, ECLI:EU:C:2018:433, paras 57–59, where the court states that nothing in the provision indicates that the list of provisions therein is not

al sea, there is also an authorization under the CFP Regulation empowering Member States to adopt national measures to maintain or improve the conservation status of marine ecosystems.[14] The scope is broad and the authorization can be used to implement requirements because of the Habitats Directive. This leaves the question open if, and to what extent, Member States can take measures against fisheries in the EEZ to comply with Article 12 of the Habitats Directive, also when there are no obligations according to the habitat protection provisions.[15]

Against this backdrop, this article aims to analyze to what extent Member States are obliged to take measures against fisheries to eliminate bycatches of strictly protected species in their marine waters, according to Article 12 of the Habitats Directive, and thus to analyze to what extent the obligations under the Article applies to fisheries. Thereafter, the article will assess to what extent Member States have the power to take measures against fisheries to protect Annex IV species from bycatch outside marine protected areas (MPAs) in the EEZ. An aim is also to contribute with new knowledge on the legal preconditions to implement an ecosystem approach to fisheries management, an approach that *should be applied* according to the CFP Regulation[16] and is recommended by the parties to the CBD.[17] The CFP requires an integrated approach to fisheries management, to maintain fisheries "within ecologically meaningful boundaries… while preserving both the biological wealth and the biological processes necessary to safeguard the composition, structure and functioning of the habitats of the ecosystem affected."[18] In order to implement the ecosystem approach to fisheries, Member States therefore have to be able to take measures against fishing for the purpose of, *inter alia*, protecting marine species listed in Annex IV of the Habitats Directive, in the absence of Union measures.[19]

The assessments have been carried out through an application of an EU law methodological approach. The point of departure is thus the text of relevant provisions regarding species protection and fisheries and case law of the Court of Justice of the EU (CJEU) and the methods of textual, contextual and teleological interpretation.[20] Non-binding sources used are pre-

exhaustive. This means that the authorization is limited to measures necessary to comply with the three provisions listed therein, and Member States are therefore not authorized to take measures for the purpose of complying with Article 12 of the Habitats Directive through the provision.

[14] CFP Regulation, Article 20. Member States may take non-discriminatory measures for the maintenance or improvement of the conservation status of marine ecosystems in the territorial zone.

[15] See note 13.

[16] CFP Regulation, Article 2(3), an *ecosystem based approach to fisheries management* should be applied to minimize negative impacts of fisheries on the marine environment.

[17] See the Malawi principles in the Annex of COP decision V/6 (2000) and Annex I of COP decision VII/11 (2004). According to the FAO Fishery Resources Division (FIR) in their guidelines, an ecosystem approach to fisheries is defined as striving "to balance diverse societal objectives, by taking into account of the knowledge and uncertainties about biotic, abiotic and human components of ecosystems and their interactions and applying an integrated approach to fisheries within ecologically meaningful boundaries", FAO, Fisheries Management – 2. The Ecosystem Approach to Fisheries. FAO Technical Guidelines for Responsible Fisheries. No. 4. Suppl. 2. Rome, 2003, p. 14.

[18] CFP Regulation, Article 4(1)(9).

[19] For further reading about the relevance of an ecosystem approach to fisheries management see Wakefield, J., *The Ecosystem Approach and the Common Fisheries Policy*, in Langlet and Rayfuse (eds.), *The Ecosystem Approach in Ocean Planning and Governance*, BrillNijhoff (2019). See also Michanek and Christiernsson, *Adaptive Management of EU Marine Ecosystems – About Time to Include Fishery*, Scandinavian Studies in Law (2014), p. 201–240.

[20] See Case 26/62, *van Gend en Loos* ECLI:EU:C:1963:1, 12–13 and Case C-129/19, *Presidenza del Consiglio dei Ministri v BV* ECLI:EU:C:2020:566, para 38. In the first case, the court stated, in relation to ascertaining the meaning and effects of EU provisions, that "*it is necessary to con-*

paratory work for the Habitats Directive and for the Technical Regulation under the CFP.[21] The legislation is analyzed through the lens of the Baltic Proper harbour porpoise. The aim however, is not limited to analyzing the legal situation for this species alone, but to paint a broader picture of the overall function of EU law in the area of bycatch of Annex IV species and fisheries, and thus the intersection between two of the Union's policy areas. Based on the fact that scientific research shows that marine species under the responsibility of EU Member States are threatened and that fishing is one of the drivers of biodiversity loss, a single example of a threatened species will help to identify possible deficits in the legal system and analyze the integration between two policy areas.

The article thus takes its point of departure from the presumption that anthropogenic activities, such as fisheries, can affect species and their habitats negatively. Managing such activities is therefore central for supporting biodiversity and to implement and ecosystem-based approach to fisheries.[22] This in turn, is seen as vital in order to create and uphold a sustainable fishery that ensures the preservation of biodiversity. Healthy ecosystems and conservation of their inhabitants are in turn essential for processes that support life, including human life, as well as for achieving the objectives of the CFP.[23] In the case of the Baltic Proper harbour porpoise, researchers have moreover concluded that existing protected areas are insufficient to safeguard the future survival of the species, and that the bycatch risk is high in parts of the area. It is also emphasized that although there are designated areas with effective regulations to protect the species within MPAs, protection in its entire population range is vital for preventing bycatch and to ensure a favourable conservation status.[24]

2. Bycatch of the Baltic Proper Harbour Porpoise

The Baltic Proper harbour porpoise has its main distribution in the Baltic Proper, and is one of three harbour porpoise populations in the Baltic Sea Region.[25] Unlike its relatives in the Belt Sea, Kattegat and Skagerrak, the Baltic Proper population is classified as Critically Endangered by the International Union for Conservation of Nature (IUCN)[26] and the Baltic Marine Environment Protection Commission (HELCOM)[27]. The decline of the Baltic Proper population became severe in the 1960s with the emergence of serious threats such as environmental contaminations and fisheries bycatch. The introduction of thin nylon nets caused a significant increase in

sider the spirit, the general scheme and the wording of those provisions". In the latter case the court held that when interpreting an EU law provision, "*it is necessary to consider not only the wording of that provision, but also its context and the objectives of the legislation of which it forms part*".

[21] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive*, 92/43/EE, C(2021) 7301 final (Brussels 2021) (hereafter Guidance Document Habitats Directive) and *Proposal for a regulation of the European Parliament and of the Council on the conservation of fishery resources and the protection of marine ecosystems through technical measures* […], COM/2016/0134 final, (Brussels 2016) (hereafter Commission proposal 2016), p. 3..

[22] See *inter alia* Christiernsson and Michanek, *Miljöbalken och fisket*, 1 Nordisk Miljörättslig Tidskrift, p. 11–28, where the authors address the issue of impact of fisheries on species and ecosystems.

[23] CFP Regulation, Article 4(1)(8).

[24] *Bycatch in Baltic Sea commercial fisheries: High-risk areas and evaluation of measures to reduce bycatch*, HELCOM ACTION (2021) (hereafter HELCOM ACTION 2021), p. 21 and Carlström, J and Carlén, I, *Skyddsvärda områden för tumlare i svenska vatten* (2016), AquaBiota Report 2016:04, p. 9.

[25] Carlén, *Ecology and Conservation of the Baltic Proper Harbour Porpoise* (2022), Doctoral Thesis in Animal Ecology, Stockholm University, Department of Zoology, Stockholm 2022 (hereafter Carlén 2022), p. 3.

[26] Carlström et al. (2023). *Phocoena phocoena (Baltic Sea subpopulation). The IUCN Red List of Threatened Species* 2023: e.T17031A50370773.

[27] HELCOM 2013, p. 7.

static net fishing effort and hence very likely in bycatch of harbour porpoises.[28] The use of static nets, such as gillnets and trammel nets, has been shown to be associated with the greatest risk of bycatch, and small-scale[29] gillnet fisheries is pointed out as the most problematic in terms of bycatch of marine mammals.[30] Because of the alarming situation for, *inter alia*, the Baltic Proper population, a group of NGOs submitted a proposal to the Commission in 2019 to adopt emergency measures to prevent further bycatch.[31] This resulted in the Commission sending a special request to The International Council for the Exploration of the Sea (ICES) for scientific advice regarding bycatch mitigation in the Baltic Sea. The request, in turn, resulted in a report from ICES on emergency measures to prevent bycatch.[32] Since acoustic deterrent devices (pingers) on nets have been shown to reduce the bycatch rate significantly, ICES recommends the use of pingers in *all* commercial gillnet fisheries within the distribution range of the population, besides measures taken within protected areas.[33] In a report from 2019, they also indicate that there is a need for bycatch monitoring of vessels smaller than 15 m, stating that monitoring of smaller vessels has been poor, and that data need to ensure "representative coverage of relevant metiers for protected species bycatch".[34] In their advice from 2020, they state that enhanced monitoring is required to, *inter alia*, assess the effectiveness of management measures.[35]

A study carried out between 2011 to 2013 estimated, for the first time, the density and abundance of the Baltic Proper population.[36] The study included spatial and temporal variables and showed when and where the species is likely to be present during the year and concluded that the species inhabits large parts of the Baltic Sea. The results of the study thus give Member States a powerful tool to take informed conservation measures based on scientific knowledge to mitigate bycatch in the fisheries posing a threat to the species.

There is a lack of data on bycatch of the Baltic Proper population, but an approximation, based on bycatch numbers of the Belt Sea population, suggests that 7 specimens (1.4% of the population) are bycaught every year in Baltic waters.[37] The maximum mortality that the population can handle without risking extinction is estimated to 0.7 specimens per year.[38] Based on the low number of individuals in Baltic waters and these estimations, every bycatch, especially of a fertile

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[28] Carlén, Nunny and Simmonds, *Out of Sight, Out of Mind: How Conservation is Failing European Porpoises* (2021), Frontiers in Marine Science, 8:617478, p. 6.

[29] In the EU, small-scale fisheries is defined, in relation to vessel size, as fisheries carried out by fishing vessels of an overall length of 12 m or less, see Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund […] OJ L 149/1, Article 3(2)(14).

[30] HELCOM ACTION 2021, p. 29.

[31] Seas at Risk (2019), *Groups Call on the European Commission to take action over huge numbers of cetacean deaths* (hereafter Seas at Risk 2019) (press release), 10 July 2019, https://seas-at-risk.org/press-releases/groups-call-on-the-european-commission-to-take-action-over-huge-number-of-cetacean-deaths/. (Accessed 18-08-23.)

[32] ICES 2020, *EU request on emergency measures to prevent bycatch of common dolphin (Delphinus delphis) and Baltic Proper harbour porpoise (Phocoena phocoena) in the North-east Atlantic* (hereafter ICES Advice 2020), in Report of the ICES Advisory Committee, 2020. ICES Advice 2020, *sr.2020.04. https://10.17895/ices.advice.6023*.

[33] Carlén 2022, p. 3 and Moan and Bjørge, *Pingers reduce harbour porpoise bycatch in Norwegian gillnet fisheries, with little impact on day-to-day fishing operations*, Fisheries Research 259 (2023) 106564 and ICES Advice 2020, p. 7 f.

[34] ICES 2019, Working Group on Bycatch of Protected Species (WGBYC), ICES Scientific Reports, 1:51, 163 pp. http://doi.org/10.17895/ices.pub.5563, p. 3.

[35] ICES Advice 2020, p. 7.

[36] The results of the study were published in 2021, see Amundin et al. 2022.

[37] IMR/NAMMCO 2018, *International Workshop on the Status of Harbour Porpoises in the North Atlantic*, Report, https://nammco.no/wp-content/uploads/2020/03/final-report_hpws_2018_rev2020.pdf, p. 45.

[38] Ibid.

female, risks major negative consequences for the population.[39] Today, there are measures in place to mitigate bycatch in some Natura 2000 sites and an adjacent area within the population range of the Baltic Proper harbour porpoise.[40] However, given the fact that the population is spread over large parts of the Baltic Sea, research emphasize that there is need for bycatch mitigation measures in their *entire* distribution range to ensure the survival of the population.[41] This is further supported by the fact that porpoise occurrence in many cases coincides with areas where fishing takes place, which increases the risk of bycatch.[42]

3. The relationship between environmental law and the fisheries policy framework

The question of whether the Habitats Directive applies to fisheries is important since it has implications for how the requirements on Member States are to be interpreted. For many years, there was in fact a presumption that the Habitats and Birds Directives did not automatically apply to fisheries, because of the exclusive competence of the EU in questions regarding conservation of marine resources, which made it more difficult for Member States to fulfil their obligations under the Directives in relation to fisheries compared to other sectors.[43] The consolidation of the CFP as a field of exclusive competence of the EU was established by the CJEU[44] already in the late 1970s and early 1980s, although the legal basis of the competence was not introduced until 2007, and entered into force through the Treaty of Lisbon in 2009.[45] The presumption that the species protection did not apply to fisheries was partially disproved by the court already in 1987, in a case regarding the protection of wild birds.[46] In their law transposing the Birds Directive, Germany excepted the general prohibitions in Article 5 of the Directive, which prohibits harmful deliberate actions, for activities taking place in "the normal use of the land for agricultural, forestry or fishing purposes". Germany argued that such activities should be excepted, since agricultural, forestry or fishing activities having the intention of harmful deliberate actions could not be described as "normal" activities. The court found that such an exemption was in breach of the Birds Directive, and thus that rules on species protection are applicable to all types of land use, including fisheries. In 2004, the application of the Habitats Directive to fisheries was recog-

[39] Seas at Risk 2019.

[40] See Commission Delegated Regulation (EU) 2022/303 of 15 December 2021 […] as regards measures to reduce incidental catches of the resident population of the Baltic Proper harbour porpoise (*Phocoena phocoena*) OJ L 46/67.

[41] Carlén 2022, p. 13 f.

[42] Sveegaard et al., *Spatial interactions between marine predators and their prey: herring abundance as a driver for the distribution of mackerel and harbour porpoise*, Marine Ecology Progress Series 468, 245–253 (2012).

[43] Appleby and Harrison, *Taking the Pulse of Environmental and Fisheries Law: The Common Fisheries Policy, the Habitats Directive, and Brexit* (2019), Journal of Environmental Law, 2019, 0, 1–22, p. 1 f.

[44] At the time, the Court of Justice of the European Communities.

[45] Joined cases 3/76, 4/76 and 6/76 [1976], where the move into fisheries conservation was endorsed by the court, and Case 804/79 [1981] ECR 1045, paras 17–18, where the court clarified that the legislative jurisdiction in the area of fisheries conservation is exclusive. The judgements raised the question whether the exclusive competence related to fisheries conservation only, and not the power to adopt measures to minimize the effect of fishing to the marine ecosystem, see Owen, D, *Interaction between the EU Common Fisheries Policy and the Habitats and Birds Directives*, Institute for European Environmental Policy (2004), section 2.4.1. This question was as stated clarified by the adoption of the Treaty of Lisbon, by which the TFEU was revised and thus recognized the conservation of marine biological resources as an exclusive competence of the Union.

[46] Case C-412/85, *Commission v the Federal Republic of Germany* [1987] ECLI:EU:C:1987:370.

nized for the first time.[47] The case regarded mechanical fishing of cockles and the question as to whether the fishery qualified as a plan or project under Article 6(3) of the Directive.[48] The court concluded that fisheries can qualify as a plan or a project in the meaning of the Article and that Member States are required to conduct an appropriate assessment of fisheries that are likely to have a significant effect on a Natura 2000 site. Member States may only authorize such fisheries after having ascertained that it will not adversely affect the integrity of the site concerned. In the more recent case *Skydda Skogen*, the court concluded that the prohibitions listed in Article 12(1)(a) to (c) in the Habitats Directive are also applicable to activities where the purpose is *manifestly different* from capture or killing in the meaning of the Article.[49] The court exemplifies such activities with forestry work or land development, but do not preclude fishing activities by doing so, since the words "such as" implies that the list of examples is not exhaustive. On the opposite, it implies that the list would include a wide range of activities, such as e.g. fishing. Additionally, nothing in the Habitats Directive indicates that fishing would be exempted from the rules therein, a conclusion that is supported by the rulings of the CJEU referred to above. Thus, all measures necessary to implement the requirements of the Directive must be adopted in the EEZ.[50] Further, the CFP Regulation explicitly states that the Regulation shall be coherent with the Union environmental legislation.[51] This is partly reflected in the Technical Regulation, that in its objectives states that it shall contribute to having in place fisheries management measures for the purpose of complying with, *inter alia*, the Habitats Directive.[52]

The main secondary EU acts that have been adopted in the two policy areas that are of relevance for this article are the CFP Regulation and the Habitats Directive, which both apply in the EEZ.[53] Among the objectives of the CFP Regulation is that the CFP shall be coherent with the Union environmental legislation and thus, *inter alia*, the Habitats Directive.[54] However, despite this objective, the CFP Regulation does not contain an explicit competence for Member States to implement rules on the strict protection of species in the EEZ.[55] In 2019, a new regulation on technical measures entered into force.[56] The purpose of the Regulation is to contribute to achieving the objectives of the CFP.[57] The measures shall contribute to achieving, *inter alia*, the objective of ensuring that incidental catches (bycatches) of sensitive species, which includes species listed in Annex IV of the Habitats Directive, are minimized and where possible eliminated so that they do not represent a threat to the con-

[47] Case C-127/02, *Landeliljke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECLI:EU:C:2004:482.

[48] See Christiernsson et al. 2015 for a deeper analysis of the case.

[49] Joint cases C-473/19 and C-474/19, *Föreningen Skydda Skogen, Naturskyddsföreningen i Härryda, Göteborgs Ornitologiska Förening v The County Board* [2021] ECLI:EU:C:2021:166, para 53.

[50] Case C-6/04, *Commission v United Kingdom of Great Britain and Northern Ireland*, [2005] ECLI:EU:C:2005:626, para 121.

[51] CFP regulation, Article 2(5)(j).

[52] Regulation 2019/1241, Article 3(2)(d).

[53] See CFP Regulation, Article 1(2)(b) and Case C-6/04, para 117.

[54] CFP Regulation, Article 2(5)(j). The same provision emphasizes the importance of the Regulation being coherent with the objective of achieving a good environmental status by 2020 as set out in Article 1(1) of the MSFD.

[55] See, inter alia, Christiernsson and Michanek 2015, section 3.1, where the authors discuss the relationship between fisheries and the environment.

[56] Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures […] OJ L 198/105.

[57] Regulation 2019/1241, Article 3(1).

servation status of these species.[58] Targets of the technical measures include aiming to ensure that incidental catches of marine mammals do not exceed levels provided for in Union legislation.[59] The measures of the Regulation shall moreover, in particular, contribute to achieving the objective of having in place fisheries management measures for the purpose of complying with the Habitats Directive.[60]

The main aim of the Habitats Directive is, according to Article 2(1), to "contribute towards ensuring biodiversity through the conservation of wild fauna and flora". The preamble points out that this aim makes a contribution to the general objective of sustainable development, which in turn emphasizes the importance of a development that meets the needs of both present and future generations.[61] The species listed in the Habitats Directive are all considered in need of protection from a European perspective, and the Directive divides species into categories, with different levels of protection. Annex IV lists the most vulnerable species, that are in need of strict protection in their natural range. Measures taken under the Directive shall be designed to "maintain or restore, at favorable conservation status, natural habitats and species of wild fauna and flora of Community interest".[62] Member states shall therefore surveil the conservation status of species of community interest, to identify whether they reach a *favorable conservation status*, which in turn comprises appropriate scientific and ecological research.[63] Such a status should be achieved at the national level and also, if a species' natural range stretches over several Member States, at a cross-border level.[64] In light of the overall objective of the Habitats Directive, i.e. to achieve and maintain favorable conservation status for all habitats and species of Community interest, the surveillance must provide clear information about the conservation status of relevant species, including indications on the effectiveness of the Directive. The information will thus be the starting point when determining what measures that need to be taken to protect species of community interest, and thereby meeting the requirements of the Directive.

Member States are obliged to faithfully implement and apply the directives in conformity with the intent of the legislator.[65] This is particularly important in relation to the Birds and the Habitats Directives, since the Member States have been trusted with the management of the

[58] Regulation 2019/1241, Article 3(2)(b). Article 6(8) defines sensitive species as a species whose conservation status, including its habitat, distribution, population size or population condition is adversely affected by pressures arising from human activities, including fishing activities. This includes species listed in Annexes II and IV of the Habitats Directive, species covered by the Birds Directive as well as species whose protection is necessary to achieve good environmental status under the MSFD.

[59] Regulation 2019/1241, Article 4(1)(b). Such targets shall be identified through threshold values for the status classification of marine species in accordance with several criteria, for the purpose of determining "good environmental status" under the MSFD. This has been specified by the Commission in Decision 2017/848 of 17 May 2017 laying down criteria and methodological standards on good environmental status of marine waters and specifications and standardised methods for monitoring and assessment […] OJ L 125/43.

[60] Regulation 2019/1241, Article 3(2)(d).

[61] See recital 3 in the preamble. Although the recitals are not legally binding, they give a clear indication of the intent behind the Directive.

[62] Habitats Directive, Article 2(2).

[63] Habitats Directive, Article 11. For an interdisciplinary understanding of the term *favourable conservation status* in a European context, see Epstein, López-Bao, and Chapron, *A Legal-Ecological Understanding of Favorable Conservation Status for Species in Europe* (2015), Conservation Letters, March/April 2016, p. 81–88.

[64] Case C-674/17, *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo – Kainuu ry* [2019] ECLI:EU:C:2019:851, para 61.

[65] This obligation follows from the principle of sincere cooperation, which applies generally "to ensure fulfilment of the obligations arising out of the Treaties". Consolidated Version of the Treaty on the European Union, 26 October 2012 OJ C 326/13 (TEU), Article 4(3).

common heritage.[66] An important note in relation to the interpretation and application of the Directive, is that the precautionary principle shall apply where there is uncertainty as to the existence or extent of risks.[67] This means that lack of full scientific certainty should not be used as reason for postponing measures to avoid or minimize threats.[68] According to the CJEU, protective measures may therefore be taken without having to wait until the reality and seriousness of risks become fully apparent.[69] Since the precautionary principle is one of the foundations of environmental protection, rules must be interpreted in light of the principle so as to contribute to the main aim of the Directive, i.e. to ensure biodiversity through conservation measures to restore, *inter alia*, populations of species of wild fauna at a favorable status.[70]

4. Protection of species

4.2 Prohibition and requirements

Member States are obliged to establish a system of strict protection in the natural range of species listed in Annex IV of the Directive. The system has to include prohibiting, *inter alia*, all forms of deliberate capture or killing of specimens of these species in the wild.[71] The prohibition aims to address a wide range of threats for the concerned animal species, and the protection must be efficient when it comes to preventing them.[72] According to the CJEU, the transposition of the provision requires not only the adoption of a comprehensive legislative framework, but also the implementation of concrete and specific protective measures.[73] The system must thus be coherent, coordinated and of a preventive nature in order to be able to implement the prohibitions in relation to specific species.[74]

According to the aims of the Directive, it seeks to restore, as well as to *maintain* a favourable conservation status.[75] There is thus a requirement to maintain the status over time.[76] Further, it follows from Article 12(1)(a) that the strict protection requires protection of individual specimens in relation to deliberate capture or killing. Regarding "specimens", the CJEU has stated, in the case *Skydda Skogen*, that the situation at the level of each individual of the relevant species shall be assessed.[77] The court thus confirmed that the strict protection of species applies at the individual level, which means that every deliberate capture or killing of individual specimens of a strictly protected species is prohibited.[78] Therefore, the provision applies not only to species that have not reached a favorable conservation status, but to all species listed in Annex IV, regardless of their status, and regardless if an

[66] See e.g. Case 262/85, *Commission v Italy* [1987] ECLI:EU:C:1987:340, para 9 and Case C-38/99, *Commission v France* [2000] ECLI:EU:C:2000:674, para 53.

[67] The principle is established, however not clearly defined, in Article 191(2) of the TFEU.

[68] See preamble of the Convention on Biological Diversity (CBD) where the precautionary principle is defined.

[69] Case C-499/18 P, *Bayer CropScience AG and Others v Commission* [2021] ECLI:EU:2021:367, para 80. See also C-473/19 and C-474/19 *Skydda Skogen*, para 60, where the court stated that an interpretation of Article 12(1)(a) to (c) where the applicability of the prohibitions would be conditional on the risk that an activity may have an adverse effect on the conservation status of a species would not be consistent with the precautionary principle.

[70] See C-127/02 *Waddenzee*, paras 44 and 58. See also, by analogy, Case C-180/96, *United Kingdom v Commission* [1998] ECLI:EU:C:1998:192, paras 105 and 107.

[71] Habitats Directive, Article 12(1)(a).

[72] Case C-88/19, *Alianta pentru combaterea abuzuliror v TM, UN, Directia pentru Monitorizarea si Protectia Animalelor* [2020] ECLI:EU:2020:458, para 23.

[73] C-383/09, *Commission v France* [2011] ECLI:EU:C:2011:369, para 19.

[74] Ibid., para 20.

[75] Habitats Directive, Article 2(2).

[76] C-473/19 and C-474/19 *Skydda Skogen*, paras 64 to 66. See also Christiernsson, *Is the Swedish Brown Bear Management in Compliance with EU Biodiversity Law?*, Journal for European Environmental & Planning Law, Volume 16:3, p. 237–261, p. 242.

[77] C-473/19 and C-474/19 *Skydda Skogen*, para 54.

[78] Ibid.

activity does not risk affecting their status negatively.[79]

4.2 Deliberate capture and killing of species

The Directive prohibits actions that are deliberate in the meaning of the Directive. The concept has been interpreted extensively by the CJEU, stretching beyond a direct intent, where the person or body performing an action *consciously accepts* the risk that it could cause harm to a protected species. The *Caretta Caretta* case regarded deliberate disturbance of the loggerhead sea turtle, where a beach area in the bay of Laganas was used as a breeding site by turtles.[80] Mopeds were prohibited on the beach and the surrounding sea area was classified as an absolute protection area. Despite the fact that information was available about the presence of turtle nests on the beach and special notices about the protection area had been erected, mopeds were used by people on the beach, and pedalos and small boats were present in the sea area. The court stated that the presence of mopeds, pedalos and small boats constituted deliberate disturbance during the species breeding period.[81] Thus, the statement of the court should be interpreted as *deliberate* meaning a conscious acceptance of consequences.[82] A later judgement concerned bycatching of otters in fox hunting. In that case, the Commission argued that permitting the use of stopped snares in fox hunting endangering the protected otter should be seen as *deliberate capture* since (the Commission claimed) authorities were aware that otters were present in the area.[83] The court however, found that the action did not constitute deliberate capture since the intent was not to capture otters and that it had not been established that otters were present in the area. It had therefore not been established that the authorities were aware that they risked endangering otters by issuing a permit for fox hunting. In the case, the court clarified that for an action to be deliberate, the one performing the activity must have the *intent* to capture or kill the concerned species or "at the very least" must have *accepted* the possibility of such capture or killing.[84] The judgement in the *Spanish Otter* case raises the question of the meaning of a species being present in an area, since this is bound to the risk of deliberate capture or killing. That a species is present in an area, means that the area in question is equivalent to, or forms a part of, the species natural range.[85] According to the CJEU, the natural range of an animal species is a dynamic concept that corresponds to the geographical area in which the species concerned is present or distributed in the course of its natural behavior.[86] The Commission based their argument that otters were present in the area on a standard data sheet drawn up for the relevant area by the Spanish authorities. According to the sheet, otters were supposed to exist in the area. However, the court, as regards the information in the sheet, stated that it was unlikely that otters would move into the area, based on information about the topographic conditions as well as the direction of waterways affecting the distribution of the species.[87] This means that the geograph-

[79] C-473/19 and C-474/19 *Skydda Skogen*, para 66.
[80] Case C-103/00, *Commission v Greece* [2002] ECLI:EU:2002:60.
[81] C-103/00 *Caretta Caretta*, paras 32–40. In the case, the court not only condemned Greece for not establishing a necessary legal framework, but also for not taking concrete and effective measures to protect the breeding sites.
[82] See para 118 of the Advocate General's opinion in Case C-6/04, *Commission v United Kingdom of Great Britain and Northern Ireland*, [2005] ECLI:EU:C:2005:372.
[83] Case C-221/04, *Commission v Spain* [2006] ECLI:EU:C:2006:329.
[84] C-221/04 *Commission v Spain*, paras 69, 71–74.
[85] Since Article 12(1) is applicable in the natural range of all Annex IV-species.
[86] C-88/19 *Alianta pentru combaterea abuzuliror*, paras 38 and 40.
[87] C-221/04 *Commission v Spain*, para 60.

ic area for which the data sheet that the Commission based their argument on did not correspond to the *natural range* of the concerned otter population. This also means that scientific data mapping the natural range of Annex IV-species has to be reliable and updated in order for it to be established that a species is present in an area.

Member States are obliged to establish a legal framework for coherent and coordinated measures as well as to apply and enforce the prohibitions. It is therefore rarely sufficient to issue a ban; preventive measures may also be required, which in turn requires Member States to anticipate threats and risks that a species may face. The system can thus include a wide range of measures, tailored to specific activities and specific species that are to be protected. With regard to ongoing activities, such as fishing, various forms of planning instruments, codes of conduct and practical information and guidance can potentially satisfy legal requirements.[88] Were they do not take "all of the specific measures necessary" to prevent deliberate actions, Member States have failed to fulfill their obligation to implement a system of strict protection under Article 12(1).[89] For example, in the *Caretta Caretta* case, measures including information about prohibited actions and activities along with information about species occurrence were insufficient for the implementation of a strict protection system.

4.3 Incidental capture and killing of species

In addition to the requirements following from Article 12(1), Member States are also obliged to establish a system to monitor the *incidental* capture and killing of animal species listed in Annex IV, under Article 12(4).[90] The provision works complementary to Article 12(1) for activities that are not deliberate in the meaning of the Directive, and its purpose is to gather reliable data and to take conservation measures if needed "to ensure that incidental capture or killing does not have a *significant negative impact* on the species concerned" (author's italics). The provisions may thus impose different obligations on Member States. Namely, the conservation status of the species in question has no significance in the assessment whether the prohibition in Article 12(1) is applicable.[91] Article 12(4), however, is linked to the incidental capture or killing risking a significant negative impact on the species for conservation measures to be required. In that way, conservation measures taken for the purpose of ensuring that incidental capture or killing does not have a significant negative impact on a species may serve the purpose to comply with the requirements following from Article 12(1). The word "system" implies that the monitoring can involve several complementary methods, which can be used, if necessary to determine whether incidental capture or killing risks a significant negative impact on the concerned species. The Commission provides some examples on what the monitoring system could cover, included bycatch of cetaceans or sea turtles in fishing gear.[92] The collected data, combined with the results

[88] Guidance Document Habitats Directive, p. 18.
[89] C-473/19 and C-474/19 *Skydda Skogen*, para 52.
[90] In the marine area, such a monitoring system can rely on the data collected by Member States under the fisheries data collection framework. See Regulation (EU) 2017/1004 of the European Parliament and of the Council of 17 May 2017 on the establishment of a Union framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the common fisheries policy […] OJ L 157/1. Member States shall collect data, including data on bycatch, for fisheries management following their national work plans and shall submit an annual report to the Commission on their implementation, see CFP Regulation, Article 25.
[91] C-473/19 and C-474/19 *Skydda Skogen*, para 66.
[92] Guidance Document Habitats Directive, p. 40.

of surveillance of a species conservation status, works to determine if measures are needed.[93] The Directive does not define "significant negative impact". However, the concept must be viewed in light of the relevant species' conservation status, since the surveillance of the conservation status is a part of the assessment under Article 12(4). The Commission states that the impact will need to be assessed on a case-by-case basis, where the gathered information on the effect of incidental capture and killing on the populations of a species, together with the achievement or maintenance of its favourable conservation status, is crucial.[94] The Commission identifies three factors relevant to the assessment: the life history of the species, the magnitude and duration of bycatch and the conservation status and trend of the species. According to the Commission, the impact could thus be seen as significant if a species is in unfavorable conservation status and incidental capture and killing causes further decline in numbers of the species, in particular if future recovery prospects are affected.[95] Finally, the precautionary principle applies in lack of data on the conservation status and/or a lack of the actual level of incidental capture and killing.[96] A conclusion is therefore, that in the case where a Member State has failed to implement a monitoring system under Article 12(4), and/or failed to implement the surveillance of the conservation status under Article 11 for a specific species, conservation measures may be required. This has support in case law from the CJEU[97] and in the very nature of the precautionary principle, meaning that protective measures shall be taken where there is a lack of scientific certainty in relation to risks. Additionally, the purpose behind the provision is to establish a monitoring system and to take conservation measures if needed to *ensure* that incidental capture or killing does not have a significant negative impact on the species concerned.[98] The provision in itself therefore expresses a precautionary approach in relation to the need for conservation measures.

5. Fisheries regulation to address species protection?

During the development of the current CFP Regulation, it was emphasized that the regulatory structure of the Technical Regulation was "sub-optimal".[99] Among the issues mentioned was the fact that the current measures did not provide incentives to fish selectively since there was no cost of catching sensitive species, which had resulted in limited protection. There had been attempts to align the Regulation in e.g. the Baltic Sea, but the attempts had failed due to the negotiations moving away from alignment to detailed substance of the Regulation, which was another issue that was emphasized in the critique of the then current regulation.[100] Before the Technical Regulation entered into force, there were also a number of standalone regulations containing technical measures, among them a regulation explicitly dedicated to mitigate bycatches of cetaceans in fisheries. This changed with the new regulatory structure, to simplify and strengthen the long-term approach to, *inter alia*, conservation, and the regulation now in-

[93] Ibid.
[94] Ibid., p. 43.
[95] Ibid.
[96] Ibid.
[97] See section 3.

[98] This can be compared to the judgment in the *Waddenzee* case. The case concerned Article 6(3) of the Directive, where the court concluded that already the *risk* of a significant effect on a site is relevant for requiring prior assessment of a plan or project. This follows from the legal text "likely to have". In the case, the court stated that an assessment has to be made "if it cannot be *excluded*, on the basis of objective information, that it will have significant effects on that site" (author's italics). See C-127/02 *Waddenzee*, para 45.
[99] Commission proposal 2016, p. 3.
[100] Ibid., p. 4.

cludes an annex explicitly dedicated to measures for the purpose of reducing bycatch of sensitive marine species.[101] One mechanism introduced for the purpose of simplifying the structure was the governance approach of regionalization. It was emphasized that such an approach would give scope to limit the need for detailed technical measures adopted by the European Parliament and the Council of Ministers under co-decision. Through the new process, measures could be regionally devised and tailored to different fisheries.[102] Thus, the regulation went from micro-management towards a results-based management approach.

The Technical Regulation sets out technical conservation measures that govern when, where and how fishing is allowed. It sets out general baseline measures that apply to all EU waters as well as provides for the adoption of additional technical measures responding to regional fisheries, where Member States are provided with the incentive to play an active role in implementing measures against national vessels and in initiating measures against foreign vessels. Baseline measures include, *inter alia*, a prohibition of driftnets with a total length over 2,5 km, with a total prohibition on driftnets in the Baltic Sea.[103] The Regulation moreover contains a general prohibition on the catching, retention onboard, transhipment and landing of Annex IV-species, where the three latter shall be permitted in cases of accidental catches where it is necessary for e.g. research purposes when the animal has been killed due to the catching.[104] The same provision, which also applies to recreational fisheries, authorizes Member States to adopt, for vessels flying their flag, national mitigation measures or restrictions on the use of fishing gear for the purpose of minimizing bycatches.[105] The measures must be at least equivalent to existing baseline measures under the regulation.[106]

Regional technical measures, with baseline measures applying in the respective region, are set out in a number of annexes, which can be amended or supplemented through delegated acts by the Commission at the initiative of Member States.[107] The initiating Member State and Member States affected by the measures may submit joint recommendations for the purpose of adopting such delegated acts that take into account regional specificities of their fisheries.[108] The technical measures adopted through delegated acts shall *aim* at achieving the objectives and targets set out in that regulation, and shall "as a minimum lead to such benefits for the conservation of marine biological resources that are at least equivalent … to the measures" according to the respective annexes.[109] This means that a delegated act alone should not be required to ensure the objectives and targets of the Regulation and that there is no requirement for the measures adopted under such an act to be more stringent than under the existing annexes.

The Commission shall adopt the delegated acts on the basis of a joint recommendation submitted in accordance with, *inter alia*, the regionalization process under Article 18 of the CFP Regulation.[110] According to the CFP Regulation, concerned Member States shall cooperate at a regional level to formulate a joint recommendation if the measures to be adopted would affect a fishery where more than one Member State has a direct management interest.[111] The joint rec-

[101] See Regulation 2019/1241, Annex XIII.
[102] Commission proposal 2016, p. 6.
[103] Regulation 2019/1241, Article 9(1) and 9(3).
[104] Regulation 2019/1241, Article 11(1) and 11(3).
[105] Regulation 2019/1241, Article 2(2) states that Article 11 applies to recreational fisheries.
[106] Regulation 2019/1241, Article 11(4).
[107] Regulation 2019/1241, Article 15(2).
[108] Regulation 2019/1241, Articles 15(2) and 15(3).
[109] Regulation 2019/1241, Article 15(4)(a) and (d).
[110] Regulation 2019/1241, Article 15(2).
[111] CFP Regulation, Article 18(2).

ommendation must be compatible with the objectives of the CFP Regulation and the measures must be at least as stringent as measures under Union law.[112] The objectives include applying the precautionary approach and implementing the ecosystem based approach to fisheries management as well as contributing to the collection of scientific data.[113] They also include a wording stating that the CFP *shall* be coherent with the Union environmental legislation.[114] If the concerned Member State do not agree on a joint recommendation *or* if the proposed measures are not compatible with the objectives and quantifiable targets of the conservation measures in question, measures may be adopted by the Commission through the ordinary legislative procedure.[115]

Annex XIII to the Regulation includes a requirement for Member States to take necessary steps to collect scientific data on incidental catches of sensitive species. The Annex also includes a requirement for Member States to monitor and assess the effectiveness of existing mitigation measures for the purpose of reducing incidental catches of cetaceans in the Baltic Sea, such as the requirement on the use of active acoustic deterrent devices (pingers) in parts of the Baltic Sea on vessels with an overall length of 12 m or more when using bottom-set gillnets or entangling nets.[116] In relation to data collection on bycatch, there is a requirement to monitor cetacean bycatch on an annual basis in the Baltic Sea, that applies to national vessels with an overall length of 15 m or more, when using pelagic trawls, bottom-set gillnets or entangling nets with a mesh size equal to or greater than 80 mm.[117] Where there is scientific evidence to support the negative impact of fishing gear on sensitive species, Member States are *required* to submit joint recommendations for additional mitigation measures to prevent bycatch. The measures are adopted by the Commission under the same procedure as regional technical measures.[118] The measures can include e.g., restricted areas, periods and gear limitations in relation to fisheries.[119] The list is not exhaustive and can thus include a wide range of measures in relation to the protection of sensitive species.

Every three years, the Commission shall submit a report on the implementation of the Regulation, which shall assess to what extent the measures have contributed to achieving the objectives and targets of the Regulation, both at regional and Union level. The information on which the assessment shall be made should be supplied by the Member States and the relevant advisory councils, evaluated by STECF.[120] Where there is evidence that the objectives and targets of the Regulation have not been met at a regional level, relevant Member States shall submit a plan setting out the actions to be taken to contribute to achieving them.[121]

Under the headline "Deliberate capture or killing of specimens of Annex IV(a) species" in its guidelines, the Commission argues that

[112] CFP Regulation, Article 18(5)(a) and (d).
[113] CFP Regulation, Article 2(2) to (4).
[114] CFP Regulation, Article 2(5)(j). It is worth noting that this is expressed as a requirement, despite being part of the objectives of the Regulation.
[115] CFP Regulation, Article 18(6).
[116] Regulation 2019/1241, Annex XIII, Article 4 and part A 1.1.1.
[117] Regulation 2019/1241, Annex XIII, Part A 2.2.1.
[118] Regulation 2019/1241, Annex XIII, Articles 2–3, where Article 3 refers to the regionalization process under Article 15(2) and states that the scientific evidence must be validated by ICES or the Scientific, Technical and Economic Committee for Fisheries (STECF). One example of a delegated act adopted under Article 15(2) is Commission Delegated Regulation (EU) 2022/303 of 15 December 2021 […] as regards measures to reduce incidental catches of the resident population of the Baltic Proper harbour porpoise (*Phocoena phocoena*) OJ L 46/67. The Regulation applies in certain MPAs in the Baltic Sea.
[119] Regulation 2019/1241, Article 21.
[120] Regulation 2019/1241, Article 31(1).
[121] Regulation 2019/1241, Article 31(3).

the need for information from Member States to fishermen is highly relevant in cases of accidental bycatch of marine species during fishing operations *conducted in breach of fisheries rules*.[122] The rules that the Commission refers to is the Regulation on technical measures. The Commission develops its' statement by using the prohibition in the Regulation for certain vessels to use certain types of fishing gear without the simultaneous use of pingers as an example, and state that "Member States must not only ensure that the use of acoustic deterrents is effectively controlled and enforced but also that the fishers are fully informed of this obligation". Two conclusions can be drawn from the Commission's statement, the first being that the Technical Regulation can work as a tool for implementing Article 12 of the Habitats Directive. The second conclusion is that the statement can be seen as an argument that bycatch of a strictly protected marine species occurring during a fishing operation would constitute *deliberate* capture or killing if the operation is conducted in breach of the rules under the Technical Regulation (provided that scientific evidence shows that the species is likely to be present in the concerned area). This could also mean that if the bycatch occurs under the same conditions, but without any fishing rules being breached, it would not constitute deliberate capture or killing, but *incidental* capture or killing. This would mean that fishing operations conducted in line with technical rules issued pursuant to the CFP should not be seen as deliberate. This argument is supported by the principle of legal certainty; all operators have the right to be able to foresee the legal consequences of their actions. However, for Member States to be able to comply with the requirements following from Article 12 of the Habitats Directive, the Technical Regulation has to ensure compliance with the provision. If not, Member States will be held in a vacuum between the obligations following from the Habitats Directive and the principle of legality, where they are hindered from acting outside their powers. In the preparatory act during the reform of the technical measures, the Commission stated that the objectives of the new regulation were consistent with, *inter alia*, the Habitats Directive.[123] This could heal the deficiency of the CFP Regulation not empowering Member States to comply with Article 12 of the Directive in the EEZ.

6. Does the Technical Regulation ensure compliance with Article 12 of the Habitats Directive?

Since Article 12 of the Habitats Directive applies to fisheries, Member States are required to take measures against fisheries to prevent deliberate bycatch as well as to ensure that incidental bycatch does not have a significant negative impact on Annex IV species. In order not to conflict with Article 12, Member States must therefore prevent every case of deliberate bycatch as well as monitor incidental bycatch and take conservation measures if needed to avoid significant negative impact on species. One alternative to avoid conflict with Article 12 has been adopted under the Technical Regulation, through the regionalization process. In order to meet the requirements of the Habitats Directive through the Regulation, Member states must take "all of the specific measures necessary" within that framework. This means that Member States must adopt measures or submit joint recommenda-

[122] See Guidance Document Habitats Directive, p. 25.

[123] Commission proposal 2016, p. 6. It should be noted that several proposals from the Commission were not included in the adopted regulation. Therefore, the original proposal and the adopted regulation are not identical. However, the objectives and targets suggested by the Commission largely correspond to those in the adopted regulation.

tions for additional technical measures in their fisheries that correspond to the requirements under Article 12. The authorization to adopt national mitigation measures or restrictions on the use of fishing gear under Article 11(4) could thus be seen as a requirement rather than an option, if necessary to comply with Article 12.[124] It also means that Member States in the Baltic region must cooperate to adopt additional regional measures, e.g. under Annex XIII and on the basis of Article 15(2), in the natural range of the harbour porpoise and based on validated scientific evidence. This can include e.g., a requirement on the use of pingers relating to net type rather than vessel size, to include small-scale fisheries. If necessary, it could also involve a closure of relevant fisheries in certain areas, permanently or during limited time periods over the year.

Article 12(4) sets the bar that determines how bycatch monitoring should be implemented and requires that a monitoring system for *incidental* catches be adopted. The Commission states that for the implementation of the provision, it is irrelevant whether the bycatch is deliberate or not, but does not provide any arguments to support their standpoint.[125] It is correct that for the requirement to take conservation measures, it is irrelevant whether the bycatch is deliberate or incidental, under the condition that incidental bycatch risks a significant negative impact on the concerned species. However, it is not clear if this is what the Commission aims to point to. A lexical interpretation of the provision would however not support the conclusion that the requirement for monitoring applies to both deliberate and incidental bycatches.[126] Further, the Habitats Directive does not separate between commercial and recreational activities, which means that the requirement for monitoring applies to commercial fisheries as well as recreational fisheries.[127] Member States thus have a requirement to monitor incidental bycatch in commercial as well as recreational fisheries. Finally, in relation to incidental bycatch, estimations suggests that 7 specimens of the population are bycaught every year while as few as 0,7 specimens is acceptable, which in turn would suggest that incidental bycatch has a significant negative impact on the population and that conservation measures therefore shall be taken.[128]

Despite the Commissions' statement that the objectives of the Technical Regulation are consistent with the Habitats Directive, there are challenges regarding compliance with Article 12 in relation to the Regulation. The first challenge relates to Annex XIII and its requirements. The vast majority (94%) of European gillnet vessels are smaller than 12 m.[129] This means that the requirement to use pingers as well as the requirement for a monitoring scheme relating to by-

[124] The provision states that Member States *may*, on the basis of best available scientific advice, put in place measures or restrictions.

[125] European Commission, *Reasoned Opinion addressed to Kingdom of Sweden under Article 258 of the Treaty on the Functioning of the European Union on account of its failure to fulfil its obligation under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora*, Brussels 7.2.2024 INFR(2020)4037, C(2024)158 final (hereafter Commission reasoned opinion), para 40.

[126] It should be noted though, that since the Habitats Directive is adopted on the basis of Article 192 TFEU, Article 193 TFEU provides for Member States to adopt more stringent protective measures than required by the Directive, if the measures are compatible with the Treaty and are notified to the Commission.

[127] C-103/00 *Caretta Caretta* case regarded recreational activities.

[128] In their reasoned opinion regarding the infringement case against Sweden, the Commission claims that incidental bycatch already has such negative impact on the Baltic Proper population, see Commission reasoned opinion, para 44.

[129] Rogan, Read, and Berggren, *Empty promises: The European Union is failing to protect dolphins and porpoises from fisheries by-catch*, Fish and Fisheries, 2021; 22: 865–869, p. 866.

catch of cetaceans only applies to a fraction of the relevant fisheries. This in turn means that there are most likely many cases of bycatch which could be avoided and that estimations of bycatch do not reflect the reality. Additionally, even though recreational fishing takes place in all parts of the Baltic Sea, using a variety of gear, including gillnets, the requirements under Annex XIII do not apply to recreational fisheries.[130]

The regionalization process under the Regulation is another weakness, due to its design. Annex XIII *requires* Member States to take measures on the basis of scientific evidence, but the process to submit joint recommendations under Article 15 depends on whether Member States reach unanimous agreement, at least in practice.[131] This can potentially hinder the initiating Member State in its ambitions to comply with the Directive, if other Member States are less ambitious. This in turn can lead to no measures being agreed or that the weakest measures proposed by the relevant Member States are being adopted, which counteracts both the objectives under the Technical Regulation as well as the objectives and requirements under the Habitats Directive.

The obligation for Member States to submit a plan containing future planned measures when the implementation of the Regulation has not met the objectives and targets of the Regulation, can be one of several tools to motivate Member States in their work to implement the requirements following from Article 12. However, based on the weak requirements under the regionalization process, there is a risk that implementation will be slow, delaying the fulfillment of the objectives of the Habitats Directive.

To conclude, adhering to general and regional baseline measures set out in the Regulation is not enough for Member States to comply with the requirements following from Article 12 of the Habitats Directive. In order for Member States to implement Article 12 fully and by that contributing to the objectives of the Directive, additional measures adapted to regional fisheries must be initiated and implemented.

7. Concluding remarks

This article has concluded that Article 12 of the Habitats Directive applies to fisheries and that Member States of the European Union have a far-reaching obligation to protect the Baltic Proper harbour porpoise from bycatch. Member States have an obligation not only to implement a comprehensive regulatory framework but also to take concrete and preventive measures to meet the requirements under the Directive. This is particularly important in relation to migrating aquatic species, such as the harbour porpoise, since the process of designating areas for their conservation that become part of the Natura 2000 network is limited to sites "where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction".[132] This should be compared to terrestrial species, where no exact corresponding limitation exists, which makes the strict protection of the harbour porpoise crucial in order to restore the Baltic Proper population at a favourable conservation status.[133] Because of the

[130] Regulation 2019/1241, Article 2(2). Note though, that Article 11 of the Regulation applies to recreational fisheries.

[131] If the Commission considers that the proposed measures are not compatible with the objectives and quantifiable targets of the conservation measures in question, measures may be adopted by the Commission through the ordinary legislative procedure.

[132] Habitats Directive, Article 4(1).

[133] Ibid. For migrating *terrestrial* species, the sites shall correspond to the places within the natural range of such species which represent the physical or biological factors essential to their life and reproduction. There is thus no requirement that the site must be "clearly identifiable" in relation to such species. For non-migrating terrestrial

increased ambition in relation to environmental concerns with the reform of the CFP Regulation and the Technical Regulation, Member States were given greater scope in relation to the implementation of measures to comply with the Habitats Directive. This means that since competence has been delegated, Member States are *required* to take measures if needed to comply with the Directive. More than ten years have now passed since the reform, and even though it is not visible "on the surface", scientific research clearly shows that compliance with the Habitats Directive in the marine area is poor. The lack of conservation measures can thus not be blamed on knowledge gaps regarding the status, range and distribution of the Baltic Proper harbour porpoise. Since research indicates that incidental bycatch has a significant negative impact on the population, measures to *mitigate* bycatch should be prioritized. In addition, the knowledge about the natural range of the population indicates that the scope of Article 12(4) is fairly limited, which speaks in favor of the conclusion that mitigation measures to comply with Article 12(1) should be prioritized. However, the Technical Regulation does not separate between deliberate and incidental bycatch and therefore includes general baseline measures to mitigate as well as to monitor bycatch. It also includes a regionalization process under which Member States can initiate additional measures for the same purposes. Following the baseline measures set out in the Regulation will not ensure full implementation; to comply with the requirements under Article 12 and to restore the population at a favourable conservation status, Member States are obliged to adopt and initiate regional measures at national and cross-border level. Therefore, if applied fully in accordance with the requirements following from Article 12, the Technical Regulation has potential as a tool for contributing to the objectives of the Habitats Directive. However, lack of political ambition risk to result in weak measures and non-compliance with the requirements following from the Directive as well as with the requirement for an ecosystem approach to fisheries management under the CFP Regulation. Picking up on one of the motives for a new Technical Regulation, that there were "no cost of catching sensitive species"[134]; in lack of additional measures taken under the Regulation, there still is no such cost.

species, a site shall indicate which species that are "native to its territory".

[134] Commission proposal 2016, p. 4.

Äldre kvinnor, klimat och juridik

*Christina Olsen Lundh**

Abstract

On 9 April 2024, the European Court of Human Rights gave its decision in three climate law cases. The Court dismissed the cases *Carême v. France* and *Duarte Agostinho and Others v. Portugal and Others*, but delivered a favourable judgment in the action brought by a group of Swiss elderly women (*Verein KlimaSeniorinnen*). In the case, the Court considers for the first time the effects of climate change. It recognises, among other things, that Article 8 of the ECHR gives individuals the right to protection against the adverse effects of climate change on their life and health, and that a State cannot escape responsibility by referring to the responsibility of other States but must take reasonable steps to mitigate the damage. The article summarises, in Swedish, some of the key issues in the case and provides some reflections on them.

Key words: klimatprocesser, Europadomstolen, talerätt

Inledning

Den 9 april 2024 biföll Europeiska domstolen för de mänskliga rättigheterna ('Domstolen') en talan förd av en grupp schweiziska äldre kvinnor (*Verein KlimaSeniorinnen*).[1] Samma dag avvisade domstolen en man (en före detta borgmästare från kommunen Grande-Synthe[2]), som hävdade att Frankrikes åtgärder för att förhindra den globala uppvärmningen varit otillräckliga och att detta innebär en kränkning av rätten till liv och rätten till respekt för privatliv och familjeliv. Domstolens motivering till avvisningsbeslutet var att sökanden, som inte längre bodde i Frankrike, inte hade ställning som 'utsatt' i den mening som avses i artikel 34 i Europakonventionen.[3] Domstolen avvisade också de ungdomar som i det mest uppmärksammade målet, *Duarte Agostinho m.fl. mot Portugal m.fl.*, stämt Portugal och 32 andra stater i Europadomstolen för att de nuvarande och framtida allvarliga effekterna av klimatförändringarna påverkar deras liv, välbefinnande, mentala hälsa och hemfrid. Domstolen fann inte några skäl i konventionen för att utvidga domstolens extraterritoriella jurisdiktion på det sätt som sökandena begärt och med hänsyn till att sökandena inte hade vänt sig till någon domstol i Portugal, kunde sökandenas klagomål mot Portugal inte heller tas upp till sakprövning på grund av att de inhemska rättsmedlen inte hade uttömts.[4]

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[1] Case of Verein KlimaSeniorinnen Schweiz and others v. Switzerland (application no. 53600/20), 2024-04-09 (KlimaSeniorinnen).

[2] I denna egenskap hade han i kommunens namn och för dess räkning ansökt hos Conseil d'État om rättslig prövning (*recours pour excès de pouvoir*) av varje beslut som rörde de risker som klimatförändringarna medförde för kommunen och invånarna på dess territorium.

[3] *Carême v. France* (application no. 7189/21).

[4] *Duarte Agostinho and Others v. Portugal and 32 Others* (application no. 39371/20). Jfr Ebbessons konstaterande att även om det brådskar med klimatomställningen, så måste Europadomstolen och andra domstolar upprätthålla en processuell ordning som är saklig och rättvis, annars riskeras domstolens legitimitet. Ebbesson, I

Målet *KlimaSeniorinnen* är intressant eftersom de rättsfrågor kring klimatet som aktualiseras inte tidigare har behandlats i Europadomstolen.[5] Domstolen utvecklar också tämligen noggrant vad det är som gör klimatfrågan så annorlunda. Min ambition med den här artikeln är att sortera lite i Domstolens mycket utförliga dom och att försöka förstå varför de enskilda kvinnornas talan inte tilläts medan föreningen släpptes fram (och därtill hade framgång i målet).

Domstolens utgångspunkt är klimatfrågans särdrag och de fyra orsakssamband som behöver identifieras och bedömas. Dessa utgör därför även mina utgångspunkter. Inledningsvis beskriver jag målet så som det såg ut i de schweiziska domstolarna och sökandena i Domstolen. Avslutningsvis summerar jag de slutsatser jag anser viktigast och reflekterar även kort över dem. Jag behandlar endast klagomålen i den del de rör klimatförändringarnas påverkan på kvinnorna. Alltså går jag inte närmare in på frågan om huruvida schweiziska myndigheter och domstolar hanterat klagomålen, i strid med rätten till ett effektivt rättsmedel.

KlimaSeniorinnen i nationella domstolar

Målet vid Domstolen började i Schweiz. En sammanslutning av äldre kvinnor, *KlimaSeniorinnen* samt några enskilda kvinnor (även dessa medlemmar i *KlimaSeniorinnen*) begärde av fyra statliga myndigheter[6] att dessa skulle ”upphöra med sina misslyckanden att skydda klimatet” och säkerställa att mål och åtgärder ligger i linje med Parisavtalet[7]. Som grund anförde de att konstitutionella principer och mänskliga rättigheter hade kränkts, såväl enligt den schweiziska konstitutionen[8] som enligt Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna (EKMR).[9] Myndigheterna avvisade kvinnornas begäran, eftersom *KlimaSeniorinnens* talan inte berörde enskildas rättigheter eller skyldigheter. Myndigheterna resonerade bland annat enligt följande.[10]

Enlighet § 25a (1) VwVG (*Verwaltungsverfahrensgesetz*, den schweiziska motsvarigheten till förvaltningslagen) kan den som har ett skyddsvärt intresse begära att en ansvarig myndighet ingriper, vad gäller handlingar (ageranden) som är baserade på federal offentlig rätt *och som påverkar någons rättigheter eller skyldigheter* [min kursivering], genom att

a) avstå från, avbryta eller återkalla olagliga handlingar;

rättsstaten kan statens klimatansvar prövas i domstol: praktisk juridik. *Advokaten* (Stockholm), 2023 (9), p. 50–57.

[5] Men väl i andra domstolar inom Europa; det finns mål från såväl nationella domstolar som EU-domstolen. För en genomgång av dessa och allmänt om klimatet i domstolsprocesser (om klimatet), se t.ex. Ebbesson, Klimatprocesser mot staten – runt om i världen och i Sverige, *Juridisk tidskrift vid Stockholms universitet*, 2020, p. 106, Darpö, Aurora – morgonrodnad för klimatprocessen i Sverige? Om föreningen Auroras stämning av staten för bristande klimatarbete, *JPMiljönet* 2023-02-24, samt Hellner, Klimatrelaterad Strategisk Processföring: Nederländska Urgenda, Norska Klimasøksmålet och svenska Preemraff i ett jämförande perspektiv, *Förvaltningsrättslig Tidskrift*, 3/2020, s. 401–426 och Hellner, Aurora – en kort kommentar, *Retfærd*, 2023 (4), s. 87.

[6] *KlimaSeniorinnens* dokumentationssida: https://www.klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf (2024-04-25).

[7] Parisavtalet; https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf.

[8] 101 *Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999* SR 101 – https://www.fedlex.admin.ch/eli/cc/1999/404/en.

[9] European Convention on Human Rights, https://www.echr.coe.int/documents/d/echr/Convention_ENG.

[10] *KlimaSeniorinnen*: https://www.klimaseniorinnen.ch/wp-content/uploads/2017/11/Verfuegung_UVEK_Abschnitt_C_English.pdf.

b) åtgärda konsekvenserna av olagliga handlingar; eller
c) bekräfta att sådana handlingar är olagliga.

Att handlingen måste påverka rättigheter eller skyldigheter är alltså en grundförutsättning. Enligt myndigheternas tolkning syftade kvinnornas begäran till att åstadkomma en global minskning av växthusgaskoncentrationen i atmosfären. Det rörde därför ingen enskilds rättsliga situation utan syftet med begäran var att få myndigheterna att anta föreskrifter och meddelanden. Eftersom lagstiftningsförfaranden inte bestäms av VwVG ansåg myndigheterna att kriteriet inte var uppfyllt.

Kvinnorna överklagade till den Federala Förvaltningsrätten som konstaterade att kvinnorna, för att kunna framställa begäran hos myndigheterna, måste vara 'särskilt berörda', dvs. berörda på ett sätt som går utöver hur allmänheten är berörd. Domstolen förklarade att olika befolkningsgrupper förvisso påverkas olika men att det inte visats att gruppen kvinnor äldre än 75 år skulle påverkas särskilt. Myndigheternas beslut var riktigt.

KlimaSeniorinnen i Europadomstolen

Sedan de nationella rättsmedlen uttömts[11] lämnade *KlimaSeniorinnen* jämte fyra enskilda schweiziska kvinnor in en ansökan mot Schweiz till Domstolen i november 2020. I huvudsak gjorde de gällande att de schweiziska myndigheterna försummat att vidta åtgärder för att mildra klimatförändringarna varvid de åberopade artiklarna 2, 6, 8 och 13 i EKMR, huvudsakligen enligt följande.

– Schweiz otillräckliga klimatpolitik kränker kvinnors rätt till liv och hälsa enligt artiklarna 2 och 8 i EKMR,
– den schweiziska federala Högsta domstolen avvisade deras fall på godtyckliga grunder, i strid med rätten till en rättvis rättegång enligt artikel 6, och
– de schweiziska myndigheterna och domstolarna behandlade inte innehållet i klagomålen, i strid med rätten till ett effektivt rättsmedel i artikel 13.

Den 9 april 2024 fann Domstolen, som avgjorde målet i stor kammare, att en kränkning av både rätten till respekt för privat- och familjeliv (artikel 8) och rätten till tillgång till domstol (artikel 6 § 1) hade ägt rum. Domstolen fann att artikel 8 i EKMR omfattar en rätt till effektivt skydd mot de allvarliga negativa effekterna av klimatförändringar på liv, hälsa, välbefinnande och livskvalitet. Enligt Domstolen hade Schweiz misslyckats med att uppfylla sina positiva skyldigheter enligt konventionen om klimatförändringar och det fanns allvarliga luckor i relevant inhemskt regelverk.

Föreningen och kvinnorna

Den första sökanden, föreningen *KlimaSeniorinnen*, består av schweiziska kvinnor. Föreningen har mer än 2 000 medlemmar vars medelålder är 73 år. Närmare 650 medlemmar är 75 år eller äldre. Majoriteten är över 70 år. Det är en ideell förening upprättad enligt schweizisk lag, enligt stadgarna etablerad för att främja och genomföra ett effektivt klimatskydd å sina medlemmars vägnar. Föreningen agerar även i allmänhetens och kommande generationers intresse. Syftet fullföljs särskilt genom att föreningen tillhandahåller information, bedriver utbildningsverksamhet och vidtar rättsliga åtgärder.[12] Den menade sig vara ett medel för att möjliggöra för fysiska personer att föra talan vid Domstolen. Även om den har status som juridisk person så

[11] Slutligt beslut meddelades av Högsta domstolen (Schweiz) i maj 2020.

[12] KlimaSeniorinnen, p. 11.

anser den själv att den ska ses som en grupp individer där var och en är direkt berörd av statens misslyckanden. Föreningen ansåg sig inte ha väckt talan i allmänhetens intresse (även om medlemmarnas intresse sammanfaller med allmänhetens eftersom åtgärder för att begränsa klimatförändringarna eller dess effekter inte kan avgränsas till att endast gynna vissa befolkningsgrupper), det var alltså inte fråga om *actio popularis*.[13]

Härutöver stämde fyra av medlemmarna Schweiz för egen räkning. Dessa fyra sökanden, var kvinnor födda 1931, 1937, 1941 och 1942. Den äldsta av dem avled under processens gång varvid hennes son fortsatte förfarandet vid domstolen å sin mors vägnar vilket godtogs av Schweiz. Domstolen fann, med beaktande av etablerad praxis att sonen var berättigad att driva förfarandet samt att det, med tanke på att kvinnan hade en hög ålder och att hennes klagomål var kopplat till effekterna av klimatförändringar på just äldre kvinnor, skulle strida mot domstolens uppdrag att avstå från att avgöra hennes framförda klagomål.[14]

Samtliga kvinnor gjorde, om än på ett individualiserat sätt, gällande att de hade svårt att uthärda värmeböljorna. Någon hade kollapsat mer än en gång vilket lett till sjukhusvistelse; en annans extremt smärtsamma giktperioder förstärktes under varma dagar; någons astma och kroniska lungsjukdom förvärrades. De var alla, i olika utsträckning och på olika sätt tvungna att anpassa sina liv efter värmeböljorna, t.ex. genom att vara inomhus dagtid med neddragna persienner eller genom att använda speciella kläder. Att stanna inomhus, hemma, innebar också att de tvingades avstå från fritidsaktiviteter och ett socialt liv. Begränsningarna uppgavs leda till att de blev isolerade, begränsades socialt och de drabbades därmed av såväl fysiskt som psykiskt lidande under värmeböljorna. Alla de fyra kvinnorna hade sökt läkare och åberopade läkarintyg.[15]

Samtliga sökanden i målet åberopade rapporter och resultat från Intergovernmental Panel on Climate Change (IPCC[16]) och de många studier som visar sambanden mellan klimatförändringar, heta somrar och hälsoeffekter, särskilt för tidiga dödsfall. Dödsfall som inte fördelat sig slumpmässigt bland befolkningen, utan främst drabbat personer i åldern 75 till 85 år och kvinnor mer än män.[17]

Klimatfrågans särdrag

Klimatfrågan har vissa rättsliga särdrag. I *KlimaSeniorinnen* beskriver Domstolen, tämligen utförligt, på vilket sätt klimatfrågan skiljer sig från typiska miljörättsliga problem.[18] Det är t.ex. omöjligt att härleda specifika utsläppsskador till en specifik källa. Skada uppstår heller inte

[13] KlimaSeniorinnen, p. 306 och 307.
[14] KlimaSeniorinnen, p. 273 och 274.
[15] KlimaSeniorinnen, p. 13–21.
[16] Intergovernmental Panel on Climate Change, IPCC, skapades 1988 av Världsmeteorologiska organisationen (WMO) och FN:s miljöprogram (UNEP) med syfte att förse regeringar med vetenskaplig information som de kan använda för att utveckla sin klimatpolitik. IPCC-rapporter ligger också till grund för internationella klimatförändringsförhandlingar. Se IPCC – Intergovernmental Panel on Climate Change, https://www.ipcc.ch/.
[17] För en fullständig redogörelse av hur *KlimaSeniorinnen* lade upp sin talan och förde sin bevisning, se Bähr et al., KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation. *Journal of Human Rights and the Environment*, 2018, Volume 9: Issue 2, pp. 194–221.
[18] Jfr hur Høyesterett utförligt förklarade klimatfrågan, https://www.domstol.no/globalassets/upload/hret/avgjorelser/2020/desember-2020/hr-2020-2472-p.pdf (2024-05-13). Se även Backer, Plenumsdommen i klimasøksmålet, *Lov og rett*, 2021-04, Vol. 60 (3), p. 135–158. Domstolarnas sätt att förhålla sig till klimatfrågan kan ses i ljuset av att klimatfrågan kan betraktas som "juridiskt störande" eftersom den kräver en förmåga att hantera globala och polycentriska frågor inom ramen för befintliga rättsordningar, se Fisher et al., The Legally Disruptive Nature of Climate Change, *Modern law review*, 2017-03, Vol. 80 (2), p. 173–201.

som följd av själva utsläppen utan som en följd av en komplex händelsekedja. De aggregerade växthusgaserna i atmosfären ger upphov till extrema väderhändelser och naturkatastrofer som i sin tur hotar att påverka hela samhällen på olika sätt. Att stoppa ett enskilt utsläpp ger ingen omedelbart påvisbar effekt. Många utsläpp följer dessutom av vad som anses vara samhällsnödvändiga aktiviteter såsom energiproduktion, transporter, jordbruk och vardagslivet i stort. Att minska utsläppen innefattar samordnade insatser och investeringar inom olika sektorer och måste omfatta såväl nutida utsläpp som framtida effekter av växthusgasutsläppen.[19]

Ur ett rättsligt perspektiv betyder det att ett antal orsakssamband måste hanteras.

1. Sambandet mellan växthusgasutsläpp och den aggregerade koncentrationen växthusgaser i atmosfären samt effekterna och konsekvenserna av detta, vilket är *en fråga om vetenskap*.
2. Sambandet mellan de varierande negativa effekterna av klimatförändringens konsekvenser och risken för att dessa effekter påverkar mänskliga rättigheter nu och i framtiden, vilket relaterar till *den rättsliga frågan* om hur omfattningen av skyddet av mänskliga rättigheter ska förstås.
3. Sambandet mellan skada eller risk för skada som drabbar en individ eller grupp av individer och en stats/regerings handlingar eller underlåtenheter.
4. Om *en* stat kan hållas ansvarig för de negativa effekter som följer av klimatförändringen och som uppges påverka individer eller grupper, när det är så oerhört många aktörer på global nivå som bidrar till den aggregerade koncentrationen växthusgaser och därmed till effekterna av växthusgasutsläppen.

Frågor om orsakssamband måste enligt domstolen ses mot bakgrund av den påstådda överträdelsens faktiska karaktär samt arten och omfattningen av de rättsliga skyldigheterna i fråga.[20]

En viktig fråga är också vem som har bevisbördan för de olika orsaksakssambanden och hur beviskravet ser ut. Domstolen redogör här för hur bevisfrågor i miljömål har hanterats i praxis, och att den tidigare utgått från beviskravet utom rimligt tvivel, även om viss flexibilitet tillåtits, särskilt med hänsyn till den materiella rätten och eventuella bevissvårigheter. I vissa fall, konstaterar Domstolen, har t.ex. endast den svarande regeringen tillgång till information som kan bekräfta eller motbevisa sökandens påståenden och följaktligen är en strikt tillämpning av principen *affirmanti, non neganti, incumbit probatio*[21] omöjlig.[22] Domstolen redogör vidare för hur den också har fäst särskild vikt vid vilka slutsatser som nationella domstolar och behöriga myndigheter har dragit när de fastställt de faktiska omständigheterna i målet (även om den inte är bunden av dessa).[23] I vissa fall, menar Domstolen, är det nödvändigt att beakta relevanta internationella regler[24] liksom olika studier och rapporter. Här erinrar Domstolen om att Europakonventionen är ett levande instrument som måste tolkas i ljuset av nutida villkor.[25]

[19] KlimaSeniorinnen, p. 414–419.

[20] KlimaSeniorinnen, p. 435.

[21] Bevisbördan åvilar den som påstår något, inte den som förnekar.

[22] KlimaSeniorinnen, p. 427. Domstolen hänvisar till bl.a. *Fadeyeva v. Russia* (application no. 55723/00).

[23] KlimaSeniorinnen, p. 428–430.

[24] Domstolen hänvisar till bl.a. *Thibaut v. France* (application nos. 41892/19 and 41893/19).

[25] KlimaSeniorinnen, p. 431–434.

Det första orsakssambandet; klimatfrågan och dess effekter

Vad gäller det första orsakssambandet, sambandet mellan växthusgasutsläpp och den aggregerade koncentrationen växthusgaser i atmosfären med efterföljande fenomen, det vill säga själva klimatfrågan och dess effekter anser Domstolen att IPCC:s rapporter är särskilt relevanta för att ge vetenskaplig vägledning. Domstolens ställningstagande får stöd av att ingen part, inte heller de intervenerande, har invänt mot eller ifrågasatt rapporterna.[26] Därför utgår Domstolen i *KlimaSeniorinnen* från

– att det är ett faktum att antropogena klimatförändringar existerar,
– att förändringarna utgör ett allvarligt nuvarande och framtida hot mot konventionsrättigheterna,
– att staterna är medvetna om hotet och kapabla att vidta åtgärder för att effektivt hantera det,
– att relevanta risker beräknas bli lägre om åtgärder vidtas skyndsamt och temperaturökningen begränsas till 1,5 grader över förindustriella nivåer samt
– att nuvarande globala begränsningsinsatser inte är tillräckliga för att nå det målet.[27]

Domstolen anser alltså att själva klimatfrågan är *en fråga om vetenskap* och benämner även de antropogena klimatförändringarna som ett faktum. Nu anfördes inga invändningar mot den presenterade vetenskapliga utredningen men jag tycker ändå det kan tolkas som att Domstolen betraktar dessa samband som mer eller mindre notoriska; de ifrågasattes dock inte av någon part vilket innebar att domstolen inte tvingades ta verklig ställning i frågan.

Domstolen utgår också från att klimatförändringarna utgör ett allvarligt hot mot konventionsrättigheterna (ett hot som staterna är medvetna om), dock utan att (här) uttala sig om den rättsliga bedömningen rörande huruvida det är fråga om en kränkning av konventionsrättigheterna eller inte.

Sedan utgångspunkterna konstaterats går domstolen vidare med att bedöma vilken rättslig relevans dessa utgångspunkter har och får.

Det andra och tredje orsakssambandet: tillämpliga artiklar och vem som är utsatt

Det andra orsakssambandet, som enligt domstolen relaterar till *den rättsliga frågan* om hur omfattningen av skyddet av mänskliga rättigheter ska förstås, handlar om kopplingen mellan klimatförändringarnas negativa aspekter och åtnjutandet av mänskliga rättigheter medan det tredje orsakssambandet relaterar skada eller risken för skada som drabbar någon till en stats/regerings handlingar eller underlåtenheter. Skada eller risken för skada relaterar i sin tur till att vara 'utsatt', något som är nödvändigt för att ha talerätt inför Domstolen.[28]

I målet ansåg Domstolen det nödvändigt att först utveckla allmänna principer för talerätt och sedan pröva frågan i målet samtidigt som den prövade tillämpligheten av åberopade konventionsartiklar.[29]

Talerätt handlar i sin grundläggande form om rätten att föra talan i en domstol. Det är talerätten (eller klagorätten) som är själva nyckeln till processen. Utan talerätt spelar det ingen roll hur mycket 'rätt' man har – domstolen kommer inte att pröva det. Domstolens synsätt, att frågorna om talerätt och konventionsbestämmel-

[26] KlimaSeniorinnen, p. 428–430.
[27] KlimaSeniorinnen, p. 436.
[28] KlimaSeniorinnen, p. 425 och 435. Domstolen tar emot klagomål från enskilda personer, icke statliga organisationer eller grupper av enskilda personer som påstår sig av någon av de höga fördragsslutande parterna ha utsatts för en kränkning av någon av de i EKMR eller protokollen till denna angivna rättigheterna (EKMR, artikel 34).
[29] KlimaSeniorinnen, p. 458 och 459 samt 504 och 505.

sernas tillämplighet går hand i hand, gör att jag nedan först behandlar hur domstolen hanterade vad sökandena åberopat rörande klimatförändringens effekter på kvinnor, därefter allmänt om talerätt och begreppen ”berörd” och ”utsatt” och vad domstolen sade om tillämpligheten i målet av artiklarna 8 och 2 samt, slutligen, vad Domstolen kom fram till i talerättsfrågan.

Klimatförändringens effekter på kvinnor

De fyra kvinnorna åberopade sitt personliga direkta lidande till följd av värmen och förklarade att med varje värmebölja löper de en verklig och allvarlig risk för dödlighet och sjuklighet, större än den allmänna befolkningen, enbart på grund av att de är kvinnor över 75 år. Värmerelaterade dödsfall eller kroniska sjukdomar fördelas inte slumpmässigt över befolkningen utan förekommer särskilt hos äldre kvinnor. Just dessa fyra kvinnor led också av sjukdomar som innebar en högre risk. De gjorde gällande att Schweiz underlåtelse att vidta nödvändiga åtgärder för att minska utsläppen så att de hamnar i linje med 1,5 gradersmålet, avsevärt ökar risken för värmerelaterad dödlighet och sjuklighet.[30]

Föreningen *KlimaSeniorinnen* ansåg sig också ha ställning som ’utsatt’; det handlade om att säkerställa att medlemmar i gruppen kunde utöva sina rättigheter på lång sikt med hänsyn till att det är oöverkomligt dyrt för de flesta individer att föra en liknande process, givet komplexiteten i klimattvister.[31]

Domstolen konstaterar att de vetenskapliga bevisen för klimatförändringarnas effekter är övertygande. Klimatförändringarna har redan bidragit till en ökning av sjuklighet och dödlighet, särskilt i vissa utsatta grupper. Klimatförändringens effekter riskerar att bli oåterkalleliga och katastrofala om inte staterna vidtar kraftfulla åtgärder. Staterna har även medgett de negativa effekterna och förbundit sig att, i enlighet med det gemensamma men differentierade ansvaret, vidta nödvändiga åtgärder. Tillsammans visar det, menar Domstolen, att det finns en indikation för ett juridiskt relevant orsakssamband mellan å ena sidan statliga handlingar eller försummelser, och å andra sidan den skada som drabbar individer som en följd av klimatförändringarna. Det innebär i sin tur, menar domstolen, att det behövs *ett särskilt förhållningssätt* till när någon ska anses ’utsatt’ eftersom konsekvenserna av en stats underlåtenhet inte begränsas till vissa identifierbara individer eller grupper utan påverkar befolkningen mer allmänt.[32]

Med det konstaterandet övergår jag till att se vad domstolen skriver om vad det innebär att vara ’utsatt’ i EKMR:s mening.

Direkt utsatt – ingen actio popularis

Eftersom Domstolen inte granskar relevant lag (eller praxis) *in abstracto* måste någon (påstå sig) ha fått sina konventionsrättigheter kränkta för att kunna föra talan.

I miljömål är det *inte* tillräckligt att klaga på en allmän miljöskada/risk utan sökanden måste personligen ha påverkats. Skadan för sökanden ska vara av ett visst allvar eller varaktighet och det ska finnas en adekvat koppling mellan sökanden och miljöskadan, t.ex. det geografiska avståndet. Det räcker alltså inte att vara indirekt påverkad eller att påvisa att lag eller praxis skulle kunna strida mot EKMR. En sökande kan inte åberopa ett allmänintresse som inte berör hen på ett direkt sätt. I praktiken innebär det att Domstolen inte medger *actio popularis*. För att kategoriseras som *direkt utsatt* måste sökanden visa att hen faktiskt varit eller är *direkt berörd*. Det betyder inte nödvändigtvis att en åtgärd riktats mot sökanden; det viktiga är att sökanden bli-

[30] KlimaSeniorinnen, p. 308–311.
[31] KlimaSeniorinnen, p. 307.
[32] KlimaSeniorinnen, p. 478 och 479.

vit direkt och personligen berörd av åtgärden. Även indirekt utsatta kan anses berörda om man kan visa på någon form av 'rikoschetteffekt'[33] från den direkt utsatte. Bevisen som sökanden måste lägga fram för att visa att överträdelsen påverkat hen personligen måste vara rimliga och övertygande. Endast misstankar eller gissningar är otillräckligt. Domstolen prövar endast kränkningar i efterhand, om det inte handlar om exceptionella förhållanden.[34]

Härefter konstaterar domstolen att vissa konventionsrättigheter till sin natur är omöjliga för en förening att inneha. En förening har helt enkelt inte rätt till respekt för sitt privat- och familjeliv – för den har varken privatliv eller familjeliv. Föreningens medlemmar kan emellertid inneha rättigheter och en förening kan agera som ombud för sina medlemmar. Trots detta har Domstolen ansett att det kan finnas särskilda omständigheter som gör det möjligt att acceptera att man söker för annans räkning utan egentligt uppdrag att göra det. Domstolen har t.ex. godkänt att föreningar driver mål på uppdrag av direkt drabbade, även när den drabbade i och för sig hade kunnat agera själv.[35]

Domstolen fortsätter sedan med att fastställa kriterier för när en enskild ska anses vara *direkt utsatt* respektive för när föreningar kan ha talerätt.

Kriterier för direkt utsatt

Med utgångspunkten att 'utsatt' ska innebära en verklig risk för 'direkt påverkan' kom Domstolen fram till att följande två kriterier ska uppfyllas för att en individ ska anses 'utsatt'.

1. Nivån och risken för att sökanden ska utsättas för negativa konsekvenser som en följd av statens åtgärder eller underlåtenhet måste vara betydande, *och*
2. det måste finnas ett trängande behov av att säkerställa sökandens individuella skydd, på grund av avsaknad av rimliga åtgärder eller att dessa är otillräckliga för att minska skadan.

Domstolen betonade att tröskeln för att uppfylla dessa kriterier är synnerligen hög (*especially high*) och i syfte att utesluta *actio popularis* måste de konkreta omständigheterna i målet beaktas; t.ex. lokala förhållanden och individuella särdrag och sårbarheter, sannolikheten för negativa effekter, den specifika inverkan på sökandens liv, hälsa eller välbefinnande, och arten av sårbarhet hos sökanden.[36]

Kriterier för föreningar

Domstolen poängterar att frågan om 'utsatt' noga bör särskiljas från frågan om talerätt eftersom talerätten handlar om representation av de (direkta) offrens klagomål inför domstolen. Det kan därför även kallas *representation*.[37] Det ska i sammanhanget noteras att i domen behandlas frågan om föreningens klagorätt under rubriken "*Locus standi* (representation) by associations". Även om en förening inte kan vara berörd i vissa avseenden så kan den alltså ha talerätt.

När det handlar om komplicerade administrativa beslut är det många gånger svårt för en enskild att effektivt försvara sin intressen. Vikten av att kunna vända sig till föreningar för att försvara intressen vad gäller miljöfrågor återspeglas t.ex. i Århuskonventionen. Den konventionen, påpekar Domstolen, är emellertid utformad för att öka allmänhetens deltagande i miljöfrågor medan EKMR är utformad för att skydda individers mänskliga rättigheter.[38]

[33] KlimaSeniorinnen, p. 468.
[34] KlimaSeniorinnen, p. 460 och 465–472.
[35] KlimaSeniorinnen, p. 473, 474, 476 och 477.
[36] KlimaSeniorinnen, p. 486–488.
[37] KlimaSeniorinnen, p. 464.
[38] KlimaSeniorinnen, p. 489, 490 och 501.

Icke desto mindre är klimatet just en sådan komplex och komplicerad fråga där Domstolen inte utesluter föreningar som sökande. Men om en förening ska godtas som sökande måste den uppfylla vissa kriterier. Den ska

– vara lagligen etablerad i den berörda jurisdiktionen eller ha ställning att agera där,
– kunna visa att den har som syfte (i sina stadgar) att försvara medlemmarnas (eller andra berörda individers) mänskliga rättigheter, oavsett om det begränsas till eller inkluderar skyddet av rättigheter som hotas av klimatförändringarna, och
– kunna visa att den kan betraktas som verkligt kvalificerad att agera på uppdrag av medlemmar eller andra berörda individer som är utsatta för specifika risker eller negativa effekter till följd av klimatförändringarna rörande vad som skyddas enligt EKMR.[39]

Tillämpliga artiklar i EKMR

Artikel 8 kan tillämpas i miljömål oavsett om föroreningarna är direkt orsakade av staten eller om statens ansvar uppstår genom att den misslyckats med att reglera t.ex. industrin ordentligt.[40] Denna plikt att reglera verksamheter eller aktiviteter avser inte bara faktisk skada på någons hälsa eller välbefinnande utan även inneboende risker.[41] Dock måste det finnas ett orsakssamband mellan risken och den påstådda underlåtenheten att uppfylla positiva förpliktelser.[42]

Viktigt här är att Domstolen markerar det juridiskt relevanta orsakssambandet. Det måste finns *statliga handlingar eller försummelser* med i bilden. Det måste finnas *en skada som drabbat någon*. Skadan ska vara av en viss allvarlighet eller varaktighet och det ska finnas en *adekvat koppling* mellan sökanden och miljöskadan.

Domstolen har upprepade gånger betonat att ingen artikel i EKMR är speciellt utformad för att allmänt skydda miljön; inte heller klimatet.[43] Artikel 8 anses emellertid omfatta en rätt för enskilda till effektivt skydd mot klimatförändringarnas allvarliga negativa *effekter* på liv, hälsa, välbefinnande och livskvalité och det är statliga myndigheter som ska erbjuda det skyddet. Huruvida risken är relevant och tillräckligt allvarlig beror på den utsattes situation.[44]

Kortfattat innebär ovanstående att artikel 8 omfattar en rätt för enskilda till effektivt skydd mot klimatförändringarnas allvarliga negativa effekter på liv, hälsa, välbefinnande och livskvalité och det är statliga myndigheter som ska erbjuda det skyddet. Det som måste visas är ett orsakssamband mellan risken och den påstådda underlåtenheten att uppfylla positiva förpliktelser. Huruvida risken är relevant och tillräckligt allvarlig beror på den utsattes situation. Det viktiga är alltså huruvida man är utsatt eller ej.

Hur det sedan blev

Domstolen formulerade själv att dess knäckfråga; vad, hur och i vilken utsträckning som påståenden om skada kopplade till statliga handlingar eller underlåtenheter i samband med klimatförändringar, och som påverkar individers konventionsrättigheter, kan prövas utan att undergräva uteslutandet av *actio popularis* och utan att bortse från att domstolens dömande funktion per definition är reaktiv snarare än proaktiv. Domstolen behöver säkerställa ett effektivt skydd av konventionsrättigheterna utan att låta kriterierna för

[39] KlimaSeniorinnen, p. 502.
[40] Domstolen hänvisar till *Hatton and Others v. the United Kingdom* (application no. 36022/97).
[41] Domstolen hänvisar till *Di Sarno and Others v. Italy* (application no. 30765/08).
[42] KlimaSeniorinnen, p. 437–440.
[43] KlimaSeniorinnen, p. 445.
[44] KlimaSeniorinnen, p. 513, 519 och 520.

'utsatt' glida över i ett de facto-erkännande av *actio popularis*.[45]

Domstolen upprepar åtskilliga gånger hur viktigt det är att utesluta *actio popularis* och att man måste se till individuella särdrag och sårbarheter. Det gör att under stora delar av läsningen ges intrycket av att det är de individuella kvinnorna som kommer att anses utsatta (de har ju faktiskt visat hur påverkade de varit av värmeböljorna och det finns orsakssamband) och ha talerätt medan *KlimaSeniorinnen* kommer att bli avvisad (föreningen har ju varken privat – eller familjeliv). Det blir precis tvärt om.

De enskilda kvinnorna redogjorde utförligt för sina svårigheter under värmeböljor och för sina medicinska tillstånd (ingen betvivlar heller deras utsagor), men enligt Domstolen förmår de inte visa att de varit utsatta *med sådan intensitet att det givit upphov till ett trängande behov av att säkerställa deras individuella skydd*. Kvinnorna hade inte visat sådana exceptionella omständigheter som gör att de kan få status av 'utsatt' *i relation till framtida risker*. De enskilda kvinnorna uppfyllde således inte kriterierna för status som 'utsatta' enligt EKMR:s artikel 34. Deras talan tilläts därför inte, varken enligt artikel 8 eller artikel 2.[46] Domstolen praktiserar således sitt uttalande om att klimatfrågans karaktärsdrag gör att det behövs *ett särskilt förhållningssätt* till när någon ska anses 'utsatt' och använder de två kriterier som den tagit fram.

Detsamma gäller ifråga om föreningen *KlimaSeniorinnen* och uttalandet om att utveckla behovet av att godta föreningar som sökande när det gäller så komplicerade och komplexa frågor som klimatfrågan. Domstolen tillämpade de tre kriterierna och konstaterade att föreningen var etablerad enligt lag, att stadgarna angav som syfte att för utsatta individers räkning tillvarata de mänskliga rättigheter som skyddas av EKMR och hotas genom klimatförändringarna i den stat som är svarande (Schweiz) samt att föreningen är verkligt kvalificerad att agera för dessa utsatta individer. De klagomål som förts fram av föreningen omfattas också av artikel 8. Sammanfattningsvis innebar det att *KlimaSeniorinnen* ansågs ha talerätt.[47]

När det sedan gällde artikel 2 ansåg Domstolen att det var mer tveksamt huruvida Schweiz brister i klimatåtgärder hade sådana livshotande konsekvenser[48] men ansåg det onödigt att analysera frågan. Därmed beslutade Domstolen att pröva *KlimaSeniorinnens* talan endast utifrån artikel 8.[49]

Domstolen ifrågasätter inte vad kvinnorna anfört men anser inte att det räcker för att påstå ett trängande behov av individuellt skydd för sina konventionsrättigheter. Bevisningen är således inte otillräcklig för att visa att kvinnorna är påverkade men de har inte förmått visa att de är *personligen* utsatta på en relevant nivå. Jag har svårt att se att det på något sätt skulle göra det svårare än tidigare att visa ett sådant behov när det gäller miljöproblem som inte är så komplexa som klimatfrågan. Domstolen har i tidigare mål (i stor kammare) också uttalat att detta kriterium i EKMR:s artikel 34 inte ska tillämpas på ett stelt, mekaniskt och oflexibelt sätt.[50] Domstolen har själv varnat för att alla överdrivet formalistiska tolkningar av begreppet 'utsatt' skulle göra skyddet av de rättigheter som EKMR garanterar

[45] KlimaSeniorinnen, p. 481 och 484.
[46] KlimaSeniorinnen p. 527–533 samt 536 och 537.
[47] KlimaSeniorinnen, p. 524–526, jfr p. 519.
[48] Om man kan konstatera dels att en enskild sökande är att anse som 'utsatt', dels att det finns en allvarlig risk för att dennes liv förkortas betydligt på grund av klimatförändringarna, så är artikel 2 tillämplig.
[49] KlimaSeniorinnen p. 536 och 537.
[50] KlimaSeniorinnen, p. 461 med hänvisning till *Albert and Others v. Hungary* (application no. 5294/14), p. 121.

ineffektivt och illusoriskt.[51] Min bedömning är att Domstolen har följt sin tidigare praxis i frågan men tillämpat den i en mer komplex kontext och därmed inte höjt tröskeln.

Om de enskilda kvinnorna tillerkänts talerätt hade risken funnits att domstolarna till slut dukat under på grund av att samtliga medborgare, var och en individuellt drabbad av klimatförändringens effekter, hade stämt staten för den skada som man personligen riskerar att åsamkas och för den som funderat över att stämma staten hade det blivit nödvändigt att samla på sig ordentlig bevisning för att visa den personliga utsattheten. Vilket blir lätt absurt givet att skadan ju faktiskt drabbar oss, mänskligheten (och alla icke mänskliga djur), som kollektiv.[52] Om Domstolen i stället lättat på kriterierna, hade det sannolikt inneburit en form av *actio popularis*. Domstolen hade här kunnat dra igen dörren om den höga tröskeln och stannat vid det. Men det gör den inte; den öppnar istället altandörren och släpper in föreningen och ger den talerätt som representant för oss alla. Genom sin hantering av frågan om talerätt i kombination med utgången i målet har Domstolen visat att det faktiskt är möjligt för det juridiska systemet att hantera komplexa frågor som drabbar precis hela världen och hela dess befolkning *utan* att varje individ behöver visa på ett trängande behov av individuellt skydd (förutsatt att en förening som uppfyller kriterierna för talan).

Avgörandet har kritiserats i denna del och oro har framförts för att den synnerligen höga tröskeln för 'utsatt' har blivit för hög för att individer i underrepresenterade grupper ska kunna ta sig över den. Detta eftersom Domstolen, trots att den godtog bevisen för att kvinnor över 75 år är mer sårbara än andra, inte går närmare in på staternas skyldighet att hantera klimatförändringens effekter på just denna grupp. Enligt kritikerna innebär det en risk för att domen möjliggör att kvinnors (eller andra utsatta gruppers) anspråk tystas ned, också i andra miljösammanhang.[53]

Jag delar inte den oron. Mot bakgrund av hur tydlig domstolen är med klimatfrågans särdrag; att det är en global fråga med många diffusa bidrag till problematiken som sedan drabbar i princip alla människor, om än på olika sätt, tror jag oron för att kriterierna i talerättsfrågan ska drabba minoritetsgrupper i allmänhet är obefogad. Som jag läser domen handlar det inte om att förminska kvinnornas situation utan snarare om att lyfta att klimatfrågan är en fråga för hela mänskligheten.

Det fjärde orsakssambandet; statens ansvar

Det fjärde orsakssambandet handlar om möjligheten att hålla *en* stat ansvarig för de negativa effekter som följer av klimatförändringen och som uppges påverka individer eller grupper, när det är så oerhört många aktörer, på global nivå, som bidrar till den aggregerade koncentrationen växthusgaser och därmed till effekterna av växthusgasutsläppen.[54] Domstolen konstaterar här att staternas ansvar följer av principen om ett *gemensamt men differentierat ansvar* som ska förstås enligt Klimatkonventionen som bygger på denna princip.[55]

Den hänvisar direkt till principen som innebär att varje stat har ett ansvar för att vidta åtgärder i en omfattning som bestäms av statens egen förmåga (inte av andra staters handlande). Det

[51] KlimaSeniorinnen, p. 461 med hänvisning till *Gorraiz Lizarraga and Others v. Spain* (application no. 62543/00) p. 38.

[52] Se t.ex. Hellner (n 5, 2023), s. 91, som formulerar det som att klimatprocesser gäller storskaliga kränkningar av mänskliga rättigheter.

[53] Se t.ex. Lupin et al. (2024) *KlimaSeniorinnen and Gender*, https://verfassungsblog.de/klimaseniorinnen-and-gender/.

[54] KlimaSeniorinnen, p. 425.

[55] Klimatkonventionen, artikel 3 p. 4.

betyder i sin tur att en stat inte kan undgå ansvar genom att hänvisa till andra staters ansvar.[56] Det behöver alltså inte fastställas med säkerhet att situationen skulle ha sett annorlunda ut om staten agerat annorlunda. Det relevanta är att de rimliga åtgärder som staten varit skyldig att vidta men underlåtit, kunde ha inneburit en möjlighet att påverka situationen eller minska skadan.[57] Det är alltså vad staten är *rättsligt skyldig* att göra som är avgörande.[58]

Statens ansvar kan prövas i domstol

Nu är det inte självklart vad som ska betraktas som rättsliga skyldigheter. Även om ett stort antal s.k. klimatprocesser[59] pågår och har avgjorts i domstolar världen över så anses det inte självklart att det anses handla om frågor som lämpar sig för domstolsprövning. Orsaken är att det som yrkas i processerna anses fordra lagstiftning, dvs. demokratiskt beslutsfattande av lagstiftaren och att demokratiska processer normalt inte kan ersättas av rättsliga ingripanden.[60] Frågan är var gränsen går mellan å ena sidan politiska beslut om minskningsmål eller åtgärder och å andra sidan rättslig bevisvärdering avseende skyldigheter som följer av rättsligt bindande beslut eller lagstiftning.[61]

Domstolen konstaterar i *KlimaSeniorinnen* att domstolarna har en roll att spela för att säkerställa att stiftad lag efterlevs. Frågan är inte 'om' utan 'hur' domstolar ska angripa klimateffekternas påverkan för mänskliga rättigheter.[62] Det är ett ganska befriande konstaterande, givet de upprörda diskussionerna och farhågan att förrättsligande av klimatfrågor på internationell nivå riskerar innebära ett kringgående av den demokratiska debatten och försvåra sökandet efter politiskt acceptabla lösningar.[63] Inte sällan har också sökanden/käranden/klaganden ett politiskt syfte och vill åstadkomma samhällsförändringar som typiskt sett innebär ett mer ambitiöst klimatskydd. När en regering är svarande/motpart, ökar rättsprocessernas politiska betydelse. Problemen förs ofta fram som konstitutio-

[56] Här hänvisar domstolen till International Law Commission; *Draft articles on Responsibility of States for Internationally Wrongful Acts*, se https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[57] KlimaSeniorinnen, p. 442–444.

[58] Med andra ord ger den Ebbesson helt rätt; "Min bedömning är (…) att [domstolen] kommer att bekräfta att konventionen ställer krav på staterna att vidta rimliga åtgärder för att förhindra klimatförändringarna och minimera skadorna till följd av det förändrade klimatet. Det handlar då inte om att Sverige eller något annat enskilt land ensamt kan lösa klimatkrisen, utan om att varje part måste göra sin rimliga del inom ramen för sin jurisdiktion. Vi får se om Europadomstolen ger mig rätt." (Ebbesson, n 4).

[59] Enligt UNEP (*Global Climate Litigation Report: 2023 Status Review*) har antalet klimatprocesser i världen ökat, från 884 mål år 2017, 1 550 mål år 2020 och 2 180 mål år 2022. En sammanräkning av målen listade av *the Climate Change Litigation databases*, som utvecklats av *Sabin Center for Climate Change Law at Columbia Law School* ger att antalet mål i dagsläget uppgår till 3 281 st. (den 6 maj 2024). Med 'klimatprocess' avses mål där den materiella frågan handlar om att begränsa klimatförändringarna eller dessas effekter, att anpassa sig till dem eller om klimatvetenskap. Processer där klimatfrågan saknar relevans för målets materiella utgång eller där man egentligen vill uppnå något annat (t.ex. begränsa luftföroreningar från koleldade kraftverk men där en minskning av dessa innebär lägre växthusgasutsläpp) omfattas *inte* av definitionen. (Den definition som utvecklats av *Sabin Center*; https://climatecasechart.com/, (2024-05-06).

[60] KlimaSeniorinnen, p. 412.

[61] Om relevansen av maktdelningsargumentet i klimatprocesser, se Eckes et al., Climate litigation and separation of powers i Wewerinke-Singh & Mead (red.), *Judicial Handbook on Climate Litigation, lawyers and legal scholars*, IUCN, 2024. Se även t.ex. Vinken och Mazzotti, The First Italian Climate Judgement and the Separation of Powers – A Critical Assessment in Light of the ECtHR's Climate Jurisprudence. *Max Steinbeis Verfassungsblog GmbH Verfassungsblog*, 2024-04 (2366-7044).

[62] KlimaSeniorinnen, p. 410–412 och 451. Domstolen analyserar den egna rollen kontra den inrikespolitiska processen i p. 412 och 413 samt 449 och 450.

[63] Se p. 4, Schweiz inlaga i målet Stellungnahme Schweiz, https://www.klimaseniorinnen.ch/wp-content/uploads/2021/11/2021.07.16-Stellungnahme-schweiz-en.pdf, samt den skiljaktiga meningen från Judge Eicke i målet.

nella[64] och som att de äventyrar maktdelningen. Ett exempel på det är norska mediers reaktioner när bland annat Greenpeace väckte talan mot norska staten 2016. Närmast unisont uttrycktes en underliggande rädsla för domstolskontrollerad klimatpolitik tillsammans med varningar för att den politiska makten skulle överföras till domstolarna. Detta trots att det i Norge finns en väletablerad tradition av kontroll genom domstolsprövning.[65] Motsvarande reaktioner syns efter *KlimaSeniorinnen*.[66] Det högerorienterade *Schweizerische Volkspartei* betecknade domen som en skandal, anklagade domstolen för rättsliga övergrepp och krävde att Schweiz skulle lämna Europarådet.[67] *Schweizer Radio und Fernsehen* frågade sina lyssnare och tittare om de tycker det är bra när domstolar lägger sig i klimatpolitiken".[68] Tidningen *Tages-Anzeiger* talade om en farlig dom och ansåg att Domstolen var påträngande som blandar sig i nationella beslut.[69] Tidningen *Aargauer Zeitung* frågade sig om domare åsidosätter demokratin.[70] och en tidigare domare vid den schweiziska federala domstolen uttryckte det som att Rubicon korsats[71].

Målet handlar i grunden om mänskliga rättigheter (ett sammanhang där ofta kontroversiella samhällsfrågor med många intressen och intressekonflikter aktualiseras) och bestämmelserna är nödvändiga att tolka i ljuset av samhällsutvecklingen. Domstolen påpekar också, flera gånger, att EKMR är ett levande dokument. Precis som Domstolen, också flera gånger, påpekar har klimatfrågan många särdrag. Ett särdrag som inte nämns, men som kan anas i ovan nämnd kritik av att frågan prövas i domstol, är att klimatfrågan är laddad med värderingar som i många avseenden ställer olika synsätt på sin spets. Miljösociologer har t.ex. kunnat koppla globala miljöfrågor och maskulinitetsfrågor genom att visa på en koppling mellan högerextrema, elitistiska maskulina attityder och klimatskepsis respektive mellan jämställdhetsintegrering och nationell miljöpolitik.[72] Det är därför viktigt att påpeka att domstolen *inte* låtit dokumentet få sådant liv att det sprungit bort från sin rättsliga kontext. Domstolens dom har *inte* ersatt politiska beslut och Domstolen har *inte* ägnat sig åt endast en intresseavvägning. Domstolen har utgått från sin tidigare praxis, och lagt rättsliga skyldigheter och rättsligt ansvar till grund för samtliga sina ställningstaganden som utförligt har motiverats, rättsligt. En rättsligt motiverad dom som grundar sig på rättsliga överväganden

[64] Se t.ex. statens svaromål i det svenska s.k. Auroramålet (mål T 8304-22 vid Nacka tingsrätt).

[65] Øyrehagen Sunde, Klimasøksmål og demokrati, *Nytt norsk tidsskrift*, 2017-11, Vol. 34 (4), p. 354–365. Se även Backer, Plenumsdommen i klimasøksmålet, *Lov og rett*, 2021-04, Vol. 60 (3), p. 135–158.

[66] Redovisade schweiziska mediareaktioner är sammanställda av Blattner (2024) Separation of Powers and KlimaSeniorinnen, *Max Steinbeis Verfassungsblog GmbH,* som också noterar att vissa medier rapporterade om och kritiserade domen bara några timmar – en del redan inom några minuter – efter att domen meddelats, vilket är imponerande givet att domen omfattar 260 sidor.

[67] SVP Schweiz – Das Strassburger Urteil ist inakzeptabel, https://www.svp.ch/aktuell/publikationen/medienmitteilungen/das-strassburger-urteil-ist-inakzeptabel-die-schweiz-muss-aus-dem-europarat-austreten/ (2024-05-11).

[68] Sieg für Klimaseniorinnen – EGMR, https://www.srf.ch/news/international/sieg-fuer-klimaseniorinnen-egmr-schweiz-verletzt-menschenrechte-bei-klimafragen (2024-05-11).

[69] Klimaseniorinnen: Gefährliches Urteil des Gerichtshofs in Strassburg, https://www.tagesanzeiger.ch/klimaseniorinnen-gefaehrliches-urteil-des-gerichtshofs-in-strassburg-893330908970.

[70] Klimaseniorinnen: Was bedeutet das Urteil des EGMR?, https://www.aargauerzeitung.ch/schweiz/expertin-erklaert-uebersteuern-die-richter-die-demokratie-was-sie-jetzt-ueber-das-klimaseniorinnen-urteil-wissen-muessen-ld.2604903?reduced=true.

[71] EGMR entscheidet politisch statt juristisch, https://www.nzz.ch/meinung/egmr-und-klimaseniorinnen-den-rubikon-ueberschritten-ld.1825593.

[72] Hultman, Exploring Industrial, Ecomodern, and Ecological Masculinities i MacGregor (ed.) *Routledge Handbook of Gender and Environment*, Routledge, 2017, kap. 16.

är rimligen just precis vad man förväntar sig att en domstol ska meddela, oavsett hur man ser på frågor om judikalisering och maktdelning.

Jag tror också det är viktigt att både erkänna oberoende domstolars roll som kontrollinstans och låta dem verka som sådana för att kunna säkerställa att stiftad lag efterlevs. Att driva klimatfrågan i domstol kan förvisso ses som främmande för de nordiska länderna som saknar den rättighetstradition som finns i Centraleuropa.[73] Domstolen markerade härvid tydligt att klimatfrågan innehåller flera *rättsliga* dimensioner. Det oroade domstolens Judge Eicke, som skrev en skiljaktig mening i frågan. Oron gäller att om man med rättsliga medel tvingar inhemska myndigheter att utvärdera sina regler och åtgärder, samt utforma och anta nya mot bakgrund av den utvärderingen, så kan det få en negativ effekt när det gäller att stärka klimatskyddet, eftersom länderna nu kommer att bindas upp i rättstvister.[74] Jag tror faktiskt, i likhet med Ebbesson, att det blir precis tvärt om. Genom att erkänna den rättsliga dimensionen av klimatfrågan blir det möjligt att öka trycket på regeringar att vidta effektivare åtgärder, både för att minska utsläppen av växthusgaser och för att förhindra skador.[75]

Utrymmet för skönsmässiga bedömningar

Domstolens utgångspunkt är att stater har ett visst utrymme för skönsmässiga bedömningar men skiljer mellan å ena sidan *statens åtagande* för att motverka klimatförändringarna och, å andra sidan, *valet av medel* för att uppnå målen. När det gäller hotets natur och allvar, minskningsmålen och vilka minskningsinsatser som behövs har de avtalsslutande parterna gjort *åtaganden*. Det innebär ett minskat utrymme för skönsmässighet. I parternas val av konkreta åtgärder för att nå sina åtaganden, är utrymmet stort.

Vid bedömningen av huruvida en stat har hållit sig inom sitt (stora) utrymme undersöker domstolen om myndigheterna tagit vederbörlig hänsyn till behovet av att

- ange tidsplan för att uppnå koldioxidneutralitet i kombination med en koldioxidbudget eller liknande som ligger i linje med målet och tidsplanen;
- fastställa delmål för utsläppsminskning som kan nå de övergripande nationella målen inom relevant tidsram;
- visa att de uppfyller, eller är på väg att uppfylla, relevanta minskningsmål;
- uppdatera relevanta minskningsmål med vederbörlig noggrannhet, baserat på bästa tillgängliga bevis; och
- agera i god tid och på ett lämpligt och konsekvent sätt när den utarbetar och genomför relevant lagstiftning och andra åtgärder.

Prövningen är av övergripande karaktär; en brist i något avseende medför inte nödvändigtvis att staten har överskridit sitt utrymme.[76]

Domstolen drar helt enkelt upp tydligt rättsligt grundande kriterier för en juridisk prövning som i sin tur grundar sig i de åtaganden som staten gjort. Det en stat åtagit sig att göra ska den göra – och när det kommer till ansvarsfrågan finns det skäl att se till om staten gör vad den påstår sig göra. Domstolen underströk också att de fem omständigheterna inte var kumulativa utan att en helhetsbedömning ska göras. Här uppstår dock en hel del frågor, t.ex. om hur stora krav som ska ställas på ”koldioxidbudget eller liknande”.[77] Hur ska parallella åtgärder, avtal och strategier bedömas? Sannolikt går det inte

[73] Se Hellner (n 5, 2023). s. 91. Se även Hellner (n 5, 2020).
[74] Judge Eickes skiljaktiga mening, framför allt p. 69 och 70.
[75] Ebbesson (n 4).
[76] KlimaSeniorinnen p. 543, 550 och 551.
[77] Se t.ex. Hilson, The Meaning of Carbon Budget within a Wide Margin of Appreciation – *Verfassungsblog*, 2024.

att dra upp mer generella och tydliga kriterier här; det blir helt enkelt en bedömningsfråga.[78] Genom domen synliggör Domstolen att det gemensamma men differentierade ansvaret faktiskt innebär ett rättsligt identifierbart ansvar för staten att skydda sin befolkning i enlighet med sina rättsliga åtaganden.

Ofta (och även i det här målet) framförs invändningen, att det enskilda bidraget inte gör någon skillnad. En sådan invändning leder till en paradox eftersom många enskilda bidrag skulle göra stor skillnad.[79] Argumentet är till och med vilseledande; dels eftersom det alltid går att säga att något land eller någon sektor är för liten för att spela någon roll globalt, dels därför att länder i väst har väldigt höga per capita-utsläpp både i nutid och historiskt.[80] Här menar jag att Domstolen, genom att vända sig direkt mot the "drop in the ocean" argument,[81] på ett väldigt klart och rättsligt övertygande sätt konstaterar att det är varje stats ansvar som är relevant. Man kan inte frånhända sig ansvar genom att påstå att det finns flera ansvariga. Fokus ligger på vad just den aktuella staten är *rättsligt skyldig* att göra.

I *KlimaSeniorinnen* fann Domstolen, sammanfattningsvis, att Schweiz misslyckats med att kvantifiera nationella begränsningar för utsläpp av växthusgaser samt med att uppfylla sina tidigare mål för minskning av utsläppen av växthusgaser. 2020 skulle växthusgasutsläppen ha minskat med 20 % jämfört med 1990 års nivåer; Schweiz minskade med ca 11 % under relevant tid. Genom att inte agera i god tid och på ett lämpligt och konsekvent sätt utforma, utveckla och genomföra relevant lagstiftning hade Schweiz överskridit sitt utrymme för skönsmässiga bedömningar. Genom detta hade det förekommit ett brott mot artikel 8 i EKMR. Det finns alltså en rättslig skyldighet för Stater att genomföra utsläppsminskningar på ett sätt som dels är vetenskapligt grundat, dels beaktar principen om jämlikhet mellan generationerna.[82]

Sammanfattande noteringar

Genom domen tydliggörs att domstolarna har en roll att spela för att säkerställa att lag efterlevs. För att en individ ska anses 'utsatt' i den mening som är relevant för tillämpningen av artikel 34 i EKMR (talerätt) är tröskeln synnerligen hög (*especially high*). Två kumulativa kriterier ska uppfyllas. Nivån och risken för att sökanden ska utsättas för negativa konsekvenser som en följd av statens åtgärder eller underlåtenhet måste vara betydande, *och* det måste finnas ett trängande behov av att säkerställa sökandens individuella skydd, på grund av avsaknad av rimliga åtgärder eller att dessa är otillräckliga för att minska skadan.

Om en förening ska godtas som sökande måste den uppfylla tre kumulativa kriterier. Den ska vara lagligen etablerad i den berörda jurisdiktionen eller ha ställning att agera där, den ska kunna visa att den har som syfte (i sina stadgar) att försvara medlemmarnas (eller andra berörda individers) mänskliga rättigheter, oavsett om det begränsas till eller inkluderar skyddet av rättigheter som hotas av klimatförändringarna, och den ska kunna visa att den kan betraktas som verkligt kvalificerad att agera på uppdrag av medlemmar eller andra berörda individer som är utsatta för specifika risker eller negativa ef-

[78] Om juridiska dilemman i avgörandet av hur olika klimatmål och åtgärder förhåller sig till varandra, se t.ex. Bogojevic, Legal Dilemmas of Climate Action, *Journal of environmental law*, 2023-04, Vol. 35 (1), s. 1–9.

[79] Brülde och Sandberg, Hur bör vi handla? Filosofiska tankar om rättvisemärkt, vegetariskt & ekologiskt, Thales, 2012 s. 141 ff.

[80] Vowles, När svenska högerradikala medier blev en del av kontraklimatrörelsen, *Fronesis* nr 76–77, 2022, s. 176.

[81] KlimaSeniorinnen, p. 441.

[82] KlimaSeniorinnen, p. 549–550, 558, 559, 573 och 574.

fekter till följd av klimatförändringarna rörande vad som skyddas enligt EKMR.

En stat kan inte undgå ansvar genom att hänvisa till andra staters ansvar. Det relevanta är att de rimliga åtgärder som staten varit skyldig att vidta men underlåtit, kunde ha inneburit en möjlighet att påverka situationen eller minska skadan. De avtalsslutande parterna har gjort *åtaganden* vad gäller klimathotets natur och allvar, minskningsmål och minskningsinsatser. Det innebär ett minskat utrymme för skönsmässighet. I valet av konkreta åtgärder för att nå åtaganden, är däremot det skönsmässiga utrymmet stort. Det som avgör om en stat håller sig inom det utrymmet är en övergripande bedömning av huruvida staten (myndigheterna) tagit vederbörlig hänsyn till behovet av fem angivna omständigheter. Dessa fem punkter är inte kumulativa utan prövningen ska vara av övergripande karaktär.

EKMR skyddar inte klimatet. Det finns fortfarande ingen artikel i EKMR som allmänt skyddar miljön och Domstolen understryker det. EKMR skyddar människor och människors rättigheter och det anses finnas en rätt för enskilda till effektivt skydd mot klimatförändringarnas allvarliga negativa *effekter* på liv, hälsa, välbefinnande och livskvalité. Och det är staten som ska erbjuda det skyddet.