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The Influence of European Union Law on the Conservation of Estonian Biological Diversity — the Case of Natura 2000 Areas

1. Introduction to the subject

Section 5 of the Constitution of the Republic of Estonia¹ provides: “The natural wealth and resources of Estonia are national riches which shall be used economically.” The riches of Estonian nature are indeed remarkable. A variety of valuable and unique aspects of Estonian biodiversity are worth mentioning. The diversity of Estonian flora and fauna when compared to that of other territories north of the latitude 57° N is among the greatest in the world. This is due to climate conditions and climatic diversity in Estonia that are related to the country’s geographic position, the fact that there are both islands and mainland territory in Estonia, the abundance of sea and inland waters, and the versatility of soil conditions. Plant colonies can be found in Estonia with the largest small-scale diversity of species in the world. There are plant colonies in Eastern Estonian wooded meadowland that have been in use for a long time; that are still thriving; and where, for instance, the number of tracheophytes amounts to 74 species per square metre.² The general diversity of landscape is great in Estonia as well. These riches must be cherished.

Nature conservation is one of the priorities of European Union environmental policy. It has now been five years already since Estonia joined the EU. Analysis of Estonian legal practice, especially administrative practice, often seems to indicate that we have not joined the European Union yet, as only Estonian law is known and implemented, even when it is in direct contradiction with Community law. European Union law has affected different areas of law differently. Environmental law is undoubtedly one area where the influence of European Union law can be felt at every step, although conflicts between Estonian law and European Union law are not uncommon. A good example is the so-called Suurupi logging case in the Tallinn Administrative Court³, where

¹ RT 1992, 26, 349; RT I 2007, 33, 210 (in Estonian). English translation available at www.just.ee/23295 (28.07.2009).

² Bioloogilise mitmekesisuse kaitse strateegia ja tegevuskava (Estonian Protection of Biological Diversity Strategy and Action Plan). Available at <http://www.envir.ee/orb.aw/class=file/action=preview/id=1993/Bioloogilise+mitmekesisuse+kaitse+strateegia+ja+tegevuskava.pdf> (20.03.2009) (in Estonian).

³ Tallinn ACd, 19.12.2007, 3-07-2209. Available at <http://kola.just.ee/> (10.07.2009) (in Estonian).

Estonian law could not find a reason to prohibit logging, whereas the decision for a ban was quite obvious under European Union law, as the case concerned an area of valuable natural habitats to be conserved, not logged. The court pointed out that the same. Natura 2000 network areas taken under protection pursuant to the European Union nature conservation directives are often a collision ground for nature conservation with economic and related social interests. Such conflicts are not uncommon also in other European Union Member States and have been brought also before the European Court of Justice.

The analysis that follows is largely based on European Court of Justice case law. The European Court of Justice has demonstrated its dedication to nature conservation and regularly given priority to nature conservation considerations. The European Court of Justice called for radical implementation of the precautionary principle in several cases analysed below. At the same time, an infantile understanding prevails in Estonia that economic concerns always outweigh environmental values. Even the Supreme Court found, in the so-called Paluküla sacred grove case, that nature conservation does not prevail at Natura sites but that the need to ensure sustainable development does.⁴ The objective of this article is to consider which instructions the European Court of Justice's case law provides to the Member States for resolving the conflict of economic and environmental interests at Natura sites. There are plenty of legal problems with Natura sites; therefore, the primary aim of this article is to determine whether Estonian law provides sufficient protection to Natura sites — i.e., protection in the meaning of the European Court of Justice's interpretations. Attention is paid primarily to the selection of Natura sites and the so-called Natura assessment. The article begins with an examination of the principles of EU nature conservation law.

2. The main principles of European Union nature conservation law: Member States as keepers of the common European nature heritage

The Supreme Court has touched on the relationship between Estonian law and EU law in the Paluküla sacred grove case, noting that in that particular case there were no grounds for the direct application of European Union law, as Estonian law provides sufficient protection to the pre-selected Natura 2000 Kõnnumaa landscape protection site in accordance with European Union law. This article does not address the direct legal effect of the EU nature conservation directive's provisions. It does underscore, though, that interpretation of the Natura network protective measures derives from EU law.⁵

The two pillars of EU nature conservation law are Council Directive 79/409/EEC, on the conservation of wild birds⁶ (hereinafter 'the Bird Directive'), and Council Directive 92/43/EEC, on the conservation of natural habitats and of wild flora and fauna⁷ (hereinafter 'the Habitats Directive').

Harmonisation of bird protection measures via the adoption of the Bird Directive is a good example of the application of the principle of subsidiarity. Birds know no 'state borders'; therefore, national protective measures cannot be sufficient. The Bird Directive compels all Member States to maintain the population of all species of naturally occurring birds at a level that corresponds in particular to ecological, scientific, and cultural requirements, while taking account of economic and recreational requirements. For that the Member States have to establish protected areas and maintain or re-establish habitats for the bird species. Thus, a situation arises wherein the aim of protection of natural resources requires the regulation of certain areas and evaluation of how the environmental impact of various types of activities affects protection of birds and conservation of their natural habitats.⁸

The Habitats Directive is regarded as the most important legal instrument for nature conservation in the EU. The aim of the Habitats Directive is to ensure the protection of biodiversity in the territory of the Member States through the conservation of natural habitats and of flora and fauna. The directive is based on the following considerations. In the European territory, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously endangered. As the endangered habitats and species are part of the Community's natural heritage and the threats to them are often of a trans-boundary nature, it is necessary to take measures at Community level in order to conserve them. In order to ensure the restoration or maintenance of natural habitats and species of Community interest with a favourable conservation status, the Member States have to designate areas of conservation and create a coherent European ecological network: Natura 2000. The direc-

⁴ ALCS Cd, 25.09.2008, 3-3-1-15-08. – RT III 2008, 37, 249 (in Estonian).

⁵ *Ibid.*, p. 19.

⁶ OJ L 103, 25.04.1979, p. 1.

⁷ OJ L 206, 22.07.1992, p. 7.

⁸ See also C. L. Diaz. The EC Habitats Directive Approaches its Tenth Anniversary: An Overview. – Review of European Community and International Environmental Law 2001 (10) 3.

tive foresees criteria for the designation of conservation sites, and it lists animal and plant species and types of natural habitats of European interest. The main criterion for successful implementation of the directive is maintenance of a favourable conservation status for natural habitats and species. For this purpose, appropriate measures have to be implemented — with regard to not only conservation sites but also any activities outside conservation sites that might adversely affect that area.⁹

One of the most problematic provisions is Article 2 of both directives is foreseeing that the measures taken pursuant to the Birds Directive and the Habitats Directive should take account of economic and related social circumstances. Many Member States have leaned on that and tried to give preference to development activities over the establishment of conservation areas, preferring economic interests to nature conservation. As shown below, this has been done in Estonia. N. de Sadeleer refers to several cases wherein the European Court of Justice has clearly expressed that nature conservation interests prevail for nature conservation areas established under EU law and that other interests are clearly subordinate to that.¹⁰ Many Member States are reluctant to implement that principle. By contrast, in the Supreme Court judgment in the case of the Paluküla sacred grove¹¹, the court indicated that the aim of the Natura 2000 network created under the European Union nature conservation directives is to support sustainable development, not to rule out all economic activity. The court is right in the sense that, indeed, the Natura conservation scheme does not rule out all economic activity, but it remains unclear what the court regards as sustainable development. The classical concept of sustainable development refers to the balance of economic, social, and environmental interests. That definition does not apply for Natura sites. Several European Court of Justice cases mentioned below prove that nature conservation interests are to be given clear preference over other interests at Natura sites.

The Habitats Directive indicates that the creation of the European Natura network is “an essential objective of general interest pursued by the Community”. The conservation areas that constitute that network are “sites of Community interest”. Thus, EU nature conservation law regards Member States as the guardians of a common natural heritage. Contemporary international environmental law also considers the environment a common heritage of mankind, since nature knows no state borders. P. Sands describes the development of international environmental law as follows. Classical (positivist) environmental law was based on norms that were established and implemented only with the consent of states. This was based on reciprocity, which, in turn, rested on Roman Law’s *do ut des* principle, according to which the obligations of one (international) contracting party should be equal to the benefits received from the other party to the contract. A turn was taken in the 1970s when several conventions were signed whereby states accepted environmental obligations without receiving any direct benefit from other parties to the contract. P. Sands calls such obligations “obligations *erga omnes*” — obligations to all — and the aim is to protect interests of humanity as such. As we can see, EU nature conservation law rests on the same principle, underscoring common nature conservation interests and responsibilities.¹²

In the case of Estonia, all of the above means that, pursuant to international law, and especially EU law, we no longer have an exclusive right to decide over the conservation and use of our precious nature. It is shown below, however, that Estonian environmental law is not entirely dedicated to ensuring protection of the Natura 2000 EU nature conservation network sites, which means that the above-quoted Supreme Court ruling on the inapplicability of EU law is not convincing.

3. Formation of the nature conservation network Natura 2000 in Estonia

The decisive factor in attaining the aim of the Habitats Directive — favourable conservation of natural habitat types and the species’ habitats as indicated in its annexes — is a catalogue of prospective Natura network sites by a Member State. In the *First Corporate Shipping (C-371/98)*¹³ case, the European Court of Justice stated that Member States must submit a full list of all sites eligible for identification as sites of Community importance, and that no such site may be omitted.

Estonia’s list of Natura sites was submitted to the European Commission by 1 May 2004. According to this document, we have 66 Natura bird sites, with an area of 1,236,808 ha, and 509 Natura habitat sites, with an area of 1,058,981 ha.¹⁴ The areas of bird sites and habitat sites overlap greatly, which means that the total area

⁹ See also N. de Sadeleer. *Habitats Conservation in EC Law ± From Nature Sanctuaries to Ecological Networks*. – Yearbook of European Environmental Law 2005 (5), pp. 215–252.

¹⁰ *Ibid.*, p. 218.

¹¹ ALCSCd, 3-3-1-15-08, p. 18.

¹² P. Sands. *Principles of International Environmental Law. Frameworks, Standards and Implementation*. Manchester University Press 1995, pp. 170–173.

¹³ Available at <http://curia.europa.eu/>.

¹⁴ The area of the Republic of Estonia is 4,522,700 ha.

of Natura sites is actually 1,422,500 ha, 51% of which is sea sites and 49% areas on land (16% of Estonia's land is covered by Natura sites).

The selection of Natura sites is a serious task, as Natura site classification usually means significant operational limitations, which can considerably impede property development. It must be mentioned that, unfortunately, the process was poorly regulated legally in Estonia. The main document regulating those activities was Government of the Republic Decree 622-k, of 25 July 2000, 'Approval of the National Programme (2000–2007) Estonian NATURA 2000'.^{*15} That programme was in essence a planning document and did not regulate the selection of sites or the legal aspects of the procedure. The media^{*16} have said that the selection of Natura sites was done in a rush and incorrectly, and that some Natura sites were assigned that status falsely. The only court case the author is aware of wherein such an oversight is referred to is the Paluküla sacred grove case heard by the Tallinn Circuit Court, in which the court pointed out that a Rapla County Environmental Authority representative had explained at the Circuit Court sitting that the designation of an alvar as a pre-selected area on one slope of the Paluküla sacred grove was outright wrong, since in fact there is no alvar on that slope. The Circuit Court believed this argument, pointing out that alvars are to be found on flat limestone terrain, while the slope in question is a rise and not limestone terrain.^{*17}

The National Audit Office pointed out significant limitations in the selection of Natura sites in its audit "Conservation of Valuable Forest Habitats at Natura 2000 sites"^{*18}. The National Audit Office reproaches that, since the Ministry of the Environment did fail to use all available options for gathering information about the extent and location of habitats, some valuable sites have mistakenly been left out of the Natura 2000 network. It was mostly earlier conservation areas that were listed in the Natura network, and the abundance and distribution of habitats in the territory of Estonia was in fact not examined. Limited information about the distribution of habitats impedes the formation of the Natura network, which would help to maintain favourable conservation status and evaluate changes in the status of habitats.

Estonian environmental non-governmental organisations are not satisfied with the selection of Natura sites. In 2005, the Estonian Fund for Nature, in collaboration with the Estonian Seminatural Community Conservation Association and other environmental organisations and experts, prepared the so-called Natura 2000 shadow list. The Natura shadow list was prepared — similarly to other member countries' lists — before the relevant negotiations between the European Commission and the Member States (the so-called biogeographical seminar), the Estonian part of which took place in December 2005. This shadow list of sites is one of the main sources of information for Member States wanting to add types of habitat and certain habitats of species to the European Commission list. The Estonian shadow list includes 628 larger and smaller sites, with a total area of 845 km². Thus, the shadow sites cover 1.8% of Estonian territory (in addition to the 16% of the 'official' Natura pre-selection sites).

The European Commission also has claims against Estonia. The Commission reviewed the Estonian list of habitat sites and found that the Natura sites provide sufficient protection to 22 types of habitat and 15 species. There are 19 types of habitat and 25 species that need elaboration in the database, and nine types of habitat and two species need additional analysis as to whether and to what extent that type of habitat or species is present in Estonia, and whether, and how many, additional sites are needed. The European Commission requires additional sites for the protection of 10 types of habitat and seven species.^{*19}

Thus, it can be argued that the Natura network formation process is far from over for Estonia, and the existence or absence of discretionary space in the choice of the sites is still acute for the country. Many other European Union Member States have had similar problems with the registration of sites in the Natura network.

Section 24 of the above-quoted audit by the National Audit Office states: "The Ministry of the Environment has publicly explained that the formation of the Natura network was based not merely on the ecological value of the site. The final approved selection was a range of compromises with land-owners, and several sites were excluded from the Natura network because of land-owners' protests." A question arises as to whether other considerations besides nature conservation factors may play a role in the listing. This question has come up also with respect to the potential construction of a bridge to the island of Saaremaa.

The European Court of Justice is of the opinion that only ecological criteria matter in the selection of Natura sites. The most important European Court of Justice case regarding the balance of biodiversity and economic (and related social) development is the *Lappel Bank* case.^{*20} That case concerned the United Kingdom giving preference to a port extension over a bird conservation site that was obligatory under EU law. The European

¹⁵ Riikliku programmi "Eesti NATURA 2000" kinnitamine aastateks 2000–2007. Available at [http://trip.rk.ee/cgi-bin/thw?\\${BASE}=akt&\\${OOHTML}=rt&TA=2000&TO=5&AN=1337&KP=2000-07-25](http://trip.rk.ee/cgi-bin/thw?${BASE}=akt&${OOHTML}=rt&TA=2000&TO=5&AN=1337&KP=2000-07-25) (10.07.2009) (in Estonian).

¹⁶ Unfortunately no scientific research is available.

¹⁷ Tallinn CCd, 4.10.2007, 3-05-43, p. 12. Available at <http://kola.just.ee/> (10.07.2009) (in Estonian).

¹⁸ Available at the National Audit Office website <http://www.riigikontroll.ee> (10.07.2009) (in Estonian).

¹⁹ Available at <http://www.envir.ee/1684> (in Estonian).

²⁰ Judgment of the Court, Case C-44/95. Available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61995J0044&lg=en (10.07.2009).

Court of Justice found that failure to designate an important bird habitat as a conservation site could be justified only by general interests outweighing the ecological interest protected by the directive. At the same time, the court ruled that in the designation of conservation sites economic considerations can never outweigh ecological interests. Thus, the selection and designation of borders is possible only in a manner that bears in mind the ecological criteria.^{*21} The European Court of Justice has clearly ruled also in other cases that at this stage economic, social, and cultural considerations must entirely be left to the side.^{*22} Therefore, if there are sites that because of economic considerations or land-owners' protests were not listed as Natura sites, as the National Audit Office audit indicates, this is a clear violation of EU law.

An interim conclusion can be drawn here that the selection of conservation sites must depend only on ecological criteria. Theoretically, a Member State does have a certain right of discretion in the selection of sites, but this can be reduced to zero in many cases, if the ecological value of the site requires it to be designated as a conservation site.

The European Court of Justice has stated in the *Lappel Bank* case that there are certain general interests that outweigh ecological interests linked to Natura sites. An explanation can be found in the materials from the *Leybucht* case.^{*23} That case concerned the problem of how to deselect or reduce the size of an already-listed site. The case revealed that there can indeed be public interests that outweigh European ecological interests. Extensive land improvement works were carried out on the coast of Germany. A conservation site designated pursuant to the Bird Directive was reduced in size when dams and other barriers were built. Germany justified this with three arguments. Firstly, the construction of dams was necessary in order to avoid floods and thereby save human lives. Secondly, new and valuable habitats are appearing because of those dams. Thirdly, the construction of dams was necessary to allow ships to approach the local port, which was allegedly important because of economic and related social considerations, in order to ensure the development of the region and avoid loss of jobs. The European Court of Justice accepted the first and the second argument but resolutely dismissed the third. The conclusion to be drawn from this is that economic (and related social) considerations do not justify giving up Natura areas, and that Estonia should dismiss such plans. Such proposals have been made in Estonia in connection with, for example, the intention to build a rowing canal and a leisure centre in Tartu, on the Emajõgi River meadow. That meadow is a habitat of the great snipe, a very rare bird in Europe, protected under the Bird Directive. The meadow should therefore be taken under protection as a Natura site.^{*24} A favourable conservation state for great snipe stands in a face-off with economic interests related to the rowing canal and sports and leisure facilities.^{*25} The *Lappel Bank* and *Leybucht* cases clearly indicate that the leisure centre construction plans are irrelevant to listing of the Emajõgi River meadow as a Natura site. That would clearly contradict EU law.

4. Ensuring protective measures for Natura sites: Critical analysis of Estonian law

As shown above, economic and social interests should have no weight whatsoever in the selection of Natura sites. The next question is whether economic and social considerations play a role in the implementation of protection measures for the sites already listed as Natura sites. They do somewhat. Designation as a Natura site does not mean complete abatement of human activity, including economic activity.

When the new Nature Conservation Act was prepared in 2004, Estonia decided not to lay down special measures for the protection of Natura sites but rather to regulate them by means of traditional nature conservation instruments, since the system of protected natural objects had worked quite well since 1994. This has not been the case in all Member States. Chapter 10 of the Nature Conservation Act of Finland is entirely devoted to conservation of the Natura network.^{*26} The author is of the opinion that in general the Estonian approach is justified but Estonian law needs significant amendments and to be brought in line with EU requirements.

The two main legal acts that should ensure sufficient protection of Natura sites in Estonia are the Nature Conservation Act^{*27} and the Environmental Impact Assessment and Environmental Management System Act.^{*28} In view of the limited length of this article, the analysis below is limited to only environmental impact assessment as one of the main instruments of ensuring protective measures for the Natura sites.

²¹ See also L. Krämer. EU Casebook on Environmental Law. Oxford: Hart Publishing 2002, pp. 316–320.

²² See, e.g., the judgment of the Court, Case C-371/98. – ECR 2000, p. I-9235.

²³ Judgment of the Court, Case C-57/89. – ECR 1991, p. I-883.

²⁴ Again, the debates are limited to media and scientific sources are unfortunately not available.

²⁵ See, e.g., Kas rohunepp ja täpikhuik peaksid sõudekanali ees taanduma? (Should Great Snipe and Spotted Crake Give Way to a Rowing Canal?). – Tartu Postimees, 2.06.2006. Available at http://tartu.postimees.ee/050606/tartu_postimees/204052.php (23.03.2009) (in Estonian).

²⁶ Available at <http://www.finlex.fi/fi/laki/kaannokset/1996/en19961096.pdf> (23.03.2009).

²⁷ Looduskaitse seadus. – RT I 2004, 38, 258; 2009, 3, 15 (in Estonian).

²⁸ Keskkonnamõju hindamise ja keskkonnanuhtumissüsteemi seadus. – RT I 2005, 15, 87; 2009, 3, 15 (in Estonian).

Environmental impact assessment is prominent also in the Habitats Directive. Article 6 (3) of the Habitats Directive provides that any plan or project likely to have a significant effect on a Natura site shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

Implementation of Article 6 (3) of the Habitats Directive involves four main problems: (1) what constitutes a plan or project in the meaning of Article 6 (3) of the Habitats Directive, (2) when a plan or project should be subject to an assessment of its implications for a Natura site, (3) how thorough the assessment should be, and (4) when a plan or project can be granted authorisation in the meaning of Article 6 (3) of the Habitats Directive. Now follows the analysis of how Estonian law (and case law) solves these problems.

4.1. What is a plan or project in the meaning of Article 6 (3) of the Habitats Directive?

The directive defines a plan or project very loosely.^{*29} The problem with Estonian legislation is that it allows an environmental impact assessment only when an action requires official authorisation (permit). Section 3 of the Environmental Impact Assessment and Environmental Management System Act specifies that environmental impact is assessed upon application for development consent or on application for amendment of that consent. Article 6 (3) of the Habitats Directive does not link the term 'plan or project' with mandatory authorisation procedure. The directive is based on the premise that many activities do not require authorisation but may nevertheless involve potentially significant adverse impact.

At the same time, it is evident that it is impossible for environmental authorities to control activities that do not require authorisation. Therefore, it could be a good idea to harmonise Estonian law with EU law by extending the list of activities that require authorisation such that it encompasses all activities with potential adverse impact on Natura sites. A good example is the regulation of protection measures for one of the protected natural objects — a special conservation area. The designation 'special conservation area' in the meaning of the Nature Conservation Act was intended primarily for the protection of Natura sites. The explanatory memorandum to the Nature Conservation Act^{*30} indicates that the need for a special conservation area derives from Council Directive 79/409/EEC, on the conservation of wild birds, and Council Directive 92/43/EEC, on the conservation of natural habitats and of wild flora and fauna. Section 33 of the Nature Conservation Act foresees notification concerning a special conservation area, and the subsequent official approval thereof, additional conditions, and prohibition of any planned work, as a specific instrument for ensuring the protective measures. The activities subject to notification are listed in Section 33 of the Nature Conservation Act. The list includes such activities also as removal of natural rock or soil, cultivation and fertilisation of natural and semi-natural grasslands and polders, cutting of trees located within areas that have the characteristics of a wooded meadow, and construction and reconstruction of land improvement systems. The question of whether requirement of environmental authorisations and notifications concerning special conservation areas cover all activities with a potential adverse impact must be thoroughly examined. As mentioned above, the list of activities that require authorisation must be open for new entries.

4.2. When should a plan or project be subject to assessment of its implications for a Natura site?

Pursuant to Article 6 (3) of the Habitats Directive, all plans and projects likely to have a significant effect on a Natura site are subject to an assessment. What effect can be classified as significant is to be decided separately for every site, taking into account the aim of protecting that site and its specific characteristics and environmental conditions. The European Court of Justice gave its interpretation of Article 6 (3) of the directive in the *Waddenzee* ruling.^{*31}

The European Court of Justice replied to the Dutch Supreme Court (*Raad van State*) request for preliminary ruling that any plan or project is subject to an appropriate assessment if it cannot be excluded that it has significant impact on a Natura site. Thus, an assessment must be carried out in all cases where there is a suspicion of absence or presence of significant impact. There is no assessment needed only if all doubt can be excluded.^{*32} It is clear that with such major projects as a bridge between the mainland and Muhu Island no sensible person

²⁹ See, e.g., the European Commission article Managing Natura 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive (92/43/EEC). Tallinn: Estonian Ministry of the Environment 2001, p. 30.

³⁰ Seletuskiri looduskaitseasutuse eelnõu juurde (Memorandum of Explanation to the Draft Nature Conservation Act). Available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90008&keel=en&pg=1&ptyyp=RT&tyyp=X&query=LOODUSKAITSESEADUS> (10.07.2009) (in Estonian).

³¹ Judgment of the Court, C-127/02. Available at <http://curia.europa.eu/>.

³² *Ibid.*, paragraph 44.

could exclude significant impact in advance. It is important to take into consideration that the European Court of Justice is of the opinion that all plans and projects that undermine the site's conservation objectives (e.g., conservation of certain types of bird species) must be considered likely to have a significant effect on that site.

Estonian law does not differentiate between an assessment of possible impact activities (the so-called Natura assessment) and a regular environmental impact assessment for a development project. The author is of the opinion that the Natura assessment procedure should in the future be different from what is provided for in the current regulation. A Natura assessment, in the author's opinion, has three distinct features.

The first is related to initiation of an assessment. An environmental impact assessment of proposed activity is initiated in Estonia only if the proposed activity has supposedly significant environmental impact; the same applies to a strategic environmental assessment. Section 3 of the Environmental Impact Assessment and Environmental Management System Act provides that environmental impact be assessed upon application for (or application for amendment of) development consent, if the proposed activity that is the basis for the application has potential to result in significant environmental impact. The European Court of Justice found in the *Waddenzee* case that with regard to plans and projects referred to in Article 6 (3) of the Habitats Directive, it must always be assumed that there is potential significant impact on the site. Therefore, the impact of those plans and projects must always be assessed. No assessment is needed only if significant impact of the plans or projects can be reasonably excluded in advance. This means that the threshold for initiating a Natura assessment is considerably lower than that for other types of environmental assessments, and Estonian law should be amended accordingly.

Secondly, a Natura assessment is more focused and limited, since it places more emphasis on conservation objectives and the integrity of the Natura site, whereas other environmental assessments look at the overall impact of the project on the environment as a whole. What is also important is that when a regular environmental assessment includes consideration of realistic alternatives, then allowing a project with significant adverse impact on a Natura site requires absolute absence of alternatives, regardless of whether any alternative is economically sound from the implementer's point of view.^{*33}

4.3. How thorough should the assessment be?

The question in the heading of this section of the paper is highly relevant in view of the abundance of Natura sites in Estonia, which means that Natura assessments could be quite frequent. In the Saaremaa port case, environmental organisations claimed that the environmental assessment carried out prior to the special exercise of water authorisation was not thorough enough and did not consider all possible effects. The Tallinn Administrative Court ruled as follows:

[C]onsidering the complexity of natural habitat, impacts of a proposed activity can be examined and predicted over a long period of time: such research is a thorough scientific work. The aim of proportional impact assessment procedure is not to make the developer carry out and finance such large and long-lasting research projects.^{*34}

The Tallinn Circuit Court ruled similarly, finding that the environmental impact assessment was quite thorough for the issue of water permit and that an assessment should consider the most probable (i.e., not all) effects.^{*35} The position of the Estonian courts is understandable, as both the Tallinn Administrative Court and the Tallinn Circuit Court did not want to broaden the permitting procedure and view the Saaremaa port case on a larger scale, which was the request of the environmental organisations. The author nevertheless dares to suppose that the above rulings are not in line with the objectives of the Habitats Directive. The European Court of Justice has repeatedly highlighted the principle that national courts must interpret national law on the basis of EU law. In order to position the thoroughness of an environmental impact assessment in the context of Natura sites, once again the *Waddenzee* case applies. In that case, the Dutch Supreme Court asked the European Court of Justice a question about what 'appropriate assessment' as provided for in Article 6 (3) of the Habitats Directive meant.^{*36} The European Court of Justice ruled that appropriate assessment in that case meant that "all the aspects [...] which can [...] affect [site conservation] objectives must be identified in the light of the best scientific knowledge in the field"^{*37}. Thus, the European Court of Justice found that an assessment basically means scientific work and has to be so thorough as to take account of all (not only the most probable) aspects of activities affecting the sites and that all reasonable doubts are eliminated regarding presence or absence of significant impact.

What conclusions can be drawn from the *Waddenzee* case for Estonian law? Firstly, as a Natura assessment is aimed at quite a specific objective (to ascertain whether the proposed activity could have significant adverse

³³ See Managing Natura 2000 sites. The provision of Article 6 of the Habitats Directive 92/43/CEE. European Commission 2000, p. 43. Available at http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf (23.03.2009).

³⁴ Administrative case No. 3-1152/2004.

³⁵ Administrative case No. 2-3/271/05.

³⁶ Judgment of the Court, C-127/02, paragraph 21. Available at <http://curia.europa.eu/>.

³⁷ *Ibid.*, paragraph 54.

impact on the integrity of the site) and the initiation threshold is low, then the requirement of full environmental impact assessment procedure in cases where the need for the impact assessment arises only because of the Natura assessment need would be a disproportionate burden for the applicant for development consent, and thus an easier and quicker assessment procedure should be provided for. It could be claimed that this is the only possible solution, given the very low threshold for initiation of a Natura assessment and the anticipation of a large number of assessments. Maintaining the current full open procedure in all assessment cases would clearly be burdensome and eliminate some projects that would not adversely affect Natura sites. The author is of the opinion that a simplified Natura assessment procedure should not involve full open procedure with public hearings and discussions, as regular environmental impact assessment requires. An expert survey should answer the specific questions raised and provide a clear answer as to whether significant impact on the conservation objective and integrity of the site is possible or could be reasonably excluded. A Natura assessment may require very specific knowledge about species and habitats — thus, it should be provided in Estonian law that an assessment can be carried out by an expert who may be an individual with extensive knowledge in research of the protected species or habitat and who has given reliable assessments concerning the protection of that species or habitat. Such a qualification requirement would considerably expedite the Natura assessment procedure.

4.4. When may a plan or project be granted authorisation in the meaning of Article 6 (3) of the Habitats Directive?

The final question considered here was also asked by the Dutch Supreme Court in the *Waddenzee* case. The European Court of Justice found that a plan or project may be granted authorisation only on the condition that the competent authorities are convinced that it will not adversely affect the integrity of the site concerned.^{*38} The European Court of Justice ruled that that is the case where no reasonable scientific doubt remains as to the absence of such effects.^{*39} The court explained its ruling again with the precautionary principle and indicated that only the above authorisation criterion (absence of suspicion of adverse impact) allows effective prevention of adverse effects on the integrity of protected sites created by the plans or projects being considered. The court also indicated that “[a] less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection”.^{*40}

The *Waddenzee* case implies the third distinct feature of Natura assessments, which should be stipulated more clearly in Estonian law. A regular environmental assessment is not always binding for the issuer of the development consent: granting of authorisation is often a discretionary decision, wherein other interests besides the environmental are taken into consideration. Existence of discretion is evident in Subsection 24 (2) of the Environmental Impact Assessment and Environmental Management System Act, which provides that “[i]f, upon making a decision to issue or refuse issue of a development consent, the decision-maker fails to take account of the results of environmental impact assessment and the environmental requirements appended to the report, the decision-maker shall set out a reasoned justification in the decision to issue or refuse issue of the development consent”. Hence, it is possible here for the decision-maker to prefer economic and social interests over environmental interests. The European Court of Justice has ruled that a Natura assessment is directly binding on the decision-maker. If suspicion remains regarding adverse impact on the Natura site, the authorisation must not be issued and the plan should not be approved. Hence, unlike a regular environmental impact assessment, a Natura assessment decision-maker has little or no room for discretion.

5. Conclusions

The question posed at the beginning of this article, that of whether Estonian law fully ensures the necessary conservation of Natura sites, must be answered in the negative. Estonian law does not ensure total disregard of economic and social interests in the selection of Natura network sites, which disregard is what EU law requires. Neither is Estonian law in full harmony with EU law with regard to Natura assessments. Estonian law does not allow assessment of activities with environmental impact that do not require environmental authorisation. The Habitats Directive does not mandate Natura assessment merely for those activities that require authorisation. The other respect in which Estonian law is not in line with EU law is related to the low threshold for Natura assessment initiation and the binding nature of Natura assessment for the decision-maker.

³⁸ *Ibid.*, paragraph 56.

³⁹ *Ibid.*, paragraph 59.

⁴⁰ *Ibid.*, paragraph 58.