



Hannes Veinla

*Docent of Environmental Law  
University of Tartu*

# **Problems in Transposing the European Union's Nature Conservation Directives into Estonian Law and Plans for Solving Them**

## **1. The problem**

This is a very exciting and eventful time for Estonian environmental law. The codification of environmental law that was started in 2007<sup>1</sup> is being continued with a final aim of establishing the Environmental Code. On 16 February of this year, the Riigikogu adopted the General Part of the Environmental Code Act<sup>2</sup> (hereinafter referred to as the GPECA), which sets forth the fundamental concepts of environmental law, the principles of environmental protection, the main environmental obligations, environmental rights, and the procedure for the new integrated environmental permit. However, the GPECA is still just the first step in codification of environmental law. In December 2010, the Environmental Law Codification Working Group, which the author of this article heads, presented the first version of the voluminous draft (with more than 1,100 sections) of the Special Part of the Environmental Code (hereinafter referred to as the SPEC) to the Minister of Justice. This was then presented to various ministries and the most important interest groups<sup>3</sup> by the time this article was written. In addition, what is known as the (extended) Draft General Part of the Environmental Code Act<sup>4</sup> has been prepared, containing regulation of environmental impact assessments, environmental monitoring, environmental supervision, and environmental liability. Work on these two drafts is what has given the author inspiration for writing this article.

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<sup>1</sup> See H. Veinla. Basic Structures of the Draft General Part of Environmental Code Act. – *Juridica International* 2010 (XVII), pp. 128–129.

<sup>2</sup> Keskkonnaseadustiku üldosa seadus. – RT I, 28.2.2011, 1 (in Estonian). The Act enters into force together with entry into force of the Special Part of the Environmental Code.

<sup>3</sup> The Draft is available at <http://www.just.ee/orb.aw/class=file/action=preview/id=53099/Keskkonnaseadustiku+eriosa+seaduse+eel%F5u.pdf> (11.4.2011) (in Estonian).

<sup>4</sup> I would like to clarify that passing of the Environmental Code in the Riigikogu takes place in different stages according to the plan. The first, General Part of Environmental Code Act, has already been passed, although this small general part has to be improved in the future with new chapters on the so-called horizontal areas of the environmental law (environmental impact assessment, monitoring, environmental liability, environmental supervision) that are applicable in all areas of environmental protection. These new chapters have been delayed so far because plenty of disputes are still inconclusive on these issues.

The objective of codification of the Special Part of the Environmental Code is to arrange the regulation of different areas of environmental protection and to co-ordinate it with the newly adopted General Part. From among the above-mentioned areas, this article covers nature protection—partly because the author was one of the main authors of the nature protection chapter of the SPEC. Many issues need to be resolved in codification of the nature conservation legislation. Given the limited space available, this article covers only some of the issues subject to debate in relation to the transposition and implementation of European Union nature conservation legislation in Estonia. It needs to be said that most of these problems are also being discussed in the other EU member states. For example, in 2006, a pan-European conference was held on this subject at the University of Krakow, in which the author of this article also participated and made a presentation.<sup>\*5</sup>

The article is based on the hypothesis that current law in Estonia is not sufficient for ensuring implementation of the EU nature conservation directives' objectives, and it highlights the possible solutions offered in the course of drawing up of the Draft SPEC. First, the article analyses the general impact of the EU's nature conservation legislation on the national nature conservation legislation, and whether the chosen method of transposition—integration of the EU's nature directives into the Estonian traditional nature conservation system—can be considered justified. It also brings out what kind of additional legal regulation would be necessary for ensuring the contribution expected from Estonia for establishment of the pan-European nature conservation network Natura 2000. After that, the analysis turns to what kind of additional legal regulation would be needed to ensure functioning of the Natura 2000 network in Estonia in a way that ensures reaching of the objective of the EU's nature conservation legislation—a favourable conservation situation for the relevant habitat types and species. This is done on the basis of the example of environmental impact assessment.

## **2. The current development of Estonia's nature conservation legislation and the impact of the European Union legislation**

### **2.1. The development and principles of Estonia's nature conservation legislation**

The legal regulation of Estonia's nature conservation has a long history. Already in 1297, King of Denmark Erik Menved had forbidden logging on three islands near Tallinn. Although it may be presumed that the actual purpose of this prohibition was more likely related to navigation, because islands covered in forests are good seamarks, it is nevertheless considered to be the first clearly dated nature conservation act in Estonia. Nature conservation in its classical form was born in the 19th century when academic circles started to highlight the aesthetic, ecological, and cultural values of exceptional natural objects and monuments, and the preserved pristine areas. Estonia followed likewise, with nature conservation coming about in the 19th century, primarily as a result of the natural sciences activity of the cultural circles of the Baltic Germans.<sup>\*6</sup> In 1935, the first Nature Conservation Act was passed—it was very progressive for the world of its time, since it organised protection of nature as a whole outside protected areas as well. In 1938, another Nature Conservation Act was passed—this one also expanded to tourism and home decoration. In 1957, the third Nature Conservation Act of Estonia was passed, on the basis of which numerous protected areas were established, many of them still in place. In 1990, the Law on Conservation of Nature was passed, but it was not restricted to nature conservation; it also regulated the general principles of environmental management. The Protected Natural Objects Act was passed in 1994.<sup>\*7</sup> The currently valid Nature Conservation Act<sup>\*8</sup>, adopted in 2004, is considered the sixth act to regulate nature conservation in the territory of Estonia. In

<sup>5</sup> See Avosetta meeting 13/14 January 2006, Krakow. EC Nature Protection Law and its Implementation in the Member States. Available at <http://www.avosetta.org> (11.4.2011).

<sup>6</sup> See Looduskaitse ajalugu (History of Nature Conservation). Available at <http://www.loodus.envir.ee/1page.html> (12.4.2011) (in Estonian).

<sup>7</sup> Also see H. Veinla. Estonia. Naturschutzrecht im Ostseeraum. – Landesberichte. E. V. Heyen (Hrsg.). Baden-Baden 1998, pp. 127–128.

<sup>8</sup> Looduskaitse seadus. – RT I 2004, 38, 258; RT I, 10.06.2011, 3 (in Estonian).

the context of this article, it must be emphasised that one of the reasons for development of the Nature Conservation Act as currently in force was the need to transpose the EU's nature conservation legislation.

Ever since the first Nature Conservation Act as passed in 1935, Estonian nature conservation legislation has been based on the same principles. These principles in general are as follows. In nature protection, preservation of as many forms of manifestation of biodiversity as possible in favourable conservation conditions must be ensured. In this case, biological diversity, or biodiversity, must be taken as variety on all levels, starting with genetic diversity and ending with the diversity of ecosystems. Natural capital and resources shall be treated as national wealth<sup>\*9</sup>, and legal regulation shall support the sustainable use of these resources to ensure their continuation to the next generations. The principle of nature conservation refers to not only passive conservation of natural resources but also positive activity for maintenance of nature and the landscape; contribution to natural processes; and, to a certain extent, restoration of the natural values that have perished or are disappearing. Nature is protected not only for its objective value but also to ensure nature-dependent well-being of humans. For this reason, nature-related cultural-historical, aesthetic, and recreation-related interests and values are also taken into consideration in conservation of nature.<sup>\*10</sup>

## 2.2. The impact of the European Union nature conservation legislation on the national legislation

Although European Union nature conservation legislation is easily adapted to the above-mentioned principles of Estonian traditional nature conservation legislation, becoming a member of the European Union has nevertheless presented some new challenges. One of the greatest problems for Estonia in implementation of the EU's environmental *acquis* probably is achieving the objectives of the EC's nature conservation directives.

A large number of natural values, species, and habitats that have already perished elsewhere in Europe have been preserved in Estonia. By virtue of that, we also have a relatively large network of Natura sites—especially in the coastal and marine areas and on islands.<sup>\*11</sup> On the Natura sites (but also outside them), highly significant limitations to economic activities resulting from the EC nature conservation directives and the relevant Estonian laws need to be taken into consideration.

Thus far, Estonian nature conservation legislation has been characterised by the main criteria for placing something under protection having been its endangerment; rarity; representativeness; or scientific, historical-cultural, or aesthetic value mainly from the standpoint of our own nature. The nature conservation legislation of the European Union, however, adds a pan-European dimension. The establishment of the pan-European Natura network is based on the principles stated in the preamble to the Nature Directive<sup>\*12</sup> (92/43/EC), according to which it is 'an essential objective of general interest pursued by the Community'. The protected areas that make up the network are 'sites of Community interest'. Hence, the EU's nature conservation legislation treats the Member States as guardians of the common natural heritage. Treating the environment as the common heritage of mankind is also a principle of modern international environmental law, resting on the fact that nature has no political boundaries.<sup>\*13</sup>

Accordingly, as a result of European Union legislation, the right to place certain natural values under protection in the Republic of Estonia will be replaced by an obligation to do so. The discretionary power of a Member State of the European Union in placing certain natural areas under protection is clearly limited. A Member State is obliged to place under protection all those areas that are suitable and necessary for place-

<sup>9</sup> Section 5 of the valid Constitution is directly based on this principle.

<sup>10</sup> See: Keskkonnaseadustiku eriosa seaduse eelnõu seletuskiri (the Explanatory Memorandum to the Draft of the Special Part of the Environmental Code), pp. 121–122. Available at <http://www.just.ee/orb.aw/class=file/action=preview/id=53100/Keskkonnaseadustiku+eriosa+seaduse+eelno%F5u+seletuskiri.pdf> (12.4.2011) (in Estonian).

<sup>11</sup> According to the National Audit Office, approximately half of Estonia's shore belongs to the European Union Natura 2000 network of protected areas. Pärnu river is almost entirely a Natura 2000 network site. Approximately 20% of the shore and 45% of the water areas of Pepisi and Lämmijärve lakes belong to Natura 2000 network. See the National Audit Office's audit „Ehitustegevus rannal ja kaldal“ (Construction Activities on the Beach and Shore), p. 5. Available at <http://www.riigikontroll.ee/tabid/206/Audit/2013/Area/15/language/et-EE/Default.aspx#results> (20.7.2011) (in Estonian).

<sup>12</sup> Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:HTML> (12.4.2011).

<sup>13</sup> P. Sands. Principles of International Environmental Law. Frameworks, Standards and Implementation. Manchester University Press 1995, pp. 170–173.

ment under protection on the basis of the (ecological) criteria following from the Habitats Directive and the Birds Directive<sup>\*14</sup> (79/409/EC).<sup>\*15</sup> N. de Sadeleer has stated that placement of the areas of pan-European importance under protection in a Member State is not political but a clearly scientific decision that may be based only on ecological considerations stemming from the objective value of the natural objects.<sup>\*16</sup>

The above-mentioned change, supplementation of the national dimension of nature conservation with a pan-European one, also requires certain changes in legal regulation of placement of areas under protection but first, and foremost, change in the base criteria for the procedure, as well as the protection regime. As will become evident below, our current legislation has a number of shortcomings in this area and the need for additional regulation is obvious.

There are several possible methods for transposition of the nature conservation legislation of the European Union. One of the most important choices lies in whether we should try to fit the present implementation mechanism for the EU directives into the existing nature conservation system or to establish a parallel system of the natural objects protected by the EU legislation. Both of these methods are in use, in different Member States. However, the materials from the above-mentioned Krakow Conference reveal that the first method has been chosen in most of the countries in question. Only a few countries, among them the Czech Republic, Poland, and Italy<sup>\*17</sup>, use a different method, with a special type of protected area established for the Natura sites protected under EU law.

As for Estonia, the first method is used. There is no special type of protected area specified for the Natura sites. Special conservation areas are an exception in a way. In the Explanatory Memorandum to the Nature Conservation Act, it has been noted that the need for special conservation areas stems from the obligation to implement the Birds Directive and the Nature Directive, and that although a large proportion of our existing protected areas became Natura 2000 sites, these nevertheless did not include enough of the habitats the protection of which is now requested by the European Union. There is not always a need to establish a protected area to protect large sea areas, rivers and lakes, semi-natural grasslands, and other habitats, while it is still important to ensure preservation of the habitats in these areas—that is why special conservation areas were established.<sup>\*18</sup> The implementation of a new type of protected area—special conservation areas—in 2004 came about mainly because a very large number of areas were specified as Natura sites all at once, covering large territories. The protection procedure for a special conservation area is simpler than that for other protected areas, special conservation areas have no protection rules or protected zone, and the main method of ensuring the protection procedure is the special conservation area notice. Hence it must be assumed that establishment of special conservation areas is also largely conditioned by the need to reduce the administrative burden. However, in preparation of the Special Part of the Environmental Code, it was presumed that the current protection procedure may still not be sufficient for protection of the Natura sites. The rationale has mostly to do with environmental impact assessments of the activities performed in the special conservation area and with decisions based on such assessments. According to §33 (1) of the Nature Conservation Act, the possessor of an immovable located within the boundaries of a special conservation area shall submit notification to the administrator of the special conservation area if certain activities are planned. However, subsection 5 of the same section provides that the administrator of the special conservation area shall assess the compliance of the planned activities with the requirements stated in §32 of the Nature Conservation Act within one month after the date of submission of the notification. On the basis of this assessment, the administrator of the special conservation area shall approve the notice and allows the planned activities to commence unconditionally, set additional terms and conditions for the applicant that enable commencement of the planned activities if complied with, or forbid the work that endangers preservation of the species under protection or the favourable condition of the habitats for which the special conservation area was established. There are several problems in the current regulation, but I wish to point out the most important one: it is not possible to understand what kind of assessment is

<sup>14</sup> Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1979:103:0001:0005:EN:HTML> (12.4.2011).

<sup>15</sup> H. Veinla. The Influence of European Union Law on the Conservation of Estonian Biological Diversity – the Case of Natura 2000 Areas. – *Juridica International* 2009 (XVI), pp. 170–171.

<sup>16</sup> N. de Sadeleer. Habitats Conservation in EC Law ± From Nature Sanctuaries to Ecological Networks. – *Yearbook of European Environmental Law* 2005 (5), p. 223.

<sup>17</sup> See E. Kruzikova, J. Guth. Czech National Report; B. Iwanska, P. Czepiel. National Report Poland; M. Montini. Report on Italy. Available at <http://www.avosetta.org> (12.4.2011).

<sup>18</sup> Available at [http://www.riigikogu.ee/?op=emsplain&content\\_type=text/html&page=mgetdoc&itemid=040570018](http://www.riigikogu.ee/?op=emsplain&content_type=text/html&page=mgetdoc&itemid=040570018) (12.4.2011).

meant by the Nature Conservation Act and under what procedure it shall be carried out. If a special conservation area belongs to the Natura 2000 network, EU legislation provides that the so-called Natura assessment shall be carried out. It is also unclear when an activity should be banned; the Nature Conservation Act refers to threat to favourable conservation status, but this is very vague.

As an interim summary, it could be said that, in general, the method used for transposing the EU's nature conservation legislation—integration of the EU's nature conservation into the Estonian traditional nature conservation system—could be considered justified. Most of the other Member States have followed this route. Establishment of a special protection system for the Natura sites would have been associated with a significantly increased administrative burden. Nevertheless, the currently implemented method too still requires presence of large-scale additional regulation to ensure complete implementation of the EU's nature conservation legislation in Estonia.

### **3. Problems related to the national regulation of the Natura network and the solutions presented in the Draft SPEC**

#### **3.1. The composition of the Natura network in Estonia**

The legislation in force covers definition of Natura sites in a very general manner in the Nature Conservation Act's §§69–70<sup>1</sup>.

Section 69 of the Nature Conservation Act defines the areas the Natura 2000 network of the European Union consists of and specifies that it is formed of areas hosting birds of which Estonia has informed the European Commission pursuant to the Birds Directive and the areas that the Commission, pursuant to the Habitats Directive, considers to be of common European importance. In view of the judicial practice of the Court of Justice of the EU, mainly the case *Bund Naturschutz*<sup>19</sup>, such regulation is not sufficient. The problem concerns the areas defined pursuant to the Council directive on the conservation of natural habitats and of wild fauna and flora. According to the Court, protection of these areas must be ensured already before the Commission adds these to the list of areas of common European importance. In the *Bund Naturschutz* case, the EU court found that, regardless of the fact that the protection procedure pursuant to the Habitats Directive extends to areas only when added to the list of areas of common European importance on the basis of Article 4 (2) of the directive and approved by the European Commission (paragraphs 35–36), certain protection measures need to be implemented earlier. In addition, the Court explains in the *Draggagi* case<sup>20</sup> (paragraph 39) that, in order to preserve the environmental characteristics of the so-called pre-selection areas offered for the Natura network, the Member States shall adopt appropriate measures also before these sites are added to the list of sites of Community interest. In the *Bund Naturschutz* case, answering the question of the German *Verwaltungsgerichtshof* as to whether the protection procedure that shall be applied (to pre-selection areas) results from Community law or, instead, the Member States have to ensure protection of the specified areas only via national protection measures (paragraph 26), the Court held that the details of the protection procedure to be applied belong under the national legal order of each Member State.

In order to take these cases into account in the Estonian legislation, a clause has been added to the regulation in the Draft SPEC for definition of the Natura network's composition, providing that the Natura network is also considered to include the sites the European Commission has never entered on the list of areas of Community interest but that have been presented to the European Commission for entry on said list and that are either placed under protection nationally or have had a procedure for coming under protection initiated. It should be stated that, although the Nature Conservation Act does not provide it, this is the practice applied today. With such an approach, Estonian law would also correspond to the relevant positions of the Court of Justice of the EU and ensure preservation of the natural values important for currently only potential union until a decision is made on the Natura sites.

<sup>19</sup> Case C-244/05. Available at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c\\_281/c\\_28120061118en00160016.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_281/c_28120061118en00160016.pdf) (12.4.2011).

<sup>20</sup> Case C-117/03. Available at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/c\\_057/c\\_05720050305en00070007.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/c_057/c_05720050305en00070007.pdf) (12.4.2011).

### 3.2. National regulation needed for establishment of the Natura network

Our current law remains short on words regarding the procedure for, and organisation of, establishment of the Natura network. Subsection 91 (6) of the Nature Conservation Act provides that the list of areas included in the Natura 2000 network to be submitted to the Commission shall be approved by an order of the Government of the Republic and the areas included in the Natura 2000 network shall be designated in adherence to the requirements set out in paragraphs 1 and 2 of Article 4 of the Birds Directive and paragraph 1 of Article 4 of the Habitats Directive. This regulation should probably be considered insufficient. In the Draft SPEC, somewhat more detailed regulation has been added concerning organisation of establishment of the Natura network. The draft provides that the areas shall still be presented to the European Commission for inclusion in the Natura 2000 network by order of the Government of the Republic, but it is specified that selection of the areas shall be organised by the Ministry of the Environment.

The applicable law provides that the authority competent to initiate proceedings for placement under protection shall arrange for expert assessment of the justification of placing the natural object under protection and the purposefulness of the planned restrictions (§8 (3) of the Nature Conservation Act). For example, in case 3-08-166 deliberated by the Tallinn Administrative Court, a question arose as to whether the inventory of Natura 2000 sites carried out before placement under protection may be equated to the above-mentioned expert assessment. A position has been taken in the Draft SPEC that, since the detailed criteria and conditions provided in the Birds Directive and the Habitats Directive, as well as their annexes (not in national legislation), shall be taken as a basis in determination of the Natura network sites, carrying out an expert procedure as provided for in §8 (3) of the Nature Conservation Act is not always necessary and if the compliance of the area with the ecological criteria under EU legislation is evident, application of expertise may be omitted.

According to the directive on the conservation of natural habitats and of wild fauna and flora, the formation of the Natura 2000 network and application of the protection regime provided in the directive to its sites takes place in stages. The nature of these stages and their national legal meaning have also remained unregulated in the law now in force. The stages of formation of the Natura network under the Habitats Directive are as follows:

- 1) Each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host (Article 4 (1)). In Estonia, this has been done by order of the Government of the Republic.<sup>\*21</sup>
- 2) The Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists (Article 4 (2)), carrying out a consultation procedure if necessary (Article 5).
- 3) As a result of entry on the list, paragraphs 2, 3, and 4 of Article 6 of the Habitats Directive (on taking measures for avoidance of deterioration of the natural and other habitats of species, as well as assessment of effects of the programmes and projects that have potential to affect these sites), shall immediately apply.
- 4) The Member States shall designate that site as a special area of conservation as soon as possible and within six years from entry of the site on the list of sites of Community interest (Article 4 (4)).<sup>\*22</sup>

Below, the legal problems related to the first; in passing, the second; and the fourth stage are discussed.

In practice (incl. in the above-mentioned Tallinn Administrative Court case), there have been problems as to the legal meaning of the list approved by order of the Government of the Republic and as to whether a site's inclusion on this list would create some kind of legal consequences for landowners. Actually, at least indirectly, an explanation responding to this problem has been given in the case *Markku Sahlstedt and Others*<sup>\*23</sup>, in which the Court of Justice of the EU noted that approval of the list of sites of Community importance does not affect the landowners of these sites personally or in a special way, since the sites have been selected under the ecological criteria and the list is in no way aimed at causing direct legal consequences for specific landowners (paragraphs 20 and 24). It may be concluded all the more clearly that no legal consequences can be brought about by the list of sites that have been presented by the Member State for inclusion on this European-Commission-approved list.

<sup>21</sup> The first of such orders was No. 615-k, Proposed Natura 2000 Sites in Estonia, 5.8.2004.

<sup>22</sup> In Estonia, this deadline is at the end of 2013.

<sup>23</sup> Case C-362/06. Available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:141:0002:0002:EN:PDF\(12.4.2011\)](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:141:0002:0002:EN:PDF(12.4.2011)).

Compiling the list of sites to be presented for the Natura 2000 network and informing the European Commission of it could be viewed as an establishing and informing activity from the legal point of view, necessary for fulfilment of the obligations under the Habitats Directive. When a country has plenty of room for decision-making in the procedure for placing an area under national protection (proceeding from the fact that the prerequisites for placement under protection have been set forth very generally in the Nature Conservation Act), then in selection of the Natura 2000 network sites, the specific criteria provided in the Habitats Directive shall be taken as a basis and the Member State has little option for not including the sites that fulfil the criteria (only the ecological criteria may be applied as a basis in selection of the sites). It can be concluded from here that by presenting the Natura 2000 site list, the country only meets its obligation under the Habitats Directive to establish the sites needing protection and conforming to the criteria in the directive, and to present these to the commission. Compilation of the national list of sites is only the first preparatory stage for final approval of the list of Natura sites. According to the Habitats Directive, this list will be compiled as an outcome of dialogue between the Commission and the Member States. The purpose of presenting national lists is to ensure that the Commission has an exhaustive list of all sites that could be included in the Natura network. The objective of the Habitats Directive is to ensure protection of species and habitats not by the Member States but with regard to their natural habitat, which often extends into the territory of several Member States (Article 3 (1)). The purpose of the directive is not conservation of nature but conservation of one part of it, that which forms the common heritage of the European nations—the sites of Community interest. Since no Member State has sufficient information on the situation of species and habitat types in the other Member States, all must include in the national list all sites that may have relevance in establishment of the Natura network. Therefore, the national lists are only, as it were, the raw material from which the sites relevant for the purposes of the directive—ensuring a favourable situation of habitat types and species in the European Union (*FirstCorporateShipping*, paragraphs 22 and 23)<sup>24</sup>—will be selected. This is repeated by the Court in the *Bund Naturschutz* case (paragraph 39), referred to above. The Commission is assisted in compiling the final list on the basis of the national lists by a committee formed under Article 20 of the Habitats Directive and the so-called biological seminars organised by it.

The fact that the Commission lays down the list of sites of Community interest on the basis of the list provided by the country therefore has no influence on the rights of individuals (i.e., registered immovable owners). Laying down of the list of sites of Community interest places new obligations on the country—to ensure protection of the sites on the list. In order to ensure such protection, a procedure for placing a site under national protection shall be initiated. The procedure is open to all interested parties who can protect their rights thereby.

The fourth stage of establishment of the Nature network—definition of special areas of conservation—is not regulated at all in the valid law of Estonia. That is why the Draft SPEC includes completely new provisions that regulate definition of specially protected areas.<sup>25</sup> The need for such regulation results from Article 4 (4) of the Habitats Directive, stating that the Member States shall declare the sites as special areas of conservation as soon as possible and within six years at most. In Estonia, this would mean that the currently protected areas would simply be renamed as special areas of conservation and no change would follow for the landowners. This is take-up of the Habitats Directive's terminology. However, not all sites in the Natura network are associated with this obligation, only those sites established on the basis of the Habitats Directive that are added to the list of sites of Community interest approved by the Commission. Article 4 (4) of the Habitats Directive provides that '[f]or special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites'. In determination of the protection regime, the Estonian nature conservation system is mainly based on legal instruments provided for in the protection rules for the sites. The importance of other instruments—administrative and contractual—is marginal. As stated above, a considerable number of the Natura sites in Estonia have the status of special conservation areas. However, there are no protection rules for these areas. There is concern that the main protection instrument for a special conservation area—notice of a special conservation area—may still not be sufficient for meeting of

<sup>24</sup> Case C-371/98. Available at [http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61998JO371:EN:HTML\(12.4.2011\)](http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61998JO371:EN:HTML(12.4.2011)).

<sup>25</sup> Subsection 2 (3) of the Nature Conservation Chapter of the SPEC Draft.

the obligations under the EU legislation and ensuring that all activities that may have an unfavourable effect on the environmental characteristics of the area are excluded.

The draft provides that management plans shall be established concerning all special conservation areas belonging to the Natura network; the valid law does not provide the management plans, but these are necessary for fulfilment of the requirements of Article 4 (4) of the Habitats Directive. A management plan is a basis for planning the activities necessary for organising protection, allocating resources, and implementing the activities. According to the Draft SPEC, the management plan is a piece of legislation with a non-administrative effect and that is why its drafting must take place in open proceedings. According to the draft, areas are declared special areas of conservation under a protection rule when these are protected areas or permanent habitats, and by a management plan in the case of special conservation areas. One of the most important objectives of declaring an area to be a special area of conservation is unambiguous and legally binding emphasis that, although these are natural objects under protection and belonging to the Estonian national system, the special features of their protection procedures derive from the European Union legislation. The other main purpose for defining special areas of conservation is the clear and detailed highlighting of the protection objectives of the areas and the aspects (activities) endangering them. After all, the cornerstone of the protection of Natura sites is the protection objectives of the area, since, as a general rule, all activities that can have a significant unfavourable effect in view of this objective are forbidden.<sup>\*26</sup> The valid legislation (protection rules of the areas<sup>\*27</sup>) covers definition of the protection objectives in a very general way (only the habitat types and species under protection are listed), and there is no obligation to specify the aspects (activities) that endanger the area. These shortcomings of the valid law have also been highlighted and admitted by the Ministry of the Environment.

## 4. Problems related to ensuring the protection procedure for Natura network sites and their possible solutions

### 4.1. The need for regulating the peculiarities of environmental impact assessment for activities that could affect Natura sites

The protection procedure for the Natura sites is ensured by different legal measures, but at the centre of these is a requirement for environmental impact assessment for those activities that could affect the area (the so-called Natura assessment requirement). This procedure is regulated by the above-mentioned (extended) Draft General Part of the Environmental Code Act (hereinafter referred to as the extended draft of the GPECA). Although this draft was prepared by the working group a full two years ago, it has still not been discussed more widely, and, therefore, the following solutions can only be seen as legal-political ideas, not as materialised regulations.<sup>\*28</sup> Hence, the references to the solutions offered in the draft shall also be considered conditional. The objective of this part of the draft is to reflect the EU legislation and the peculiarities of the Natura assessment more clearly in comparison to the other types of environmental assessment that the valid Estonian law does not cover with sufficient precision. In Estonia, attempts have been made to integrate Natura assessment with the regular EU Directive on Environmental Impact Assessment<sup>\*29</sup> (85/337/EC). N. de Sadeleer finds such a method unacceptable since the enforcement area for assessment in accordance with Directive 85/337/EC is limited with the listing of projects in the annexes of the Directive, but the Natura assessment involves practically all activities that may have an impact on the site.<sup>\*30</sup> There is reason to agree with this opinion, but it must be added that there are several other notable

<sup>26</sup> See: Keskkonnaseadustiku eriosa seaduse eelnõu seletuskiri (Explanatory Memorandum to the Draft of the Special Part of the Environmental Code), p. 122. Available at <http://www.just.ee/orb.aw/class=file/action=preview/id=53100/Keskkonnaseadustiku+eriosa+seaduse+eelnõu+seletuskiri.pdf> (12.4.2011) (in Estonian).

<sup>27</sup> I.e., see Government of the Republic Regulation No. 240. Protection Rules for Anne Nature Reserve (Anne looduskaitseala kaitse-eeskiri), adopted on 15.9.2005. – RT I 2005, 51, 407 (in Estonian); No. 97 Protection Rules for Kõpu Nature Reserve (Kõpu looduskaitseala kaitse-eeskiri), adopted on 30.3.2007. – RT I 2007, 29, 169 (in Estonian).

<sup>28</sup> The Draft is currently not available to public as well.

<sup>29</sup> Available at <http://eur-lex.europa.eu/LexUriServ/site/et/consleg/1985/L/01985L0337-20030625-et.pdf> (12.4.2011).

<sup>30</sup> N. de Sadeleer. Habitats Conservation in EC Law—From Nature Sanctuaries to Ecological Networks. – Yearbook of European Environmental Law 2005 (5), p. 245.

peculiarities in the Natura assessment. These have been expressed the most clearly in the so-called *Waddenzee* case<sup>31</sup>, and the law applicable in Estonia does not reflect them sufficiently. To be more precise, the law in effect in Estonia does not bring about distinctness for Natura assessment at all, although, as will become clear below, it is evident.

## 4.2. The enforcement area for Natura assessment

The extended draft of the GPECA takes into consideration the EU court cases *Draggagi* and *Bund Naturschutz*, in which the Court has established that, even with the areas presented to the European Commission and entered in the national list (so-called pre-selection areas), the appropriate protection procedure requires that the Member States not approve activities that could significantly damage the environmental characteristics of these areas. Therefore, the Member States must ensure that the condition of these areas does not deteriorate before the final list of Natura sites is published. The working group who prepared this draft found that this objective set by the EU court can be reached only through implementation of the Natura assessment obligation in the pre-selection areas—that is, in areas that have been presented to the Commission but have not been entered on the list of areas of Community interest yet.

Article 6 (3) of the Habitats Directive provides that any plan or project likely to have a significant effect on the site shall be subject to appropriate assessment. This means that those projects and plans that do not need permission or any other form of approval by the administrative authority for their implementation should also be assessed. According to the extended draft of the GPECA, however, a Natura assessment should be made only if permission is needed for implementation of the project—an environmental protection permit, a building permit, or some other activity licence. Apparently, it may be violation of the EU legislation if the Natura assessment were to be linked only to activities that need permission, but, on the other hand, in Estonian conditions, it is not possible to imagine a working mechanism for the use of different assessments for controlling the activities that do not require any permission—it is simply not practicable. No such mechanism has been found in the other Member States either.

## 4.3. The initiation, scope, and binding nature of the Natura assessment

The first peculiarity of Natura assessment is related to its initiation. An environmental impact assessment in accordance with Directive 85/337/EEC will be initiated only if the planned activity will presumably have a significant environmental effect; the same applies to strategic environmental assessment. However, the EU court found in the *Waddenzee* case that, for the projects or plans indicated in Article 6 (3) of the Habitats Directive, the potential significant effect on the area should always be taken into consideration and, thus, the effect of all these projects and plans should be assessed. An assessment may be left uninitiated for only those plans and projects whose significant effect has been reasonably excluded. A solution has been offered in the extended draft of the GPECA on the basis of this, providing that if a significant environmental disturbance on a Natura 2000 network site has not been reasonably excluded, the originator of the plan or the decision-maker shall initiate assessment of its effect on the Natura 2000 network site.<sup>32</sup>

The other peculiarity of the Natura assessment is that it is more purposeful and definite, since the Natura assessment concentrates more on the protection objective and integrity of the Natura site, whereas all other environmental impact assessments measure the total effect of the project on the environment as a whole. It is also important that if, in the case of assessment in accordance with Directive 85/337/EEC, the actual alternatives need to be taken into consideration, allowing a project that has a significant negative effect on a Natura 2000 network site requires the complete lack of alternatives as an important precondition, regardless of whether the alternative is reasonable from the point of view of the performer or not.<sup>33</sup>

<sup>31</sup> Case C-127/02. Available at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/c\\_262/c\\_26220041023en00020002.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/c_262/c_26220041023en00020002.pdf) (12.4.2011).

<sup>32</sup> Also see J. Jans. *European Environmental Law*. Europa Law Publishing 2008, pp. 460–461.

<sup>33</sup> See *Managing Natura 2000 sites. The Provisions of Article 6 of the Habitats Directive*. European Commission 2000, p. 43. Available at [http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision\\_of\\_art6\\_en.pdf](http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf) (12.4.2011).

Since Natura assessment is aimed at a sufficiently specific objective (that of making sure whether the planned activity may have a significant negative effect on the integrity of the site), the requirement for performance of a full assessment that completely conforms with the requirements of Directive 85/337/EEC, if the obligation to assess the impact arises only because of the need for Natura assessment, would be disproportionately burdensome for the applicant. For that reason, a simplified assessment procedure has been proposed in the extended draft of the GPECA. The working group holds that, given the very low threshold for initiation of a Natura assessment, as well as the expected large number of assessments, this is the only possible solution. Preserving such a full-scale open procedure in all events of assessment would be clearly too burdensome and would unnecessarily hinder the projects that do not have a negative effect on Natura sites. In the course of simplified proceedings of Natura assessment, a full-scale open proceeding shall not be carried out in combination with a public presentation and discussion, as in the procedure under Directive 85/337/EEC. According to the draft, an expert shall reply in his or her report to the questions asked of him or her and give a clear answer as to significant effect in view of the protection objective: is integrity of the site possible, or is it reasonably excluded? Natura assessment may require highly specific knowledge of species and habitats, and that is why the draft provides that the assessment may be done by an expert who may be a natural person with many years of experience in studying the species or the habitat under protection and who has given trustworthy assessments of the protection of this species or habitat type.

Whether a plan or project may be allowed is also regulated more precisely in the draft than in the currently valid legislation. Again, the draft is based on the EU legislation. The EU court found in the *Waddenzee* case that a project or plan with potential effect on a Natura site may be allowed if the competent authorities of the Member State have made sure that the plan or project has no negative effect on the site. The Court holds that this is so if there is no scientifically reasonable doubt as to whether a negative effect on the integrity of the site is excluded. Consequently, if reasonable doubt as to the possibility of a negative effect remains after the assessment, the competent authorities have no right to allow the plan or project to continue. Hence, unlike in the assessment under Directive 85/337/EEC, in which the result of the assessment is not binding for the decision-maker, the result of the Natura assessment is binding on the decision-makers (the granter of permission or approver of the plan).

#### 4.4. Making exceptions

In what exceptional cases potentially negative projects may be allowed is regulated by Article 6 (4) of the Habitats Directive. Projects with a potential negative effect may be allowed when three preconditions have been fulfilled. The first of these is the lack of alternatives. The second precondition is that implementation of the plan or project is determined by some superior and imperative public interest. The third condition is taking of compensation measures. If all of the above conditions have been met, a plan or project with a negative effect on the site may be allowed. As to making of exceptions, the valid Estonian legislation is in accordance with the EU legislation and the draft will preserve its contents, proposing only some formational changes.

### 5. Conclusions

This article was based on the hypothesis that the current law in Estonia is not sufficient for ensuring implementation of the EU nature conservation directives' objectives. This hypothesis proved correct: the analysis revealed that, although the method of transposing the EU nature conservation legislation and its integration into Estonia's traditional nature conservation system may be considered successful in general, the valid Estonian law still lacks numerous provisions that should regulate establishment of the Natura network and its various stages and proceedings. Also, what kinds of areas form the national part of the pan-European Natura network must be specified. At the moment, there is no regulation of the fourth stage of establishment of the Natura network, the definition and status of special areas of conservation. Estonian legislation also does not take into consideration the differences in the so-called Natura assessment, mostly arising from the practice of the EU court. In summary, it is safe to say that there are problems in Estonia as to transposition of the EU nature conservation legislation. Solutions to these are being sought in the course of codification of Estonian environmental law; some possible solutions for the most burning issues were also proposed in this article.